

137739 Glass



The Comptroller General
of the United States

(CORRECTED COPY)

Washington, D.C. 20548

Decision

Matter of: Bendix Field Engineering Corporation
File: B-232501
Date: December 30, 1988

DIGEST

1. Protest that cost figures in model contract submitted with best and final offer were unbalanced is without merit since these costs were not evaluated and did not affect the award selection decision.
2. Agency's communications after submission of best and final offers (BAFOs) with the awardee to confirm the agency's understanding of matters that were already contained in the proposal did not constitute discussions since agency did not permit revision of the awardee's BAFO.
3. Protest that contracting agency abused its discretion by failing to exclude awardee from competition because of an alleged organizational conflict of interest involving its proposed subcontractor is without merit where the record shows that the proposed subcontractor was later eliminated from the awardee's proposal and the proposed subcontractor was not involved in any matter which would have given the awardee an unfair competitive advantage.

DECISION

Bendix Field Engineering Corporation protests the award of a cost-plus-fixed-fee contract to Raytheon Service Company, under request for proposals (RFP) No. DTFA01-87-R-06839, issued by the Federal Aviation Administration (FAA), Department of Transportation for technical services to support implementation of the National Airspace System (NAS) Plan.^{1/} These services include site selection, site

^{1/} The NAS Plan delineates the improvements in facilities and equipment that are planned for implementation of the NAS by the end of this century, and provides the basis for the future scheduling of facilities and equipment installation projects throughout the FAA.

preparation, installation and test of equipment. The protester alleges that the FAA accepted a contract based on an unbalanced cost proposal. The protester also contends that an organizational conflict of interest existed which may have affected the award decision.

We deny the protest.

The RFP was issued on August 5, 1987, and, as amended, contemplated a cost reimbursement level of effort contract of 9 years, with a base period of 5 years and two option periods of 2 years each. Award was to be made primarily on the basis of technical and program management superiority, with technical being slightly more important than program management. Cost was of less importance than technical concerns, but the RFP provided for the evaluation of cost for all 9 years on the basis of risk assessment and cost realism.

The RFP, as amended, contained a schedule which provided the estimated staffing levels for each contract period for performance (base and two options) of the technical support services. The total number of technical support manhours were estimated at 5,792,187 (3,186,031 manhours for the base period and 1,303,078 manhours for both the first and second option periods). Each offeror, as part of its cost proposal, was required to provide a detailed breakdown of its technical support services staffing mix based on the total manhours for each period of performance contained in the schedule. The offerors were required to insert the estimated total cost for each performance period in the schedule.

Five offerors submitted proposals, and all five were found technically acceptable and included in the competitive range. Following discussions, each firm was requested to submit a best and final offer (BAFO) as well as an executed model contract to be completed by the FAA if the offeror was selected for award. After evaluation of BAFOs, Raytheon's cost proposal was evaluated at \$368,415,004; its score, including both technical and program management, was 72.57 out of a possible 100. The protester's evaluated cost was \$370,412,000; its score was 67.03. Raytheon was rated the highest technically of all offerors and its proposed and evaluated cost was lower than Bendix's cost. Raytheon was selected for award on August 2.

While preparing Raytheon's model contract for execution after Raytheon's selection for award, the contracting officer recognized that the proposed cost for each performance period in the model contract was not the same

as Raytheon's proposed cost in its BAFO as evaluated by the FAA. Raytheon was called on August 5 and asked to clarify the inconsistency between its model contract and its BAFO. Raytheon stated, and later confirmed by letter dated August 5, that the BAFO contained the correct number of hours being offered and the proper cost figures. Raytheon also stated that the costs in the model contract were in error. Based on this information, award was made to Raytheon on August 5 at a cost of \$343,743,880. This total cost (as opposed to individual costs for each performance period) was as stated in both the BAFO and original model contract.

On August 8, Bendix was given oral notification of the award to Raytheon and was provided with the following contract award amounts based on the erroneous model contract figures:

Base Period	\$218,493,553
First Option	73,476,141
Second Option	51,998,314
Totals	<u>\$343,743,983</u>

Bendix was debriefed on August 25. Bendix was later advised that there had been an administrative error in recording the contract dollar amounts in Raytheon's model contract and on August 31 Bendix was provided with the following correct award prices:

Base Period	\$195,846,379
First Option	72,009,865
Second Option	75,887,739
Totals	<u>\$343,743,983</u>

The protester objects to the award to Raytheon on a number of grounds. The protester argues that the FAA abused its discretion (1) in failing to properly evaluate cost as shown by the agency's acceptance of an unbalanced cost proposal from Raytheon, (2) in conducting discussions with Raytheon after receipt of BAFOs and not with the other offerors in the competitive range, and (3) in failing to exclude Raytheon from the competition because of an alleged organizational conflict of interest involving Systems Requirements and Services Association (SRSA), a subcontractor initially proposed by Raytheon, and also involving a former FAA employee now employed by SRSA.

Bendix contends that acceptance of Raytheon's model contract figures was improper because the offer was unbalanced on its face. The record shows that the model contract costs were not the actual contract award figures nor were these figures used by the FAA in its cost realism evaluation. Bendix does not argue and the record does not reflect that the actual contract award costs are unbalanced or that an improper cost analysis was performed on those costs. Under these circumstances, we find no merit to this protest issue.

Next, Bendix argues that the FAA's post-BAFO communications with Raytheon to ascertain what figures in Raytheon's BAFO were being offered without affording other offerors the same opportunity constituted discussions. We disagree.

The Raytheon BAFO contained at least two different proposed cost estimates based on different technical support services staffing mixes. The record also shows that the agency evaluated only the appropriate labor mix which most closely conformed with the estimated labor hours contained in the schedule and which estimates were also used in evaluating Bendix's proposed costs on a common basis. While Raytheon's model contract did contain a different set of figures from those that were evaluated by the agency based on a different labor mix, it is clear that the cost evaluation was properly conducted on the correct labor estimates and cost figures in the Raytheon proposal. Further, the FAA telephoned Raytheon to point out the discrepancy with the model contract, and Raytheon confirmed that the model contract costs were in error and identified the correct costs in the BAFO which had been evaluated by the FAA. The model contract subsequently was modified to conform to the correct cost figures.

The Federal Acquisition Regulation (FAR) § 15.601 (FAC 84-28) defines "discussions" as communications between the government and an offeror that either involve information essential for determining the acceptability of a proposal or provide an opportunity for proposal revision. The record shows that the FAA's communication with Raytheon was merely to confirm its understanding that the cost estimate in its BAFO which FAA had evaluated represented what the offeror had in fact intended to propose in its model contract. We note that these figures were estimates only for evaluation purposes and did not bind the successful contractor to provide any particular staffing mix during contract performance. The FAA did not afford Raytheon an opportunity to revise its proposal. In our view, the post-BAFO communications with Raytheon merely clarified the

FAA's understanding of matters that were already contained in the proposal as submitted and therefore did not constitute discussions. See General Instrument Corp., B-228053, Dec. 8, 1987, 87-2 CPD ¶ 564.

Bendix additionally argues that Raytheon should not be eligible for award because of an alleged organizational conflict of interest arising from Raytheon's inclusion in its initial proposal of SRSA as a subcontractor responsible for providing training and quality control, since SRSA is also a subcontractor to Martin Marietta Corporation under the FAA's System Engineering Integration (SEI) contract whereby Martin Marietta has the responsibility of assisting the government in the evaluation of the technical and program management proposals submitted in response to this procurement. As such, Bendix argues that SRSA was in a position to gain information from Martin Marietta relative to the evaluation of proposals and transmit that information to Raytheon, thus giving Raytheon a competitive advantage.

The FAR generally requires contracting officials to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR § 9.5 (FAC 84-12). In considering an allegation of organizational conflict of interest, we note that the responsibility for determining whether a firm has a conflict of interest if it is awarded a particular contract, and to what extent a firm should be excluded from competing, rests with the procuring agency and we will not overturn such a determination unless it is shown to be unreasonable. NAHB Research Foundation, Inc., B-219344, Aug. 29, 1985, 85-2 CPD ¶ 248. The procuring agency bears the responsibility for balancing the competing interests between preventing bias in the performance of certain contracts which would result in a conflict of interest and awarding a contract that will best serve the government's needs to the most qualified firm. Battelle Memorial Inst., B-218538, June 26, 1985, 85-1 CPD ¶ 726. We find no merit to the Bendix contention that Raytheon is precluded from competing for the award because of an alleged organizational conflict of interest or that SRSA's limited participation gave Raytheon an unfair competitive advantage.

The record indicates that SRSA was named as a team member in the areas of training and quality control under Raytheon's initial proposal. SRSA, as a subcontractor to Martin Marietta under the SEI contract, was excluded from award of future FAA contracts for any NAS plan programs unless the FAA granted a waiver from this restriction. The FAA declined to grant such a waiver. Raytheon subsequently,

prior to its BAFO submission, removed SRSA as a subcontractor from its proposal. Martin Marietta states that SRSA is not involved with any aspect of this procurement and that it has no plans to use SRSA resources for this effort. SRSA also asserts that it was not involved with any activity concerning proposal evaluation for this procurement and in fact was not involved in any proposal preparation activities for Raytheon. Raytheon states that SRSA did not participate in Raytheon's proposal preparation and that Raytheon prepared the Statement of Work (SOW) for SRSA, while SRSA was only required to prepare a cost proposal for its services.

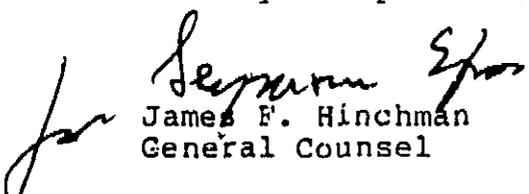
A review of Raytheon's proposal suggests that it was entirely prepared by Raytheon. There is no separate SOW prepared by SRSA; there is merely a separate cost proposal submitted to Raytheon by SRSA. Although the record indicates that SRSA did in fact attend one session of oral discussions with Raytheon and the FAA, there is no evidence that SRSA attended the detailed technical discussions. Additionally, SRSA's offer to Raytheon represented a mere 2.6 percent of the contract price. Also, the FAA has submitted documentation demonstrating that a reassessment of Raytheon's initial technical score giving it no credit for SRSA's contract participation would result in a reduction in Raytheon's score, but Raytheon would still have obtained the top composite score in the evaluation. In light of these circumstances, and Raytheon's ultimate elimination of SRSA as a proposed subcontractor, we find no organizational conflict of interest or competitive advantage that accrued to Raytheon through its initial proposed use of SRSA as a subcontractor.

Finally, the protester also maintains that Raytheon should also be excluded because of an alleged conflict of interest involving a former FAA official who allegedly participated in the preparation of the SOW and now is employed by SRSA. Specifically, the protester alleges a violation of FAR § 9.505-2(b)(1), which provides that if a contractor (1) prepares or assists in preparing a work statement to be used in competitively acquiring a system or services, or (2) "provides material leading directly, predictably, and without delay to such a work statement," then the contractor generally may not supply the system or services. This restriction is intended to avoid the possibility of bias where a contractor would be in a position to favor its own capabilities. Coopers & Lybrand, 66 Comp. Gen. 216 (1987), 87-1 CPD ¶ 100.

The agency reports that the former government employee now employed by SRSA did participate in the initial stages of the development of the standards for this procurement and that in January 1986 the former employee had limited involvement in the development of the SOW. The agency further reports that in June 1987, the Source Evaluation Board (SEB) substantially rewrote the SOW and the former employee did not provide any input. The former employee retired from the FAA in August 1987 and subsequently went to work for SRSA. The solicitation was issued on August 5, 1987. According to the agency, the former FAA employee did not attend any negotiations or otherwise contact the FAA regarding this procurement.

The protester contends that the fact that the former employee was employed by SRSA, a proposed subcontractor, and not by Raytheon directly does not neutralize the conflict of interest. We have already concluded that the record does not indicate that SRSA was involved with the evaluation of proposals for this procurement or with any proposal preparation activities for Raytheon, and that SRSA was removed as a subcontractor by Bendix prior to BAFOs. We also note that the record contains a detailed comparison of the 1985 SOW in which the employee was involved and the one which ultimately was contained in the 1987 RFP. There are considerable differences. For example, the 1987 SOW was based on approximately half the level of effort called for in 1985 SOW, contained precise labor categories, a different evaluation scheme, and added requirements including cost and quality control and omitted others. Thus, in our view, it is doubtful that knowledge of the 1985 SOW would provide any advantage under this RFP. Accordingly, there is no indication that the employment of the former FAA employee by SRSA gave Raytheon an unfair competitive advantage in this procurement. We find no merit to this protest contention.

We deny the protest.


James F. Hinchman
General Counsel