



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cajar Defense Support Company

File: B-237522

Date: February 23, 1990

Mason Ford, for the protester.
Edward J. Korte, Esq., Office of the General Counsel,
Department of the Army, for the agency.
C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and
Michael R. Golden, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Where request for proposals required offerors to propose fixed labor rates, agency was not required to make award to protester where its proposal indicated that labor rates contained in the proposal were "average" rates rather than firm prices and that offeror intended to charge different rates after award depending upon skill levels of personnel assigned to perform each task order.

DECISION

Cajar Defense Support Company protests the award of a contract under request for proposals (RFP) No. DAAA21-88-R-0190, issued by the U.S. Army Armament, Munitions and Chemical Command for pyrotechnic support services. The protester principally argues that, as the low offeror, it was entitled to award under the terms of the solicitation.

We deny the protest in part and dismiss it in part.

On August 17, 1988, the agency issued the RFP for a time and materials contract for performance of engineering and technical services supporting all aspects of pyrotechnics, including flame, smoke and incendiary systems, subsystems, components and related devices, to be assigned on a task order basis. The solicitation required submission of a single hourly rate for each of 13 categories of labor. Each single hourly rate was required to include direct labor costs, overhead, general and administrative expenses, and profit. The RFP also set forth minimum education and

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experience requirements for each labor category, with estimated hours provided for each category. The RFP stated that award would be made to the lowest priced technically acceptable offeror.

The protester submitted a timely proposal offering an "average" rate for each of the 13 labor categories, supported by "breakdown rates" that showed three different proposed labor rates for each labor category. The protester explained that it could not submit a competitive offer if it proposed the use of highly skilled senior engineers, and could not offer senior level talent at the "average" rates it proposed. Therefore, the protester explained that although its offer showed "average" rates, it required that all three different rates for each category be included in any contract award, to allow "flexibility in negotiating skill levels and rates for task effort."

The agency requested and received best and final offers (BAFOs) on November 30; its evaluation indicated that the protester's offer was the lowest among those received. The protester received the required facility clearance in April, and, in May, the agency contacted the protester to advise Cajar of its intention to award Cajar a contract as the low technically acceptable offeror, based on the "average" rates contained in the proposal. (The agency apparently considered each "average" rate as the single fixed rate required.)

The protester advised the agency by letter dated May 16 that it objected to this "pricing policy statement" and that its "breakdown rates" contained in its proposal were an integral part of that proposal which Cajar required to be included in the contract. The contracting officer advised the protester by letter of May 23 that she would not award a contract that included three different prices for each category of labor since the agency required offerors to propose a single price for each category of labor for evaluation and award purposes.

The protester's response, in a letter of May 26, indicated that the protester would consider an award on such a basis to be an illegal modification of its proposal, and that the protester would accept such an award only under "duress," reserving the right to request congressional and higher headquarter intervention and indicating an intention to pursue the matter after award. By letter dated June 2, the contracting officer offered the protester a final opportunity to accept award at its average rates. The contracting officer advised the protester that she would find Cajar's proposal unacceptable unless she received

confirmation of the protester's intention to charge its proposed "average" rates as single fixed rates. The protester again responded by letter dated June 7, in which it refused to retract any of its previous statements, but did offer to sign a contract at the average rates "contrary to our proposal and best and final offer."

On July 26, the agency advised offerors that it was reopening discussions; the contracting officer specifically advised the protester by letter of August 2 that it could only submit one price for each category of labor. On August 18, the agency received a second round of BAFOs. In its second BAFO, the protester submitted four alternate proposals, one again offering its "average" rates with three different skill levels of personnel for each category, and another proposing to use only "low-skill level," personnel.^{1/} The latter proposal contained a notation that certain rates offered were "negotiable as part of materials delivered per materials clauses." The protester further advised in its proposal that, of these two proposals, only its original "average" rate proposal was realistic and warned the agency that its ability to offer the skills required by the statement of work would depend on which alternate the agency selected.

The agency determined that the protester's proposals offering the rates for low skill levels and the "average" rates were technically unacceptable. The agency therefore awarded a contract to Applied Ordnance Technology, Inc., which had submitted the low technically acceptable offer. Cajar filed a protest with the agency on October 2 and with this Office on October 20.

The protester acknowledges that its original proposal, also submitted with its second BAFO, was based on three skill levels and three hourly rates for each category. The protester argues, however, that the agency was required to make award to the lowest priced, technically acceptable offeror and contends that its proposal presented a logical way to present professional hourly rates where the solicitation did not adequately define skill levels, since such an approach allows the government greater cost control, giving it the option to pay lower rates for lower skill levels when such levels are acceptable for individual tasks. The protester advises that offering one rate would

^{1/} The other two alternate proposals (for "high skill level" and "middle skill level" personnel) were not low from a price standpoint. We will not consider them further.

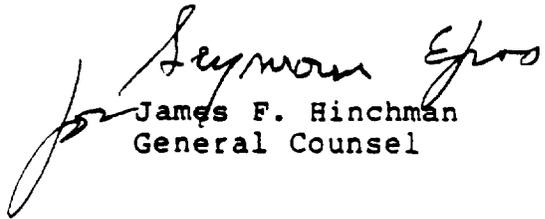
either preclude it from submitting a competitive offer or prevent it from using personnel with superior skill levels.

We consistently have held that in a negotiated procurement, any proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for award. Ralph Korte Constr. Co., Inc., B-225734, June 17, 1987, 87-1 CPD ¶ 603. Here, the solicitation clearly required a single fixed rate for each labor category. However, the protester failed to provide such a single fixed rate. Concerning its "average" rate proposal (resubmitted with its second BAFO), the record shows that each "average" rate it proposed did not represent a single fixed price, and that the protester's agreement to the terms of the solicitation was contingent on the agency's agreement to negotiate after award the required skill levels for each individual task order, using the three different labor rates for each category that it proposed. We find that the protester expressed this intention in clear terms in the course of its correspondence and in its second BAFO, and that the agency gave Cajar previous ample warning that such an offer was unacceptable and ample opportunity to submit an offer that did conform to the terms of the solicitation. Similarly, Cajar's other alternate proposal for "low skill level" personnel was conditioned (for four labor categories) on future negotiation of rates after contract award "as part of materials delivered per materials clause." Where, as here, an RFP requires fixed prices, and a proposal does not offer fixed prices, the proposal as submitted cannot be considered for award. Computer Network Corp., et al.--Requests for Recon., 56 Comp. Gen. 694, 697 (1977), 77-1 CPD ¶ 422; Burroughs Corp., 56 Comp. Gen. 142 (1976), 76-2 CPD ¶ 472. We find therefore that the agency properly found the protester's proposals unacceptable.

The protester's remaining issues--that the agency allegedly accepted its first BAFO, creating a contract in January of 1989, that the agency waited too long (from November 1988 until May 1989) before advising Cajar of deficiencies in its proposal, that the agency was not authorized to reopen discussions and that it failed to respond to the protester's questions before opening BAFOs are all clearly untimely under our Bid Protest Regulations, 4 C.F.R. §§ 21.2(a)(1) and (2) (1989). That regulation requires that a protest based on alleged improprieties in a solicitation that are apparent prior to the closing date for receipt of proposals be filed prior to that date and that all other protests shall be filed not later than 10 days after the basis of protest is known. Cajar's protests on these points, filed on October 20, all came long after the protester knew that the agency had rejected its offer containing "average" rates

and had solicited and received another round of BAFOs with firm rates.

The protest is denied in part and dismissed in part.

A handwritten signature in cursive script, appearing to read "James F. Hinchman".

James F. Hinchman
General Counsel