



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Microlog Corporation
File: B-237486
Date: February 26, 1990

Thomas L. McGovern III, Esq., Hogan & Hartson, for the protester.
Joseph R. Lawhon, Esq., for AT&T Federal Systems, an interested party.
Robert A. Lincoln, Esq., Office of the General Counsel, Library of Congress, for the agency.
Paul E. Jordan, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an agency reopens negotiations by advising one offeror to lower its prices, it must also conduct discussions with the other offeror in the competitive range.

DECISION

Microlog Corporation protests the award of a fixed-price contract to AT&T Federal Systems under request for proposals (RFP) No. 89-16, issued by the Library of Congress. Microlog contends that the Library failed to treat all offerors equally and unfairly evaluated Microlog's proposal.

We sustain the protest.

This solicitation was for the procurement of all hardware, software, installation, training, and manuals for an integrated electronic telephone information system for the Library's Copyright Office. The RFP called for a technical proposal including a detailed statement of the offeror's ability to meet each of the mandatory specifications and support requirements in the RFP and reference(s) to substantiate the claim. The technical proposal also was to contain a system description including technical publications regarding both hardware and software characteristics of the proposed configuration. Also required was a separate cost proposal detailing unit prices for all hardware, software, and services.

Proposals were evaluated in five areas with relative weights as indicated:

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| 1. Overall technical approach | 30 points |
| 2. Qualifications/Experience (work) | 10 points |
| 3. Qualifications/Experience (personnel) | 10 points |
| 4. Adequacy of Equipment | 30 points |
| 5. Cost | 20 points |

Once technical evaluations and rankings were completed, cost data was reviewed and a combined score calculated. Award was to be made to the offeror with the optimum combination of technical and price proposals.

Three offerors, including Microlog and AT&T, submitted proposals by the June 9, 1989, closing date. On the basis of the initial technical evaluation, the third offeror was rejected, and written discussions were conducted with Microlog and AT&T. By letters dated August 3, both were informed in a specification-by-specification format where their proposals were deemed responsive and where they were not. Responses to these evaluations were due by August 15. Microlog submitted its responses on August 14 while AT&T did not submit its responses until August 18.

Both AT&T and Microlog proposed their own "manufactured" systems and certified, as required by the RFP, that each would provide original equipment manufacturer (OEM) maintenance. The evaluators accepted AT&T's certification, but rejected Microlog's certification because that company's technical data showed a number of components manufactured by other concerns. During the course of negotiations, the evaluators twice sought to have Microlog establish its qualification to perform OEM maintenance on the system it proposed.

At the conclusion of discussions, best and final offers were solicited and obtained from both Microlog and AT&T. The evaluation committee scored the offerors' revised technical proposals at 80 points for AT&T, a perfect score, and 73 points for Microlog. Five points were deducted from Microlog's overall technical approach because it had failed to show that its technicians were factory certified to work on all the equipment proposed and because of a perceived risk in maintaining and supporting a system containing hardware from several manufacturers. Another 2 points were deducted from its personnel qualifications score due to the committee's perception that four Microlog representatives were "antagonistic, condescending, and sarcastic" during discussions and a site visit. This perception also arose

from certain Microlog comments in its August 14 revised proposal. Specifically, Microlog had expressed the hope that certain RFP interpretations had not been developed to favor AT&T, and its request to "please assign ZERO weight" in evaluating a particular "desirable" feature, if the Library decided not to accept a Microlog alternative proposal. Although only one of the four who participated in discussions, a sales representative, was proposed for this contract, the "committee did not feel the same level of confidence" in Microlog that it felt in AT&T.

In evaluating prices, the Library selected certain items from all those proposed by the offerors, including 2 years' extended maintenance. On September 20, the contracting officer wrote to each offeror listing the equipment selected and requesting each to advise her if it did not agree with the prices listed: \$102,410 for Microlog and \$127,575.62 for AT&T. Responses were due by September 25.

In addition to her request for agreement with the prices of selected equipment, the contracting officer proceeded to make a final price evaluation. Based on its selected items' prices, Microlog was awarded 20 points as low offeror. AT&T received a score of 16.5 points, but, as stated by the contracting officer, the evaluation "was a little complicated." Evidently after sending her September 20 letter to the offerors, the contracting officer compared AT&T's BAFO prices with a price list for a current contract with AT&T, and discovered that certain one-time charges and maintenance costs had decreased since submission of the AT&T proposal. The contracting officer then called AT&T and advised the offeror that it should resubmit its proposal at the lower prices. The Library then used the expected lower price of AT&T, \$123,745.50, for evaluation purposes.

According to the contracting officer's award recommendation memorandum, also dated September 20, Microlog received a final price/technical score of 93, while AT&T received a score of 96.5. The contracting officer recommended award to AT&T because it best met the requirements of the specifications and would provide single vendor responsibility should troubles arise between the existing and new systems. The recommendation was approved on September 25. Microlog's agreement with the selected prices was received on September 25 and on September 27, AT&T submitted revised pricing totaling approximately \$117,250, including extended maintenance. On September 29, AT&T was awarded a contract for \$104,008.75 representing installation and initial warranty, but excluding the extended maintenance. Extended maintenance beyond the first year of installation is to be awarded "using later years' appropriations."

Microlog was orally advised of the award on October 2 and requested a debriefing. After failing to receive a debriefing by the time it received the notice of award on October 12, Microlog filed its protest with our Office.

Microlog first contends that the Library was biased in favor of AT&T. Government officials are presumed to act in good faith and, therefore, to establish bias, a protester must present convincing evidence that government officials had a specific and malicious intent to injure the protester. See American Biomedical Instrumentation, Inc., B-228598, Feb. 22, 1988, 88-1 CPD ¶ 181. While the record indicates that the user of the system to be procured had expressed a preference for an AT&T system, the procurement was conducted competitively and there is no convincing evidence that the procuring officials were biased.

Microlog also contends that the Library failed to provide it equal treatment by conducting post-BAFO discussions with AT&T. We agree. It is a fundamental principle of federal procurement that all offerors must be treated equally. Loral Terracom; Marconi Italiana, 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182. Thus, the conduct of discussions with one offeror generally requires that discussions be conducted with all offerors whose offers are within the competitive range and that the offerors have an opportunity to submit revised offers. Motorola, Inc., B-225822, June 17, 1987, 87-1 CPD ¶ 604. Further, the competition generally should be reopened even where post-selection negotiations do not directly affect the offerors' relative standing. PRC Information Sciences Co., 56 Comp. Gen. 768 (1977), 77-2 CPD ¶ 11; Federal Data Corp., B-236265.2, Jan. 25, 1990, 69 Comp. Gen. ____, 90-1 CPD ¶ ____. Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of its proposal. Federal Acquisition Regulation (FAR) § 15.601 (FAC 84-28); Motorola, Inc., b-225822, supra. Discussions are to be distinguished from a request for clarifications, which is merely an inquiry for the purpose of eliminating minor uncertainties or irregularities in a proposal. Id.^{1/}

^{1/} Although the Competition in Contracting Act of 1984 (CICA) generally applies only to executive agencies, it is our understanding that the Library seeks to adhere to CICA, as implemented by the FAR, and therefore our analysis is based on these authorities. See A&C Building and Indus. Maintenance Corp., B-230270, May 12, 1988, 88-1 CPD ¶ 451.

The Library's telephone contact with AT&T subsequent to its written request for agreement with selected prices constituted a reopening of discussions with AT&T. While both offerors were provided an equal opportunity to agree or disagree with the Library's identification of prices on the selected items, it is clear that this opportunity was not intended to produce a new round of BAFOs. Rather, it was aimed at ensuring that in selecting less than all offered items, the Library had not made a mistake in evaluating the prices on those items. However, the subsequent telephonic inquiry to AT&T went beyond a simple request for agreement with prices and specifically provided an opportunity for and suggestion to AT&T to lower its prices. Moreover, it was the anticipated lower price which formed the basis of the contracting officer's price score for AT&T and ultimately the recommendation for award. As indicated above, if an offeror has been given the opportunity to modify its proposal, discussions rather than clarification contacts took place. It is undisputed that post-BAFO discussions were not conducted with the other offeror in the competitive range. Accordingly, we sustain the protest.

Our conclusion is not changed by the Library's contention that post-BAFO discussions with AT&T were acceptable since AT&T had been determined to be the successful offeror. We note that this determination was based on prices which had not yet been offered by AT&T, and the award was not approved until 5 days after the recommendation was made. Moreover, in view of the closeness in the offerors' scores, coupled with AT&T's higher prices, it is not clear that the outcome of the competition would have remained the same had Microlog been provided an opportunity to revise its proposal. See Greenleaf Distrib. Servs., Inc., B-221335, Apr. 30, 1986, 86-1 CPD ¶ 422. Thus, we do not find that the contracting officer's recommendation for award permitted her to reopen discussions with AT&T alone.

As part of our review of this protest, we have also considered Microlog's argument that it was unfairly evaluated. Specifically, Microlog argues that it was improper for the Library to deduct points for the alleged behavior of its representatives and for matters related to its offer of equipment manufactured by various concerns.

Based upon our review of the record, we are not persuaded that the Library's deduction of points from Microlog's personnel qualifications score was justified. The deduction was based simply on the evaluators' perception of the offeror's attitude and willingness to cooperate with the evaluation rather than on the basis of any objective

standard relevant to the personnel qualifications of the offeror, which was the evaluation criterion at issue.

On the other hand, we find that the deduction of points for risk and lack of OEM certifications was proper and reasonable, in view of Microlog's proposal of components manufactured by others which it integrated into its system. In any event, in light of our recommendation for reopened discussions (see infra), Microlog will have an opportunity to provide adequate certification during the reopened negotiations. In this regard, since the record indicates that AT&T may have proposed a system containing components produced by other manufacturers, AT&T should submit certifications comparable to those required of Microlog.

Finally, Microlog observes that the Library apparently did not produce a contemporaneous, written technical evaluation of the proposals. See FAR § 15.608(a)(2) (1984). Since we are sustaining the protest on another ground, we will not consider this matter, although we believe that a more detailed and contemporaneous evaluation record would have been appropriate in this case. See TRW, Inc., 68 Comp. Gen. 511 (1989), 89-1 CPD ¶ 584.

We recommend that the Library reopen negotiations with all offerors in the competitive range, obtain a new round of BAFOs, and prepare an appropriate technical evaluation. If, based upon the new evaluation, the Library determines to award to Microlog, the contract with AT&T should be terminated for the convenience of the government. In this regard, it is our understanding that AT&T has not yet delivered the system to the Library. Microlog is not entitled to its claimed proposal preparation costs, since it will have the opportunity to compete for the contract. Hydro Research Science, Inc.--Claim for Costs, 68 Comp. Gen. 506 (1989), 89-1 CPD ¶ 572. However, Microlog is entitled to the cost of filing and pursuing the protest. 4 C.F.R. § 21.6(d)(1) (1989).

The protest is sustained.

Milton J. Jordan
for Comptroller General
of the United States