



The Comptroller General
of the United States

Washington, D.C. 20548

Case PL-I

Decision

Matter of: Bencor - Petrifond - Casagrande

File: B-225408

Date: March 6, 1987

DIGEST

Determination, in the face of unresolved uncertainties in proposals, that contract award for \$2 million more than protester's offer and \$4 million more than agency's estimate satisfies requirement of Competition in Contracting Act that contracts awarded on basis of initial proposals be at lowest overall cost to the government is unreasonable.

DECISION

Bencor - Petrifond - Casagrande (Bencor), a joint venture, protests the Bureau of Reclamation's award of a contract to Soletanche & Rodio under request for proposals (RFP) No. 6-SP-40-03900. We sustain the protest.

The RFP was for the fixed-price construction of a concrete "diaphragm wall" in an abutment adjoining the Navajo dam on the Colorado River storage project. According to the RFP, the diaphragm wall will act as a barrier to seepage that is endangering the abutment. The RFP identified the four major technical factors that would be evaluated as, in order of importance: (1) concrete diaphragm wall construction, (2) key personnel, (3) corporate or company experience, and (4) safety.

The RFP instructed offerors to provide complete and detailed technical proposals. With regard to key personnel, the RFP stated that offerors should provide detailed resumes for the personnel in specifically-identified key positions, and provide narrative descriptions of the structure and function of job site and home office management. The technical evaluation was worth 70 points; cost was worth 30 points. The RFP cautioned offerors that the Bureau might award the contract on the basis of initial proposals.

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The Bureau's technical evaluation report noted deficiencies or uncertainties in all of the proposals. With regard to Soletanche, for instance, the report questioned Soletanche's proposed placement of its desanding plant and Soletanche's proposal to use bulldozers to move riprap onto the abutment prior to constructing a work platform; the Bureau thought a different method should be used. Bencor's proposal was downgraded principally for a lack of detail in discussing certain factors, lack of discussion of Bencor's project management, and a perception that Bencor lacked experience with the new rock milling technology to be used on this project. The technical evaluation did not include any consideration of costs. Bencor was ranked fourth; the technical evaluation report recommended that negotiations be conducted only with the top three ranked offerors.

The Bureau's cost evaluation report, on the other hand, included the results of the technical evaluation and recommended that negotiations, if any, be held with the top four ranked competitors, including Bencor. Bencor's cost was approximately \$7.8 million; Soletanche's cost was about \$9.8 million. The Bureau's estimate was \$5.8 million.

The Bureau awarded the contract to Soletanche on September 25, 1986, without discussions. The Bureau advised Bencor of the award by letter dated October 15, 1986, more than 10 days after the award, and Bencor's protest followed shortly thereafter.

Bencor contends the Bureau's award of the contract to Soletanche will not result in the lowest overall cost to the government, and asserts that the Bureau therefore improperly failed to conduct discussions as required by the Competition in Contracting Act of 1984 (CICA). In this latter regard, Bencor asserts that it would not have been difficult to provide a narrative description of its management, and notes that one of its joint venturers, Casagrande S.p.A., was the developer of the new rock milling technology to be used on this project and, consequently, has considerable experience in its use. Bencor contends that it should have been afforded the opportunity in discussions to address the Bureau's questions. Bencor also challenges the propriety of the Bureau's delay in advising Bencor of the award of the contract.

The Bureau points out that technical factors were more important than cost and notes that our Office often has stated that an agency properly may award a contract to a

higher-priced, higher-ranked offeror, citing Serv-Air, Inc.--Reconsideration, 58 Comp. Gen. 362 (1979), 79-1 C.P.D. ¶ 212. The Bureau also asserts that Bencor was not in the competitive range^{1/} in any event, in the opinion of the technical evaluation team, so Bencor would not have been included in discussions even if they had been held. The Bureau contends that Bencor could not, therefore, have been prejudiced by the Bureau's failure to conduct discussions.

The Bureau's advocacy of the reasonableness of its cost/technical tradeoff in the selection of Soletanche on the basis of initial proposals is misplaced. Under CICA, an agency may award a contract on the basis of initial proposals where the solicitation advises offerors of that possibility and the existence of full and open competition or accurate prior cost experience clearly demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government. 41 U.S.C. § 253b(d) (Supp. III 1985); Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(a)(3) (1986). Otherwise an agency must conduct discussions with all offerors within the competitive range. FAR, 48 C.F.R. § 15.610(b).

Consistent with these requirements, we have approved awards based on initial proposals where the agency demonstrates clearly that the award resulted in the lowest overall cost. See, e.g., Yourdon, Inc., B-222416, July 3, 1986, 86-2 C.P.D. ¶ 30, and ICSD Corp., B-222478, July 7, 1986, 86-2 C.P.D. ¶ 37, under the similar CICA requirement of 10 U.S.C. § 2305 (Supp. III 1985); Cerberonics, Inc., B-220910, Mar. 5, 1986, 86-1 C.P.D. ¶ 221. Conversely, we have objected to contracts awarded on the basis of initial proposals where it was unclear that the award resulted in the lowest overall cost to the government. See Hall-Kimbrell Environmental Services, Inc., B-224521, Feb. 19, 1987, 87-1 C.P.D. ¶ ____; Consolidated Bell, Inc., B-220425, Mar. 11, 1986, 86-1 C.P.D. ¶ 238. In our judgment, this matter falls within that second line of cases.

As a threshold matter, we note that the Bureau relies only on its technical evaluation for the assertion that Bencor would have been excluded from the competitive range and thus was not prejudiced by the lack of discussions. The RFP, however,

^{1/} The competitive range is comprised of those offerors in a particular procurement that have a reasonable chance of award. Federal Acquisition Regulation, 48 C.F.R. § 15.609 (1986).

specified that cost would be considered in establishing the competitive range, and the only document in which both cost and technical factors were considered, the cost evaluation, recommends that Bencor be included in the competitive range. Also, the FAR states that when there is doubt as to whether a proposal is in the competitive range, it should be included. FAR, 48 C.F.R. § 15.609(a). In these circumstances, we believe that Bencor should have been included in the competitive range if one had been established for the purpose of conducting discussions and, indeed, we think it likely the firm would have been included.

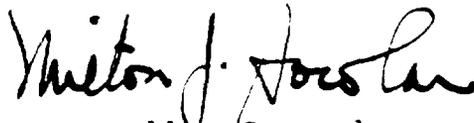
The Bureau admits that all offerors were technically acceptable, and the Bureau's evaluation does not demonstrate that Bencor's proposal was so deficient that Bencor would have had no chance of award if discussions had been held. In this respect, we note particularly that informational deficiencies of the type the Bureau noted in Bencor's proposal generally are suitable for correction through discussions and, in fact, Bencor has substantially rebutted the Bureau's principal objections during this protest. Moreover, there were technical uncertainties in Soletanche's proposal which the technical evaluation report recommended be resolved during negotiations.

We also think that in view of the above-noted unresolved uncertainties, the \$2 million difference between Soletanche's offer and Bencor's is especially significant. Where an agency may be able to resolve uncertainties and achieve cost savings, such as seems the case here, discussions should be held. Sperry Corp., 65 Comp. Gen. 195 (1986), 86-1 C.P.D. ¶ 28; Decision Sciences Corp., B-196100, May 23, 1980, 80-1 C.P.D. ¶ 357. We simply cannot conclude that acceptance of Soletanche's initial proposal, itself not entirely clear as to technical matters, at an amount \$2 million greater than the protester's offer and \$4 million greater than the agency's own estimate, satisfies the CICA requirement for award at the lowest overall cost to the government.

The protest is sustained.

We recommend that the Bureau reopen discussions under the RFP. If the result of discussions and the evaluation of best and final offers establishes that award of the contract to an offeror other than Soletanche is appropriate, we further recommend that the Bureau terminate the existing contract with Soletanche and make another award. In this respect, we recognize that Bencor's protest was not filed within 10 days of the award of the contract, and the Bureau continued performance during the pendency of the protest. See 4 C.F.R. § 21.4 (1986). Nevertheless, we also must recognize

that the cause of Bencor's delay in protesting was not the firm's own lack of diligence, but the agency's failure to notify Bencor of the award in time to allow the firm to file an earlier protest (the agency delayed 3 weeks) and preserve its opportunity under CICA to compete for the full contract. Moreover, since the record does not indicate that the government ever actually reevaluated its \$5.8 million estimate, we seriously question how an award at \$9.8 million without discussions can be considered reasonable and in the government's interest.

for 
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