



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fairchild Weston Systems, Inc.
File: B-229568.2
Date: April 22, 1988

DIGEST

1. Agency cost realism analysis that applied rates recommended by the Defense Contract Audit Agency to an agency-generated estimate of the labor hours needed to complete contract performance had a reasonable basis.
2. Where record shows that neither awardee nor protester made an unqualified promise to comply with zoom range specifications in contract for design, development and fabrication of color television camera for space shuttle, protester clearly was not prejudiced by agency decision to accept awardee proposal pending decision whether to modify requirements.
3. Where there is no indication that amounts allocated for engineering labor and overhead are insufficient to correct any deficiencies in awardee's proposal, protest that agency failed to consider the costs of correcting such deficiencies is denied.
4. Agencies are not obligated to afford offerors all encompassing discussions, only to lead offerors generally into the areas of their proposals which require amplification.
5. Where, except for deficiencies reflecting upon the protester's basic understanding of problems involved in contractual effort, record demonstrates that major deficiencies were discussed with protester, protest that agency failed to hold meaningful discussions is denied.
6. Allegation that cost evaluation did not consider cost of possible patent infringement is without merit where protester's allegation is based on mere speculation and agency and awardee flatly deny patent infringement issue exists.

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7. Protest against use of the same individuals to conduct both cost and technical evaluations is untimely where solicitation indicated that the agency intended to appoint one source evaluation committee to review all award factors. In any event, the record fails to indicate any evidence of bias by the evaluation team.

DECISION

Fairchild Weston Systems, Inc., protests the proposed award of a contract to the Astro Space Division (Astro-Space) of the General Electric Company, formerly the RCA Corporation, under request for proposals (RFP) No. 9-BE3-27-6-65P, issued by the Johnson Space Center (JSC), National Aeronautics and Space Administration (NASA). The solicitation sought proposals for the design, development, fabrication, testing and delivery of an all solid-state color television camera (CTVC) for use onboard the space shuttle orbiter.

We deny the protest.

The RFP directed offerors to submit proposals in two volumes, volume one containing the technical proposal and volume two containing the cost proposal as well as information regarding experience, past performance and other factors. The RFP, which contemplated award of a cost-plus-fixed-fee contract provided for award in accordance with Federal Acquisition Regulation (FAR) § 52.215-16 to the offeror whose offer conforming to the solicitation would be most advantageous to the government, cost or price and other factors considered. The solicitation provided that a source evaluation committee (SEC) appointed by JSC would evaluate proposals in four areas: mission suitability factors, cost factors, company experience and past performance factors. The SEC was to assign a numerical score to mission suitability factors and present the results along with its evaluation of cost, company experience and past performance and other factors for the source selection official to consider.^{1/}

There were three mission suitability factors, comprised of seven evaluation criteria, as follows: (1) Excellence of Proposed Approach, which included camera packaging and

^{1/} The source evaluation plan provided for establishment of adjectival ratings which were then translated into numerical ratings as follows: excellent, 91-100 percent of available points; good, 71-90; fair, 51-70. The protester has suggested that the use of adjectival ratings indicates a departure from the announced evaluation criteria. We find no support for this contention.

electronic design; (2) Understanding the Problem, consisting of identification of principal technical considerations and television camera design familiarity and (3) Implementation of Proposed Approach, which included program plan, key personnel and other company resources. The most important criteria were electronic design, and television camera design familiarity, in that order, with the other factors being relatively equal in importance.^{2/}

Four offerors submitted proposals on April 28, 1987. The agency determined two proposals, that of the protester and that submitted by Astro-Space, to be in the competitive range. The Astro-Space technical proposal was deemed superior to that of the protester, scoring substantially higher in four mission suitability areas and equal in three others. The protester proposed the lower cost, but in evaluating cost realism, the SEC concluded that the protester had underestimated the number of production hours required to complete work while Astro-Space had overestimated those required hours as well as overstating its burden rates. Using a "strawman" projection of production hours and adjusting the offerors' proposed costs in accordance with Defense Contract Audit Agency (DCAA) recommended rates, the SEC found that Astro-Space's probable costs were substantially lower than those of the protester.

By letter of August 14, 1987, the agency notified both offerors of their inclusion in the competitive range, provided several questions for clarification of proposals and extended the opportunity to submit a best and final offer (BAFO) including revisions in the cost and technical areas. The agency received BAFOs on August 31. In its BAFO, Astro-Space reduced its proposed cost to an amount slightly less than the probable cost projected by the earlier cost realism analyses. The protester submitted additional data and reduced its proposed cost slightly, moving the agency to reduce its estimate of the protester's probable cost, which nevertheless remained over a million dollars more than Astro-Space's proposed and probable costs.

Based upon the offerors' responses to the discussion questions, the SEC found that the gap in technical scores had narrowed, but although the protester now evidenced a slight advantage in camera packaging, the proposed awardee scored higher or equal in all other evaluation criteria. Although the final proposed cost of the protester was

^{2/} Identification of principal technical considerations, program plan, and key personnel were equal in value and slightly more important than camera packaging and other company resources which were equal in value.

slightly less than that of Astro-Space, NASA's cost realism assessment found the protester's probable costs to be significantly higher than the proposed awardee's. In view of its superiority in the area of mission suitability as well as its lower probable cost and slight advantage in experience, the source selection official selected Astro-Space for proposed award.

Fairchild now protests that NASA's cost realism analysis was conducted irrationally in that NASA arbitrarily increased the protester's production hours without discussing the basis of Fairchild's estimates, failed to consider the costs of correcting deficiencies in Astro-Space's proposal, failed to evaluate an alternative cost-plus-incentive-fee (CPIF) proposal submitted by the protester, failed to consider the cost of royalties that would be paid by the proposed awardee and failed to analyze initial and BAFO prices on a uniform and consistent basis. In addition, the protester argues that the proposed award is improper because of the proposed awardee's failure to meet the required specifications for the shutter and zoom range. Furthermore, the protester claims that the agency failed to conduct meaningful negotiations and objects to the use of the same individuals to evaluate technical and cost factors.

With regard to cost evaluations, an agency is not required to conduct an in-depth cost analysis or to verify each and every item in conducting its cost realism analysis. Rather, the evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agency involved, since it is in the best position to assess "realism" of cost and technical approaches and must bear the major criticism for the difficulty or expenses resulting from a defective cost analysis. Since the cost realism analysis is a judgment matter on the part of the contracting agency, our review is limited to a determination of whether an agency's cost evaluation was reasonably based and was not arbitrary. Research Analysis & Management Corp., B-229057, Nov. 25, 1987, 87-2 CPD ¶ 523.

The protester argues that the agency performed its cost realism analysis irrationally, that the agency did not understand that the protester could perform with fewer production hours because it mass produces key components that the proposed awardee must hand-make or batch-produce. The protester argues that the agency's failure to make any inquiry on this point was a failure to conduct meaningful negotiations.

The record shows that the SEC conducted its cost analysis by establishing an estimate of how many labor hours it would take to complete contract performance. The record further

indicates that the agency did not base its estimate upon Astro-Space's proposal but derived the estimate independently. The committee then adjusted proposed costs of both offerors to conform to this projection and adjusted the resulting figures in accordance with rates recommended by DCAA. The proposed awardee's estimated labor hours were considerably higher than the agency's estimate; the protester's were considerably lower. The agency concluded that compared with the estimate prepared by the SEC, the protester appeared to have "grossly underestimated" the hours required to do the job, particularly in the areas of fabrication, assembly and testing, manufacturing program, engineering test program and quality assurance.

The protester argues that its camera is based on a frame transfer design which the proposed awardee does not use but which represents some 95 percent of the current CTVC market. Consequently, the protester believes that it has access to a wider variety of potential commercially available lens assemblies than the proposed awardee does. The agency points out that the RFP advised offerors not only to provide a breakdown of proposed labor hours but also to furnish the basis for their estimates. The agency argues that it reasonably assumed that if the protester specifically proposed any unique production plan, it would have stated so in its proposal. In its proposal, the protester specifically indicated that it had no cost history to rely on, nor did it provide any narrative explanation of its production plans. While the agency recognized a great disparity between the hours proposed by the protester and the hours projected by the agency, it focused on the protester's subcontracting effort in looking for the "missing" production hours. Accordingly, one of the discussion questions sought information about the design and fabrication capability of the proposed subcontractor. The protester's response failed to explain the firm's production plans, leading the SEC to conclude that the protester had developed no technique, innovative or otherwise, for drastically reducing labor hours.

The agency was and is of the opinion that the CTVC is of a new design and is inherently not susceptible to a production line approach; the agency avers that its SEC members have had extensive experience with flight cameras and that while the cost realism adjustment was subjective it was also reasonable. While the protester argues that if asked it could have provided more support for its cost projections, in effect, the protester merely disagrees with the agency's opinion. In our view, the record shows that the agency reasonably based its adjustments upon the informed judgment of its most experienced personnel and in view of the protester's failure to support its projections either in its

initial or BAFO, the agency's cost realism adjustment had a reasonable basis. Creativision, Inc., B-225829, July 24, 1987, 87-2 CPD ¶ 78.

In submitting its BAFO, the protester offered as an alternative a CPIF arrangement. The protester believes that this proposal, which according to the protester would have significantly reduced the government's risk of cost overrun, was evidence of the protester's confidence in its projected costs and objects to the agency's failure to evaluate the alternative proposal. Contrary to the protester's assertion, the record establishes that the agency did consider and evaluate this alternative proposal along with an alternative proposal from the proposed awardee and remained convinced that the protester's costs were understated. As the agency points out, a CPIF contract would have shifted little of the risk of underpricing from the agency to the protester. The protester's proposed use of a CPIF contract, by itself, was not considered by NASA to support the realism of the individual cost elements since these costs clearly appeared understated within the firm's basic cost proposal. We conclude that the agency reasonably refused to consider the protester's CPIF offer as evidence that its cost projections were accurate.

In evaluating Astro-Space's proposal, the SEC considered the proposed awardee's rotary shutter to be a weakness because the shutter was complex and reduced signal level performance; furthermore, Astro-Space's proposed zoom range did not precisely meet the RFP requirements. The protester asserts that either the proposed award is improper or if the government is willing to reduce its requirements by accepting Astro-Space's purportedly noncompliant offer, the agency is required to provide Fairchild an opportunity to submit a revised proposal to the relaxed specification.

When an agency relaxes its requirements, it generally must issue a written amendment to afford all offerors an opportunity to revise their proposals. See FAR § 15.606 (FAC 84-16). Our office will not sustain a protest based on an agency's failure to do so, however, absent a showing that the protester was prejudiced in that it would have altered its proposal to its competitive advantage if given the opportunity to respond to the modified requirements. See Daggett Properties, B-227635, Oct. 22, 1987, 87-2 CPD ¶ 384. Furthermore, an agency should not automatically reject a nonconforming proposal in the same manner that it would reject a nonresponsive bid. It is a fundamental purpose of negotiated procurements to determine whether deficient proposals are reasonably susceptible of being made acceptable through discussions. Hollingsead International, B-227853, Oct. 19, 1987, 87-2 CPD ¶ 372.

Concerning the complex shutter offered by Astro-Space, in the first instance, the solicitation permits alternate technology such as the complex shutter. The agency concluded that the proposed awardee's shutter was acceptable, although less desirable than other possible designs. The agency further reports that it is willing to accept Astro-Space's shutter as proposed and the protester has not shown that this alternative approach is unacceptable under the RFP terms. Thus, we have no basis to question the evaluation and ultimate acceptance of Astro-Space's proposed shutter.

With regard to the zoom range requirements, the SEC considered the proposed awardee's failure to meet the RFP's zoom range requirements to be a major weakness. The agency contends that when the statement of work was drafted, in projecting the current rate of technological improvement, it believed that a commercially available lens would be able to meet zoom requirements by the time of award. The agency now believes that this is unlikely and that neither the protester nor the proposed awardee will be able to meet the zoom requirement.

The agency reports that both offerors would have to incur similar costs to meet the specifications or else furnish a commercially available but nonconforming lens. The protester disputes this, arguing that the agency has in effect chosen to "throw some money" at Astro-Space and that if Astro-Space fails, to waive the specification. The protester argues that Fairchild promised to meet the specification and was eligible for award while Astro-Space did not and was not. The record does not support the protester on this point.

The protester's proposal states in pertinent part:

". . . The wide angle zoom lens requirements for the CTVC, contained in the RFP, suggest a high quality optical and mechanical design. A thorough search will be made to find an acceptable, commercially available lens, with a fully closing view, that could be improved to meet the optical quality and environmental susceptibility of such lens. However, this effort may lead us to the development of a more expensive dedicated lens for this space program. . . ." (emphasis added.)

In contrast, the proposed awardee provided a list of "candidate lenses," but advised the agency that commercially available wide-angle zoom lens might not meet the RFP's range requirements. Astro-Space did not decline to meet the

specifications but rather suggested two options that would allow the agency to use one of the candidate lenses. Astro-Space advised that "available lens designs of realistic cost preclude full compliance with the desired field-of-view, zoom range and CTVC length" and recommended a tradeoff. Neither offeror flatly refused or flatly promised to meet requirements, although the protester's proposal was far more optimistic about the availability of a commercial lens. The agency believed that the difference in proposals evidenced the proposed awardee's greater familiarity with the market; the protester argues that owing to a design more commonly used, it had a wider range of choices. There is no reason to address these arguments inasmuch as we see no essential difference between what the offerors promised. The protester does not show that it was prejudiced by the agency's decision not to reopen discussions on the basis of its decision to waive absolute compliance with the RFP zoom range requirement. Thus, we find no basis to object to the agency's decision to accept Astro-Space's offer, as submitted, notwithstanding the zoom range weakness.

The protester also claims that the cost realism analysis was irrational because it failed to consider the cost of correcting the deficiencies in the lens proposed. We disagree. We see no basis for concluding that such costs properly should be added to the proposed awardee's probable costs but excluded from the protester's, since, as we have stated, supra, the agency does not expect to develop a new shutter. While the agency indicates it has not decided whether to require development of a lens that meets the RFP requirements, the record indicates that the agency's cost realism analysis allowed a considerable sum for engineering labor and overhead in recognition of the design, development and testing aspects of the effort. The protester submits no evidence that the amounts so identified were insufficient to cover any effort required. There is nothing in the record to contradict the agency's position (1) that there is no need to develop a new shutter and (2) that the engineering hours proposed by both offerors are sufficient to carry lens development to the point where it can be determined whether the cost of meeting RFP requirements is worth the effort. We deny this ground of protest.

The protester further believes that the cost realism analysis was irrational in failing to consider the cost of royalties for use of the Hoagland patent, U.S. Patent No. 4,308,690, which relates to use of dual green coupling devices. By use of this method, signaling resolution is enhanced. Insofar as the protester argues that the agency should have known that Astro-Space was required by law to pay royalties, we consider the protest to be anticipating a claim for patent infringement. The agency and awardee

flatly deny that a possible infringement issue is involved here and that any costs of any particular technology were not properly considered. In any event, a potential for patent infringement does not provide a basis for objection to award. We previously have recognized that 28 U.S.C. § 1498 gives patent holders an adequate and effective remedy for patent infringement, while saving the government from having its procurements delayed pending litigation of patent disputes. Ramer Products Ltd.--Reconsideration, B-224027.7, Sept. 28, 1987, 87-2 CPD ¶ 304; American Sealcut Corp., B-201573, Apr. 28, 1981, 81-1 CPD ¶ 327.

The protester charges that the agency failed to conduct meaningful negotiations, first by arbitrarily increasing Fairchild's production hour estimates and then by failing to discuss weaknesses in its proposal. In the source selection statement, the source selection official discusses the strengths and weaknesses of both proposals. The weaknesses in the protester's proposal included incomplete discussion of power consumption and local commands and switches; no description of lens assembly electrical design; too few hours proposed, particularly in the production phase; insufficient description of the unique processing hardware and design with the shuttle CTVC system and no quality control or quality assurance plan. The protester charges that the agency identified none of these weaknesses during discussions; furthermore, many are informational in nature and that it is irrational to score a technically deficient proposal higher than one that is informationally deficient.

With regard to the inadequacy of Fairchild's labor hours, the agency did ask a question referring to the protester's proposed production hours, although that question indicated the SEC's belief that the "missing" production hours lay in the subcontracting effort. Agencies are not obligated to afford offerors all encompassing discussions, only to lead offerors, as the agency did here, generally into the areas of their proposals that require amplification. TM Systems, Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573. The agency's assumption that the protester's subcontracting effort contained significant production hours was erroneous, but it did raise a concern regarding Fairchild's design/fabrication capability. Whether discussions are meaningful must be determined by examining information available at the time discussions were held and, here, we cannot say the agency's concern for the method of production hours was not communicated to Fairchild, however generally. Cosmodyne, Inc.; Goulds Pumps, Inc.; Prosser-East Division, Purex Corp., B-216258, et al., Sept. 19, 1985, 85-2 CPD ¶ 304. Similarly, the record indicates that the agency did ask for details on the lens design but the protester confined its answers to aspects other than electrical design.

Also, regarding the lack of a quality control plan, the solicitation required offerors to submit as part of their proposals an organization chart, a reliability plan, a safety plan and a quality control plan. The protester argues that the agency should not have penalized it for failing to submit a quality control or quality assurance plan, without identifying that deficiency during discussions. We have held, however, that where a solicitation specifically calls for certain information, the agency should not be required to remind the offeror to furnish the necessary information with its final proposal. Fischer & Porter Co., B-228764, Mar. 1, 1988, 88-1 CPD ¶ ____.

With respect to the other technical weaknesses in the protester's proposal, we have reviewed the SEC's comments on the strengths and weaknesses of Fairchild's proposal. For each criterion, the SEC prepared a sheet listing strengths and weaknesses, major and minor, with suggested questions to clarify any obscure points and suggest changes that would make the proposal more desirable, consistent with the protester's basic approach. Each weakness was the subject of a suggested question. Except with regard to the two criteria encompassed by the factor of understanding the problem--identification of principal technical consideration and television camera design familiarity--the suggested questions were incorporated into the agency's August 14 letter containing questions for discussion. Thus, we think the standards for meaningful discussions were met.

With regard to the weakness in understanding the problem, the agency argues that in evaluating an offeror's understanding of the problem, one key to that evaluation lies in whether the offeror identifies the problems. Where an offeror glosses over major problems or fails to discuss them in its initial proposal, the agency contends that any discussion will produce a mere parroting of the agency's concerns with no assurance that the offeror independently appreciates the problems identified by the agency. Thus, it asserts this was not an area for discussion since discussion potentially would result in improper coaching or leveling. We agree.

Paragraph M.3.2.1 of the RFP, identification of principal technical considerations, states that offerors will be evaluated on how well they identify and discuss such considerations. Paragraph M.3.2.2, television camera design familiarity, specifically provides that offerors will be evaluated on the basis of how well they discuss the unique processing hardware required to support the Shuttle CTVC system. We believe that the RFP thereby specifically advised offerors that they were expected to address such

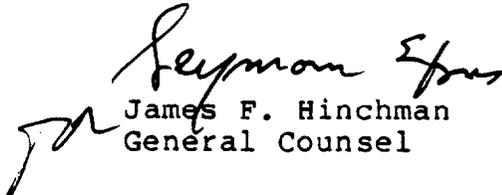
issues in their initial proposals and that the agency reasonably declined to request further information concerning these issues regarding basic understanding.

We note that as a result of the questions that were asked by the agency's letter of August 14, the protester substantially improved its technical rating, although its overall rating was lower than that of the proposed awardee. Based upon the record before us, we believe that the discussions were in fact meaningful.

Finally, the protester alleges that it was prejudiced because the same individuals conducted both the price and technical evaluations and that since these individuals were intimately involved with ongoing Astro-Space contracts, they were biased toward Astro-Space.

In the first instance, this protest issue was untimely raised after the submission of proposals as the RFP clearly provided that the agency intended to appoint one SEC, which would review technical, cost, experience, past performance and other factors. 4 C.F.R. § 21.2(a)(1) (1988). We have held that the composition of technical evaluation panels is within the discretion of the contracting agency, and we will not review the composition absent a showing of possible fraud, bad faith or conflict of interest. Universal Shipping Co., Inc., B-223905.2, Apr. 20, 1987, 87-1 CPD ¶ 424. The protester makes no such showing. Furthermore, it is clear that the SEC relied upon different individuals as nonvoting members to provide expertise in each of these areas. Nor does the protester allege any specific act of bias, apart from the protest issues discussed, only an "appearance of impropriety." We will not attribute bias to an evaluation panel simply on the basis of inference or supposition. D-K Associates, Inc., B-213417, Apr. 9, 1984, 84-1 CPD ¶ 396. As requested by the protester, we have made an in camera review of the SEC worksheets. We find no evidence of bias.

Since we deny the protest, Fairchild's request for the cost of pursuing the protest, including attorney's fees, and proposal preparation costs is denied.


James F. Hinchman
General Counsel