



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Faxon Company
File: B-227835.3; B-227835.5
Date: November 2, 1987

DIGEST

1. Where the offerors were unaware of the actual basis for award, award under such solicitation was properly terminated.
2. Discussions cannot be meaningful if an offeror is not apprised that its price exceeds what the agency believes to be reasonable.
3. Where reopening of negotiations is properly required, notwithstanding the disclosure of an offeror's proposal, this does not constitute either technical leveling or an improper auction.
4. Even though an offer may be mathematically unbalanced, it is not materially unbalanced where there is no doubt it will result in the lowest cost to the government.

DECISION

The Faxon Company protests the termination of a contract for periodical subscription services for a base year and 2 option years, awarded by the Veterans Administration (VA) under request for proposals (RFP) No. 794-4-87. Faxon also protests the award of a contract to American Overseas Book Company (AOBC) under that solicitation.

The protests are denied.

The VA awarded a contract to Faxon on May 26, 1987, based on best and final offers (BAFOs) which had been received on April 27. However, the VA, on reviewing a protest from AOBC, determined that the procurement had been improperly conducted and that the award was improper. The VA terminated Faxon's contract for convenience and reopened negotiations with the offerors in the competitive range, Faxon and AOBC.

The Termination

Faxon alleges that the VA's termination of its contract was arbitrary and baseless and was done in response to an untimely protest filed with our Office by AOBC. Faxon also contends that the VA improperly reopened negotiations following the termination, that Faxon was prejudiced because its price and technical score were revealed, that the technical requirements have been degraded so as to accommodate AOBC, and that the VA accepted an unbalanced offer from AOBC. Faxon contends that the VA improperly only asked Faxon how it would compensate in performance for the delays resulting from the resolicitation which was caused by AOBC's protest of the RFP.

Faxon also contends that the VA contravened the "stay" provisions of 4 C.F.R. § 21.4(a) (1987) by requesting BAFOs while two protests were pending before the General Accounting Office (GAO) and by not providing a determination that urgent and compelling circumstances would not permit waiting for the GAO decision until its contemporaneous decision to award to AOBC.

Regarding this last issue, our Bid Protest Regulations, 31 U.S.C. § 3553(a) (Supp. III 1985), state that when the contracting agency receives notice of a protest from us prior to award of a contract it may not award a contract under the protested procurement while the protest is pending, unless the head of the procuring activity responsible for award of the contract determines in writing and reports to us that urgent and compelling circumstances significantly affecting interests of the United States will not permit waiting for our decision. 4 C.F.R. § 21.4(a). Although that provision requires that an agency not make an award unless a determination of urgent and compelling circumstances is made, it does not require the cessation of any other agency action on the solicitation, such as the request for BAFOs, and it does not prohibit the agency from making an award at the same time it notifies our Office of its decision that urgent and compelling circumstances exist. See Progressive Learning Systems, B-218483, July 23, 1985, 85-2 C.P.D. ¶ 72.

The VA states that, after the competitive range was determined under the initial RFP, an excluded offeror protested that the evaluation criteria were different from those stated in the solicitation. The VA sustained the protest and issued amendment No. 3 listing eight evaluation criteria (there were four criteria under the solicitation prior to the amendment). The amendment, however, did not state the relative importance of the criteria, or indicate the

importance of price. No statement was included as to how award was to be made.

The evaluation plan, not disclosed in the RFP, assigned 74 points for the technical categories with categories receiving as many as 20 points or as few 5 points. The contracting officer determined that any offeror submitting an offer between \$1.2 and \$2 million would receive the full 25 points for cost.

Faxon received a total of 71 technical points and its cost proposal for 3 years of \$1,805,218, per the contracting officer's formula, received 25 points, thus resulting in a total score of 96 points. AOBC's proposal received a perfect technical score of 74 points, and its cost proposal of \$2,021,538 was awarded the full 25 points for a total score of 99, the maximum that could be received. Upon review of the final scores and evaluation, the contracting officer determined to make award to Faxon, based on its lower-priced offer, even though AOBC received more total points.

After a debriefing, AOBC protested to our Office that the VA failed to conduct meaningful negotiations, that the VA misapplied the evaluation factors, that Faxon's proposal was generally deficient, and that AOBC should have been awarded the contract as the highest-scored offeror.

The VA found that certain elements of AOBC's protest were meritorious. VA found that no meaningful negotiations had been held with AOBC concerning its automated claiming (ordering) proposal and that award was made essentially on the basis of price. Automated claiming or ordering allows personnel at VA libraries, through computer terminals, to place subscription orders directly with the contractor. VA states that AOBC was never advised that its automated claiming proposal had a greater capacity than required. The VA found that AOBC misinterpreted the requirements for claiming due to its experience as the incumbent on the prior contract; the VA states that it should have pointed out that the requirements had been relaxed from the prior year's specifications. Apparently, the VA believes that had it done so AOBC might have offered a lower price.

The VA also noted that the evaluation and award was not made properly because the RFP listed eight evaluation criteria, including cost, without any statement concerning relative importance. The VA states that each criterion should have been, but was not, considered equally important.

The VA decided that it would be in the best interest of the government to terminate the Faxon contract for convenience

and reopen negotiations with all offerors in the competitive range.

Faxon argues that any ambiguities which might have existed in the solicitation were not of such significance as to prejudice AOBC and require amending the RFP. In this connection, Faxon points out that none of the offerors knew what relative weight would be applied to the technical criteria or to price. If anything, Faxon argues, AOBC benefited from receiving the full 25 points for price even though its price was in excess of the VA's range for the full 25 points.

Faxon argues that VA's revision to the specifications did not result in changes to AOBC's or Faxon's technical proposals or scores, thereby proving that the termination was unwarranted. Faxon also contends that discussions with AOBC were unnecessary since it received a perfect score and, in any event, AOBC's costs were minimally affected by any possible misunderstanding it may have had as to automated claiming.^{1/}

It is fundamental that offerors should be advised of the basis on which their proposals will be evaluated. Union Natural Gas Co., B-225519.4, June 5, 1987, 87-1 C.P.D. ¶ 572. We have recognized that a solicitation that does not set forth a common basis for evaluating offers, which ensures that all firms are on notice of the factors for award and can compete on an equal basis, is materially deficient. In this case, the RFP did not reflect how offers actually were evaluated.

Where, as here, an RFP indicates that cost will be considered, without explicitly indicating the relative weight to be given to cost versus technical factors, it must be presumed that cost and technical considerations will be considered approximately equal in weight. Actus Corporation/Michael O. Hubbard and LSC Associates, B-225455, Feb. 24, 1987, 87-1 C.P.D. ¶ 209. During the evaluation, the VA gave a much greater weight to technical than cost but ultimately the VA awarded on the basis of cost. In effect, what happened was that the RFP did not state a basis for evaluation, then the proposals were evaluated on an unstated

^{1/} Faxon, also contends that the VA improperly considered AOBC's protest because it was untimely under our Bid Protest Regulations. However, when a contracting agency recognizes the validity of a protest and proposes to take appropriate corrective action, it is irrelevant whether the protest complied with our Bid Protest Regulations. Macro Systems, Inc., B-208540.2, Jan. 24, 1983, 83-1 C.P.D. ¶ 79.

basis, and finally award was made inconsistent with the evaluation. Additionally, the offerors did not know how price would be weighted and had they known price would have been determinative, they could have modified their proposals accordingly. The fact that AOBC was the only offeror to receive a perfect score for price and technical and yet did not receive the award in itself shows the invalidity of the evaluation scheme.

Compounding this error was VA's failure to point out AOBC's excessive level of effort as to automated claiming. 41 U.S.C. § 253b(d)(2) (Supp. III 1985), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Such discussions must be meaningful and, in order for discussions to be meaningful, agencies must point out weaknesses, excesses, or deficiencies in proposals unless doing so would result either in disclosure of one offeror's approach or in technical leveling. The Advantech Corp., B-207793, Jan 3, 1983, 83-1 C.P.D. ¶ 3; Ford Aerospace & Communications Corp., B-200672, Dec. 19, 1980, 80-2 C.P.D. ¶ 439.

During discussions, agencies are prohibited from advising an offeror of its price standing relative to other offerors, Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d)(3) (1986), and are not required to point out that a proposed price is too high if the price is still below the government estimate. University Research Corp., B-196246, Jan. 28, 1981, 81-1 C.P.D. ¶ 50. On the other hand, discussions cannot be meaningful if an offeror is not apprised that its price exceeds what the agency believes to be reasonable. Price Waterhouse, 65 Comp. Gen. 206 (1986), 86-1 C.P.D. ¶ 54.

The VA should have pointed out to AOBC that its costs were excessive for automated claiming. AOBC was put in the untenable position of not being able to improve its perfect score yet not being able to receive award. Meaningful discussions, had they been held, would have led AOBC to the areas of its proposal where it could have improved the possibility of receiving the award. We have held that where an improper award has been made, termination and recompetition of a negotiated contract is appropriate. Sperry Corp., B-222317, July 9, 1986, 65 Comp. Gen. ____, 86-2 C.P.D. ¶ 48. We find, therefore, that the VA's termination of Faxon's contract for these procurement deficiencies was appropriate.

The Award to AOBC

Turning now to Faxon's protest of the manner in which the reopening of negotiations was conducted and the award to AOBC, Faxon argues that it was placed at a competitive

disadvantage because, at a debriefing, AOBC was advised of Faxon's price, portions of Faxon's technical proposal and its evaluation scores. Faxon contends that this constituted technical transfusion and leveling and that the reopened negotiations represented an auction.

The VA has responded that there was no technical transfusion or leveling, nor was Faxon's technical proposal revealed to AOBC. What was discussed at the debriefing was the manner in which Faxon's proposal and AOBC's proposal were evaluated. While Faxon's price was disclosed to AOBC, during the subsequent negotiations, AOBC agreed to release its price to Faxon so that AOBC would not have an unfair competitive advantage.

We have held that where reopening of negotiations is properly required, notwithstanding the disclosure of an offeror's proposal, this does not constitute either improper technical leveling or an improper auction. Sperry Corp., supra. In addition, there is nothing inherently illegal in the conduct of an auction in a negotiated procurement. Rather, the possibility that a contract may not be awarded based on true competition on an equal basis has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction. Id. The statutory requirements for competition take primacy over the regulatory prohibitions of auction techniques. PRC Information Sciences Co., 56 Comp. Gen. 768, 783 (1977), 77-2 C.P.D.
¶ 11.

Here, the VA made a particular effort to equalize the competition by requiring price disclosure by all offerors. Faxon has offered no evidence that the contents of its technical proposal were released to AOBC during the debriefing. Accordingly, this basis of protest is denied.

Faxon also protests that the specifications were degraded in the resolicitation to accommodate AOBC because AOBC could not meet the original requirement that an offeror have a catalog of 100,000 titles.

The VA argues that it did not downgrade the technical specifications to ensure that AOBC could meet reduced requirements. The VA states that the original specification, as amended by amendment No. 3, called for:

"Annual Serial Catalog (a) Capability to produce catalog exhibit dealing with at least 50 percent of U.S. publishers and lists at least 100,000 titles."

Amendment No. 7 revised this requirement to a catalog of 10,000 titles. Faxon states that AOBC's catalog contains less than 13,000 titles whereas Faxon has a hard copy catalog of 48,000 titles, a microfiche listing of 85,000 titles, and a computerized data base of 200,000 titles.

The VA states that this requirement was revised to clarify the VA's actual minimum needs and was not issued for the purpose of favoring AOBC's proposal. The VA explains that it interpreted the original requirement in amendment No. 3 as specifying a catalog with 100,000 titles, yet no offeror met this requirement. Although Faxon states it has the capability of generating these titles, Faxon's catalog has only 48,000 titles. VA argues that under a reasonable interpretation of the specifications, Faxon also did not comply since it offered a catalog of only 48,000 titles. Accordingly, VA states it issued amendment No. 7 to clarify both the number of titles it actually required in the catalog as well as to correct the data elements required for an acceptable title list.

Based on the record before our Office, no offeror complied with the original requirement of 100,000 titles and therefore the changed requirement favored neither offeror. Since the VA determined that it had overstated its minimum needs, such a change in the specifications to more accurately reflect these needs was proper.

Concerning Faxon's argument that AOBC's offer is unbalanced, Faxon states that AOBC's base year price of \$579,023.47, which is higher than its price for the two option years (\$497,759.30 and \$527,032.95), respectively, is front-loaded. The VA points out that AOBC explained, upon the VA's request after initial BAFOs on the resolicitation, that AOBC is to be billed for the cost of its performance bond in the first year of contract performance, thus increasing AOBC's first year cost. The VA states that the options for both years will be exercised. In any event, AOBC's first year price is lower (\$579,023.47) than Faxon's first year price (\$583,483.50), so there is no doubt that the award to AOBC will result in the lowest ultimate cost to the government, notwithstanding whether the options will be exercised.

Finally, Faxon protests that only it was questioned during negotiations about how it would meet the delivery schedule due to the delays in performance connected with the termination and resolicitation which resulted from AOBC's original

protest. However, the record shows that both AOBC and Faxon were asked the same question regarding accelerated performance and, therefore, this basis of protest is denied.

The protests are denied.

for Seymour Egan
James F. Hinchman
General Counsel