



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tero Tek International, Inc.
File: B-228548
Date: February 10, 1988

DIGEST

1. In request for proposals (RFP) calling for firm fixed-prices, even assuming agency erred in accepting offer which proposed "currency ranges" for purposes of reimbursing contractor for services rendered in foreign countries, without apprising other offerors of the possibility of submitting offers on this basis, protester was not prejudiced by agency's acceptance of this offer. Protester does not challenge agency's technical evaluation of its proposal and fails to show how it would revise its otherwise technically unacceptable proposal, even if allowed to introduce currency ranges into its offer.
2. The inclusion in an offer on a requirements contract of prices for quantities in excess of the solicitation's best estimated quantities is legally unobjectionable so long as the terms of the "additional offer" are not inconsistent with the terms of the solicitation.
3. Protest that offer violates solicitation's integrity of unit prices clause is denied where 1) there is no evidence to suggest that per-unit costs are other than properly allocated; 2) costs are not improperly distributed between more and less expensive line items; and 3) evaluation of line items within proposals is on the basis of unit cost multiplied by estimated quantities thereby obviating possible competitive advantage to be gained from pricing individual units within a line item differently.
4. Contract which contemplates reimbursement of contractor's travel expenses on the basis of actual cost plus an agreed percentage thereof (representing general and administrative overhead) does not constitute a cost-plus-a-percentage-of-cost contract because contractor's entitlement is not uncertain at the time of contracting. Contract provides that the cost of travel is limited to rates set out in various Federal Travel Regulations and that all travel requests by the contractor are subject to prior governmental approval.

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5. In a negotiated procurement, award need not be made on the basis of lowest price. Agencies may make cost/technical trade-offs so long as such determinations are reasonable and in accordance with the solicitation's evaluation criteria.

DECISION

Tero Tek International, Inc. protests the award of a contract to Cobro Corporation under request for proposals (RFP) No. DAAJ09-87-R-A043, issued by the Department of the Army, Army Aviation Systems Command, for the procurement of worldwide unscheduled maintenance data sample collection services. Tero Tek argues that the proposal of Cobro failed to conform to the terms of the RFP in various respects and that certain portions of the awarded contract constitute a cost-plus-a-percentage-of-cost contract in violation of 10 U.S.C. § 2306 (1982). Tero Tek also argues that the agency improperly made award to Cobro on grounds that the firm did not submit the lowest priced offer. We deny the protest.

The solicitation as originally issued called for offers to perform various data collection and compilation services in the Continental United States, Alaska, Hawaii, Korea, Germany and Egypt.^{1/} Services under the resulting contract are to be performed on the basis of the Army's requirements for a base year and 3 option years, and the solicitation contained best estimated quantities (BEQ) for 51 line items during each of the contract's 4 years. The solicitation also requested that offers be submitted on a firm, fixed-price basis.

Approximately 80 firms were solicited, only two of whom, (Tero Tek and Cobro) responded with initial offers. Discussions were conducted with both firms, after which best and final offers (BAFOs) were submitted. Subsequently, award was made to Cobro as the technically superior offeror, even though the firm's offered price was higher than the price offered by Tero Tek. We note that Cobro's proposal received an overall technical score of 97.9 percent while Tero Tek's proposal received an overall technical score of 45.6 percent. After the submission of BAFOs, the source selection board found Tero Tek's technical proposal to be

^{1/} We note that Tero Tek's initial letter of protest alleged that Cobro failed to include an offer to perform the services called for in Egypt. Subsequently, it came to the attention of our Office that the Egypt requirement was omitted from the solicitation during discussions. Tero Tek has abandoned its protest with respect to this allegation.

"less than minimally acceptable." Additionally, we note that the proposal of Cobro was priced some 6.8 percent higher than the proposal of Tero Tek. The contracting officer concluded that award to Cobro was justified notwithstanding its higher price, because of the overwhelming technical disparity between the two proposals.^{2/}

Tero Tek first argues that the proposal of Cobro improperly deviated from the pricing structure outlined in the solicitation and, as such, was ineligible for award on that basis. Specifically, the protester argues that Cobro's proposal as to those line items to be performed in foreign countries impermissibly divided the line items into 4 subline items. By dividing the line items into subline items, Cobro's proposal provided for changes in contractor payments based upon fluctuations in the exchange rates between the dollar and the pertinent foreign currencies. For example, line items calling for the performance of services in Germany were divided into 4 subline items which represented ranges within which the Dollar to Deutsche Mark exchange rate could fluctuate. Variances from one "range" to another, which persist for a stated period of time result in a change in contractor reimbursement for services rendered pursuant to the line item. Again, by way of example, for services performed in Germany, the "ranges" were expressed as follows:

<u>Range</u>	<u>Exchange Rate Range (DM/\$)</u>
A	2.40 - 2.04 DM
B	2.03 - 1.73 DM
C	1.72 - 1.46 DM
D	1.45 - 1.23 DM

Similar "ranges" were set out with respect to line items to be performed in Korea, each range representing a Dollar to Won exchange rate ratio.

According to the protester, this use of currency "ranges" by Cobro rendered its proposal technically nonconforming to the RFP (which called for firm fixed prices) and thus ineligible for award. Further, the protester argues that the Army was required to apprise it of the possibility of submitting its offer with other than constant dollar prices. According to

^{2/} The solicitation provided that cost would be an unscored evaluation criterion but would be of equal potential impact vis-a-vis the technical evaluation criteria.

Tero Tek, if it had been able to introduce this element of flexibility into its pricing structure, it could have significantly enhanced the technical acceptability of its proposal. Finally, the protester argues that Cobro's proposal, with respect to the line items containing the "ranges," is incapable of price evaluation because there is no "ceiling" on its prices for these items.^{3/} Specifically, Tero Tek argues that, even though the "highest" or least favorable currency range stated in Cobro's proposal has an upper limit, this is an illusory ceiling since currency fluctuations which exceed this range may be the subject of negotiations under the changes clause contained in the contract.

We deny this basis of protest. Even if we were to agree with the protester that the agency should have apprised the firm that it would accept an offer containing adjustments for currency fluctuations, we cannot conclude that this failure on the part of the agency amounts to a sustainable basis of protest. Specifically, the record contains no evidence that Tero Tek could have significantly enhanced its technical proposal had it been afforded an opportunity to introduce this "element of flexibility" into its pricing structure. Tero Tek does not question the agency's evaluation of its technical proposal nor does it offer to show how it could achieve an approximately 52 percent improvement in its technical score even given the opportunity to place currency ranges into its pricing scheme. In this connection, we have previously held that, where an awardee's price proposal deviates from the pricing schedule called for in the RFP, acceptance of the proposal is legally unobjectionable so long as such acceptance does not work to the prejudice of other offerors. Merret Square,

^{3/} In this connection, we note that the agency report concedes that Cobro's prices were evaluated prior to the award decision on the basis of the "lowest" or most favorable currency exchange rates stated in Cobro's proposal (e.g. BEQ X 2.40DM:\$1.00). Such a calculation yields an ultimate price disparity as between the two offers of 1.7 percent. In preparing its report for the protest, the Army discovered this fact, and recalculated Cobro's proposal price by the "highest" or least favorable exchange rates (e.g. BEQ X 1.23DM:\$1.00), which yields an overall price disparity as between the proposals of 6.28 percent. According to the agency, this increased price disparity between the two proposals, had it been known at the time award was made, would not have effected its award decision because of the substantial technical superiority of Cobro's proposal.

Inc., B-220526.2, Mar. 17, 1986, 86-1 CPD ¶ 259; see also, DataVault Corp., B-223937, et al., Nov. 20, 1986, 86-2 CPD ¶ 594; (Protest denied where protester failed to show that it would have altered its proposal to its competitive advantage had it known of the government's changed requirements.) Cf. SWD Associates, B-226956.2, Sept. 16, 1987, 87-2 CPD ¶ 256. Accordingly, assuming the protester's contention is correct that the agency erred in failing to allow Tero Tek to submit an offer which contained currency ranges, Tero Tek was not thereby prejudiced.

To the extent that Tero Tek is protesting that Cobro's prices are not reasonably ascertainable because currency fluctuations beyond the stated ranges would be the subject of a contract modification under the changes clause, we find the argument to be without merit. We agree with the agency that Cobro's offered prices were reasonably determinable from the face of its offer. Moreover, the fact that any contract may be modified subsequent to its execution is, in our opinion, without legal significance insofar as our review of the matter is concerned. Contract modifications are a matter of contract administration and thus are not within the purview of our Bid Protest function, 4 C.F.R. § 21.3(f)(1) (1987), except to the extent that there is an allegation that a contract modification is tantamount to an improper sole-source procurement. See e.g., Devils Lake Sioux Mfg. Corp., 64 Comp. Gen. 578 (1985), 85-1 CPD ¶ 638. No such allegation has been made here.

Next, Tero Tek argues that the agency was required to reject Cobro's offer because Cobro proposed prices for field monitors in excess of those called for under the solicitation. We reject this contention. The inclusion in a proposal of characteristics or quantities which exceed, but are not inconsistent with the requirements of the RFP is not objectionable. American Coalition of Citizens with Disabilities, Inc., B-205191, Apr. 6, 1982, 82-1 CPD ¶ 318.

The protester also argues that certain line items of Cobro's offer violated the integrity of unit prices clause contained in the solicitation because Cobro failed to bid uniform prices for all quantities of those line items. In particular, Tero Tek argues that Cobro's offer impermissibly deviated from the solicitations requirements relating to the production of various reports and to the provision of computers.

As to the production of certain reports, Tero Tek directs our attention to two line items in the solicitation--line items A016 and A017--which request unit prices for the production of eight and six reports respectively. Cobro's offer divided each of these line items into two subline

items, the first of which quoted a price for the first report and the second of which quoted prices for the second and subsequent reports; the price for the first report was, of course, higher than the price for subsequent reports. According to the protester, Cobro's offer for these reports violates the integrity of unit prices clause contained in the solicitation which states in pertinent part:

"Any proposal submitted for the negotiation of prices for items of supplies shall distribute costs within contracts on a basis that ensures that unit prices are in proportion to the items' base cost (e.g., manufacturing or acquisition costs).

FAR § 52.215-26 (FAC 84-28). Tero Tek makes the same allegation with respect to Cobro's offered prices on line items calling for offerors to quote a monthly cost per unit for microcomputers employed in connection with performance of the contract. According to Tero Tek, Cobro's offer impermissibly increases the price of microcomputers on a per-unit basis as more units are required for contract performance. Cobro's offer also splits the line items calling for microcomputers, offering quantities in excess of those called for under the solicitation.^{4/} The per-unit price for units in excess of the BEQ stated in the solicitation is higher than the unit prices for those units requested under the BEQ. According to Tero Tek, this arrangement also impermissibly creates a disincentive for the government to fulfill its requirements in excess of the BEQ.

As to the different report prices, the agency responds that the pricing scheme offered by Cobro constituted a "unilateral discount" which was viewed as beneficial by the agency. Further, the agency argues that Cobro's offer did not change the solicitation's requirements in any way and was, in any event, evaluated on the same basis as Tero Tek's offer.

With respect to the cost of microcomputers, the agency responds that during the course of negotiations, it

^{4/} We note that Tero Tek also argues that Cobro's offer of quantities in excess of stated BEQ is improper for the same reasons alleged in that portion of its protest relating to the provision of field monitors discussed above. For the same reasons stated in that portion of our decision, we find this argument to be without merit.

questioned Cobro as to the pricing scheme offered by it for the units. Cobro's response, according to the agency, justifies the pricing scheme offered by it. Specifically, the agency points out that the pricing scheme offered by Cobro reflects the fact that the firm has a "lease to purchase" arrangement with respect to the microcomputers which it will provide under the contract and that, consequently, the gradually increasing cost per unit price merely reflects the increased capital cost of providing additional (i.e. newer) units beyond the BEQ. Further, the agency points out that the cost of units up to the BEQ was the subject of a Defense Contract Audit Agency (DCAA) investigation. DCAA apparently found that Cobro's initially offered price for units which went to fulfilling the BEQ was unreasonably high because the cost of those units had been recouped, in part or in whole, under the Army's previous contract with Cobro for the same services. Cobro's BAFO, submitted after the DCAA audit and reflecting lower per-unit prices for units offered under the BEQ, accurately reflects the actual cost of the units being offered according to the agency.

The integrity of unit prices clause is designed to prevent offerors from distorting unit prices to their competitive advantage and therefore to the prejudice of other offerors. See FAR § 15.812 (FAC 84-28). Thus, for example, where a solicitation calls for offerors to submit unit prices for different cost line items, the integrity of unit prices clause prevents offerors from distributing the cost of "high cost" line items to "low cost" line items, thereby gaining a competitive advantage where offers are evaluated on the basis of per-unit prices. Similarly, the clause prevents offerors from improperly distributing costs between base and option years in solicitations calling for such offers, and between base items and additive items in solicitations calling for those types of offers.

We find no violation of the integrity of unit prices clause. First, Tero Tek has not even alleged that Cobro's offer impermissibly distributes per unit costs between more and less expensive line items or between the base year and option years. Second, Tero Tek has proffered no evidence which would tend to show that Cobro's costs vis-a-vis the questioned line items are other than properly allocated between units. As to the "reports" line items, Cobro's price becomes lower as more units are supplied; such an inverse relationship is natural and, in our opinion, tends to show that, in fact, costs are properly allocated as between units. As to the "microcomputers" line items, we believe that Cobro's response to the agency's discussion questions in this regard provides ample rationale for its pricing scheme. Moreover, those prices were the subject of

a DCAA audit and discussions with Cobro. The agency subsequently determined that the proposed revised costs were reasonable. Nothing contained in the record would lead us to question this conclusion.

Finally, we fail to understand how Tero Tek might have been prejudiced by Cobro's pricing scheme. We have previously held that the central issue to be resolved in cases where there is an allegation that a firm has violated the integrity of unit prices clause is whether the firm has gained a competitive advantage by improperly allocating its costs as between units called for under the solicitation. See Kitco, Inc., B-221386, Apr. 3, 1986, 86-1 CPD ¶ 321. In the instant case, prices for the questioned line items were evaluated by multiplying unit cost by the BEQ. A variation in unit cost within each line item could work no competitive advantage for Cobro since prices as between offerors were compared on the basis of the total price of all units called for under each line item. While we believe that the agency should have evaluated the prices offered by Cobro in excess of the BEQ (because contract performance could require the provision of microcomputers in excess thereof), we nonetheless conclude that this error did not prejudice Tero Tek since Tero Tek's proposal was ultimately determined to be "less than technically acceptable." Moreover, the protester has not suggested that the prices offered by Cobro were other than reasonable and, as indicated above, a DCAA audit supports the agency finding to that effect. Accordingly, this basis of protest is denied.

Tero Tek next alleges that the portion of the contract which provides for the reimbursement of contractor travel costs is in violation of the statutory prohibition against awarding cost-plus-a-percentage-of-cost (CPPC) contracts. Cobro proposed that travel be reimbursed on the basis of actual cost to the contractor plus a stated percentage thereof which represents the contractor's general and administrative overhead (G&A).

The agency responds that the travel reimbursement portion of the contract does not violate the statutory prohibition contained in 10 U.S.C. § 2306 (1982) concerning CPPC contracts because the resulting contract does not violate the intent of the statute. Specifically, the agency alleges that the intent of the prohibition against CPPC contracts is to prevent the contractor from increasing the profit or fee realized on a contract by increasing its costs. According to the agency, such a situation does not exist here because Cobro's profit or fee under the contract is not affected by increased costs but, rather, only its indirect costs are increased when direct costs increase. The agency also

argues that the contract contains adequate safeguards to prevent contractor abuses. In particular, the agency points out that the cost of travel is limited to the rates set out in various Federal Travel Regulations and that all travel requests by the contractor are subject to prior governmental approval.

We find that the travel reimbursement portion of the contract does not constitute a CPPC contract. The usual guidelines applied by our Office in determining whether a contract constitutes a CPPC contract are; 1) whether payment is at a predetermined rate; 2) whether this rate is applied to actual performance costs; 3) whether the contractor's entitlement is uncertain at the time of contracting; and 4) whether it increases commensurately with increased performance costs. The Department of Labor--Request for Advance Decision, 62 Comp. Gen. 337 (1983), 83-1 CPD ¶ 429. Here, condition number 3, that the contractor's entitlement is uncertain at the time of contracting, is not met. The contract limits the cost of travel to rates established in various Federal Travel Regulations. Further, the contract also provides that all travel requests by the contractor are subject to prior governmental approval. Thus, we cannot conclude this is a CPPC contract since the contractor's entitlement is not uncertain at the time of contracting.

Finally, the protester argues that the agency failed to consider cost in its evaluation of the relative merits of the proposals. In particular, the protester argues that the Army disregarded its lower price and, further, that the Army failed to calculate properly Cobro's offered price prior to making its award decision.

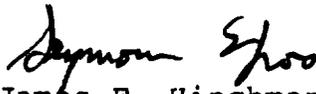
The Army, while conceding that it had initially improperly calculated Cobro's price argues that it made an entirely permissible cost/technical tradeoff and that, even had it properly calculated Cobro's price, it would not have reached a different result since Tero Tek's proposal (even after BAFOs) was considered to be "less than minimally acceptable."

In a negotiated procurement, there is no requirement that award be made on the basis of lowest cost. Agency officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. The judgment of the procuring agency concerning the significance of the difference in the technical merit of offers is

accorded great weight. Asset Inc., B-207045, Feb. 14, 1983, 83-1 CPD ¶ 150. Moreover, we have consistently upheld awards to offerors with higher technical scores and higher costs so long as the result is consistent with the evaluation criteria and the procuring agency has determined that the technical difference is sufficiently significant to outweigh the cost difference. Battelle Memorial Institute, B-218538, June 26, 1986, 86-1 CPD ¶ 726.

Within the context of this procurement, we have no basis to conclude that the cost/technical tradeoff made by the Army was unreasonable. Here, the record shows that the source selection board found Cobro's proposal to be some 52 percent superior to the proposal submitted by Tero Tek; indeed after the submission of BAFOs, the source selection board found Tero Tek's proposal to be "less than minimally acceptable." Moreover, we have no reason to question the contracting officer's statement that the recalculation of Cobro's price would not have affected the ultimate award decision. Finally, Tero Tek has not alleged that the agency's technical evaluation of its proposal was erroneous, and nothing in the record leads us to believe otherwise.

For the reasons stated above, the protest is denied.

for 
James F. Hinchman
General Counsel