



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Stanley Associates, Inc.

File: B-232361

Date: December 22, 1988

DIGEST

1. Agency properly rejected protester's offer as representing an unacceptable cost risk to the government where protester offered disproportionate prices for various labor categories, thereby creating an incentive to develop the task orders under the contract in such a way as to minimize the use of labor in a certain category and to maximize the use of other categories.

2. Agency conducted meaningful discussions where it clearly indicated to the protester that it was concerned about the rate the protester had proposed for one labor category and gave the protester an opportunity to revise its proposal.

DECISION

Stanley Associates, Inc., protests the Military Sealift Command's (MSC) award of a contract for engineering, technical and analytical support services for strategic sealift programs to Phillips Cartner & Company, Inc., under request for proposals (RFP) No. N00033-88-R-3013.

Stanley's proposal, although the lowest received, was ultimately rejected based primarily on the MSC's conclusion that Stanley's labor rate proposed for junior analysts was too low. Stanley argues that since it submitted the lowest priced, technically acceptable offer, it should have received the award. We deny the protest.

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The RFP, as amended, contemplated the award of a fixed-price indefinite quantity, indefinite delivery, labor hours contract for a range of 29,700 to 118,800 total staff hours of direct labor to be used in accomplishing 23 separately listed tasks over a 36-month period. The solicitation listed the following five labor categories to be used in performing the work along with their respective estimated levels of effort: program director (9846 hrs.), senior analyst (21,354 hrs.), analyst (4,650 hrs.), junior analyst (44,943 hrs.), and clerical (8,307 hrs.). The RFP also set forth the minimum qualifications for each category.^{1/}

Offerors were required to submit the resumes of the individuals other than clerical staff whom it proposed and were cautioned that the awardee would not be permitted to substitute other personnel for those proposed, except where the contracting officer approved the substitution of an individual of equal or higher qualifications. The RFP evaluation criteria provided that award would be made to the lowest priced, technically acceptable offeror meeting all the minimum requirements set forth in the solicitation.

Seven offerors submitted proposals by the February 17, 1988 closing date. Stanley's initial offer of \$1,890,540.41 is summarized as follows:

	Labor Category			
Program	Senior		Junior	
Director	Analyst	Analyst	Analyst	Clerical
\$38.49/hr.	\$27.54/hr.	\$18.52/hr.	\$12.05/hr.	\$17.08/hr.

The contracting officer determined that four of the proposals, including Stanley's, were within the competitive range. On May 17 and 18, discussions were held with all four offerors.

The discussions with Stanley focused on the protester's presentation of its pricing data. During the course of the discussions, Stanley initiated an exchange concerning the RFP's evaluation scheme. The protester criticized the approach of awarding to the lowest-priced technically acceptable offeror and indicated that offerors could propose unreasonably low rates for a particular labor category (called a "throw away") and then make sure that that category was not included in any of the task orders

^{1/} The actual work was to be performed pursuant to task orders issued under the contract which would specify the labor mix to be used at the rates set by the contract.

issued under the contract. The record shows that the protester's representative stated that an example of such a category under this solicitation was the junior analyst position, which accounted for approximately half of the total contract hours.

After concluding discussions with the offerors, MSC issued amendment No. 0004 to the RFP, which requested best and final offers (BAFOs) and, among other things, contained a provision stating:

"The Navy expects to pay fair and reasonable prices for required supplies and services. Therefore, all offerors should understand that the Navy fully expects to order the effort under the low priced rate categories applicable to each level of effort and the contractor's performance will be carefully assessed to ensure the appropriate caliber of support is provided. Low priced support effort shall be ordered and monitored with great care to ensure that the Navy obtains the caliber of support it needs and contracted for, regardless of the successful offeror's pricing decision."

Stanley responded by submitting a BAFO which, according to the agency, was most notable because of the reduction of the junior analyst rate from \$12.05/hr. to \$6.00/hr. Stanley, however, made no changes in the individuals proposed as junior analysts. Since, according to the contracting officer, this significant reduction in the junior analyst rate was contrary to the agency's concerns regarding unreasonably low labor rates, he presumed the \$6.00 rate to be a clerical error and by letter dated June 17 requested that Stanley verify its price for the junior analyst category. In his request for verification, the contracting officer cautioned Stanley:

"As you evaluate this apparent mistake you should consider the possible consequences of allowing the apparent mistake to go uncorrected. In considering the consequences you are advised that should your company be awarded the contract MSC intends to tightly control the ordering of tasks to be performed and will insist that tasks be ordered in accordance with the labor mix set forth in the Schedule of the solicitation."

Stanley responded to the request by verifying its price. The protester took exception, however, to the contracting

officer's statement that MSC would insist on ordering tasks in accordance with the labor mix set forth in the solicitation, arguing that the solicitation did not give the agency such authority. Based on this response, the contracting officer concluded that either Stanley did not intend to comply with the labor mix set forth in the RFP or did not understand the solicitation's requirements. He concluded that if Stanley misunderstood the RFP's terms, other offerors might too. The contracting officer accordingly determined that further discussions and a second round of BAFOs were required.

Prior to the reopening of discussions, the competitive range was redefined and two of the four offerors were eliminated. On July 19 and 20, the agency reports that negotiations were held with the two remaining offerors, Stanley and Phillips Cartner.

The discussions with Stanley focused on its proposed rate of compensation for junior analysts and the relatively low number of junior analysts offered. Stanley assured the contracting officer that it would not lose money under the contract even if hours were ordered in the proportion indicated in the solicitation. With regard to the number of junior analysts, Stanley's representative assured the contracting officer that his firm "[could] get all the Junior Analysts we need."

The contracting officer then issued amendment No. 0005 to make it clear that the government had the right to direct the labor mix under task orders. The amendment provided that delivery orders for the tasks would specify, among other things, the categories of labor to be used, the estimated number of hours for each category, the labor hour rate, and the ceiling amount for the order. It also provided that the government could issue the task orders unilaterally if agreement could not be reached.

On July 25, Stanley and Phillips Cartner submitted their second BAFOs. Stanley offered an overall price of \$1,860,456, while Phillips Cartner's total price was \$2,068,106. The two offerors proposed the following rates (per hour) for the various labor categories:

	<u>Stanley</u>	<u>Phillips Cartner</u>
Program Director	\$44.00	\$29.84
Senior Analyst	\$28.00	\$22.20
Analyst	\$27.00	\$20.97
Junior Analyst	\$ 6.00	\$17.48
Clerical	\$16.00	\$14.10

Stanley made no changes in its rate of compensation for junior analysts and identified no additional individuals to serve in this capacity. The contracting officer concluded that the \$6.00 rate proposed for the junior analysts was unrealistic and that consequently Stanley would either attempt in some way to direct the task orders to the other more costly labor categories or would not be able or willing to perform satisfactorily if forced to use a significant number of junior analyst hours. The evaluation record shows that the contracting officer therefore rejected Stanley's proposal and on August 12, awarded the contract to Phillips Cartner.

The protester argues that it should have received the award because it was the lowest priced technically acceptable offeror. Stanley states that the evaluation record supports its view that its proposal was considered technically acceptable and that it was determined to be a responsible prospective offeror. Consequently, the protester concludes that under the RFP evaluation criteria the agency could not have rejected its proposal. Further, Stanley maintains that if the agency had considered its rate for junior analysts or the number of junior analysts 2/ offered as deficiencies in its proposal, it was required to point that out specifically during discussions and since it did not do so, it could not use these reasons to reject its proposal. In this regard, the protester says that it could have easily justified its relatively low rates as the result of a well-planned business decision which would not result in a loss to the firm or poor performance for the government.

We think that the agency properly rejected Stanley's offer because it was reasonably concerned that the protester's pricing structure was unrealistic and posed a significant risk. Although the protester argues that the agency was obligated to make award to it because it was the low priced, acceptable offeror, we have recognized that an agency is not compelled to accept the low offer under an RFP, like the one here, under which services are to be ordered and the labor mix set after award, where the agency determines that

2/ The relatively small number of junior analysts proposed by Stanley does not appear from the evaluation documents to have been a major concern in the selection decision. It was, however, mentioned more prominently in the agency's protest report. While we think it constituted a legitimate area of concern for the agency, we will not separately consider it as it is not needed to support the agency's action here.

because of the proposed pricing structure there is a significant risk that performance would be deficient and that the actual cost of performance would not be the lowest. Computer Data Systems, Inc., B-223921, Dec. 9, 1986, 86-2 CPD ¶ 659.

Here, Stanley offered a disproportionately low rate for junior analysts and quite high rates for program director and analyst. In fact, all of its rates except the extremely low rate for junior analysts were higher than the rates proposed by the next low offeror. This, in the agency's view, gave Stanley an incentive to direct work into the higher priced categories and out of the junior analyst category, which, according to the RFP estimate, would make up most of the hours to be ordered. Stanley argues that the Navy was protected against such manipulation of the task orders by the solicitation clause which gave the government the right to direct the labor category mix. We disagree. Under the contract it is the contractor that submits specific proposals for performing the tasks identified by the agency; despite the Navy's authority to specify the labor mix, it will of necessity rely heavily on the contractor's assessment of the number of hours in the various labor categories that will be required to accomplish the tasks. Further, even though the Navy may attempt to control the labor mix, we think that the existence of such a disproportionately low rate in the most significant labor category creates the likelihood of disagreements over the task orders which would have to be resolved under the contract's disputes clause. This is a circumstance that the agency may legitimately take into consideration in determining whether to accept an offer of this type. See The Orkand Corp., et al.--Reconsideration, B-224466.2, et al., Jan. 23, 1987, 87-1 CPD ¶ 88. We also agree with the agency that it was reasonable to consider in this same general analysis that Stanley's rate of \$6.00/hr. for the junior analyst category raised questions as to whether Stanley would be able or willing to perform satisfactorily if directed to use a significant number of junior analyst hours. Thus, we agree with the Navy that it could properly reject Stanley's apparently low offer here because it involved significant cost risk for the government.

We also find no merit to Stanley's argument that if the Navy viewed its junior analyst rate as a deficiency in its proposal, it should have identified it as such during discussions. In order for discussions to be meaningful, contracting agencies must furnish information to all offerors in the competitive range as to areas in which their proposals are believed to be deficient so that offerors may

have an opportunity to revise their proposals to satisfy the agency's requirements. Federal Acquisition Regulation (FAR) § 15.610(c); Proprietary Software Systems, B-228395, Feb. 12, 1988, 88-1 CPD ¶ 143. It is not necessary for the agency to furnish information in any particular form or manner, however, provided that it finds some means which reasonably communicates the nature and gravity of its concerns. Mark Dunning Industries, Inc., B-230058, Apr. 13, 1988, 88-1 CPD ¶ 364.

Here, however, we fail to comprehend how the protester can argue that it was unaware of the agency's concern about its low rate. While it is true that the agency never specifically denominated the low rate as a deficiency and took the rather unusual step of sending Stanley a letter requesting verification of that rate, we think that the verification letter along with two RFP amendments concerning the labor mix and at least two oral negotiation sessions where the problem of disproportionately low rates was discussed should have placed any reasonable offeror on notice that the agency was quite concerned about such rates in general and Stanley's low junior analyst rate in particular. Thus, while the agency did not specifically state that it would reject the Stanley proposal unless Stanley either explained the basis of its junior analyst rate or raised that rate, it clearly and repeatedly expressed its concern with that aspect of the protester's proposal; it was not obligated to do more.

The problem seems to us not to have been a lack of information; rather, it appears throughout the record that the protester adopted the strategy of offering this type of rate and was bound to follow it through whether or not the agency approved. In this regard, since the protester believed that its proposal was considered technically acceptable,^{3/} it apparently concluded that it could not be rejected because of the low junior analyst rate. As indicated above, this is not so. The Navy properly could reject Stanley's BAFO based on its conclusion that the offeror's extremely low rate for junior analysts was

^{3/} The agency does not agree that the protester was informed during discussions that its proposal was technically acceptable. The agency's evaluation record does, however, indicate that the protester's proposal was considered technically acceptable.

unrealistic and created an unacceptable risk. Computer Data Systems, Inc., B-223921, supra.

The protest is denied.

for *James F. Hinchman*
James F. Hinchman
General Counsel