



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Business Information Management Corporation

File: B-238875

Date: July 17, 1990

William A. Roberts, III, Esq., Howrey & Simon, for the protester.

Carl L. Vacketta, Esq., Pettit & Martin, for Synetics Corporation, an interested party.

William F. Riley, Esq., Department of the Treasury, for the agency.

Paula A. Williams, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Cost discussions were meaningful where record establishes that the contracting agency indicated to the high-priced offeror that its costs should be reduced, and the offeror did, in fact, lower its price proposal. Agency reasonably did not discuss technical areas where the evaluators found no technical weaknesses or deficiencies in the proposals which were included in the competitive range.

2. Protest that contracting agency should have performed in-depth cost realism and most probable cost analyses is denied where solicitation essentially requires awardee to provide a fixed number of full-time staffers to perform the work described, at firm, fixed-price, loaded hourly labor rates, and provides that for evaluation purposes these rates shall be multiplied by the number of hours in a year of full-time work.

DECISION

Business Information Management Corporation (BIMCO) protests the award of a contract to Synetics Corporation issued by the Customs Service, Department of the Treasury, under request for proposals (RFP) No. CS-90-005. BIMCO, the incumbent contractor for related services, alleges that the award is improper because the Customs Service did not conduct meaningful discussions with the firm, misapplied the

0418990/141815

cost evaluation criteria, and failed to provide a common basis for competition.

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

The RFP requested offers for a firm, fixed-unit price, indefinite quantity contract for electronic data processing services in technical areas pertaining to conceptual design, general systems design, telecommunications, hardware/-software, systems evaluation and performance optimization of Customs' Large Systems. The RFP required offerors to provide loaded unit rates for eight labor categories identified in the solicitation as: program manager, senior system & designer/programmer, senior system programmer, senior systems engineer, system engineer, senior systems analyst, system programmer and technical editor. The RFP required the contractor to supply the necessary personnel, facilities and material to perform individual task orders as issued, in six areas specified in the statement of work. The contract is for a base period with three 1-year options.

The RFP provided that offers would be based on level of effort estimated at a total of 68,000 hours of direct labor for the base period and all three option periods. The RFP evaluation formula assigned a maximum of 70 points for technical merit and 30 points for price and provided that award would be made to the offeror whose proposal was most advantageous to the government, price and other factors considered.

Seven firms, including BIMCO and Synetics, submitted initial proposals and, after evaluation, three of the seven were determined to be in the competitive range. The contracting officer determined that there were no deficiencies in any of these three proposals; therefore, discussions on cost issues only were held, after which all three offerors submitted best and final offers (BAFOs). A price analysis and a most probable cost determination were performed on the BAFOs using a scoring formula that gave the lowest-priced, technically acceptable offer the maximum cost points, with other, higher-priced offers receiving proportionally less cost points.

Synetics received a final total score of 85 points, consisting of a technical score of 55 out of a possible 70 points, and 30 out of a possible 30 points for its \$3,590,339 BAFO price. BIMCO received a total score of 84.44 points, 61 points for technical merit, and 23.44 points for its BAFO price of \$4,591,158. The total score for the third offeror was significantly lower than BIMCO's score. After reviewing the technical and price evaluation

results, and determining that there was no meaningful difference between the BIMCO and Synetics technical proposals, the contracting officer concluded that the Synetics' proposal was most advantageous to the government. The contract was awarded to Synetics and this protest followed.

BIMCO's primary basis of protest is that the Customs Service failed to conduct meaningful discussions because the agency failed to advise BIMCO that its offer was not priced competitively, or to discuss BIMCO's direct labor rates or understanding of the labor categories, and did not inform BIMCO that the procurement had requirements which differed from the initial contract. BIMCO claims that it reasonably perceived the RFP to be a follow-on contract requiring sophisticated software development, programming, and oversight services because it had performed such work as the incumbent contractor under the prior contract. As a result, BIMCO asserts that its proposed staff consists of highly experienced individuals with unique, sophisticated and costly software development and programming abilities. BIMCO alleges that this caused its direct labor rates to be inflated with the result that its proposal was grossly overpriced. BIMCO also alleges that the RFP did not adequately define the required labor categories, an impropriety which affected BIMCO's calculation of its direct labor rates.^{1/}

According to the protester, during oral discussions with BIMCO officials, the contracting officer identified only minor weaknesses in BIMCO's cost proposal. BIMCO has provided signed statements from its employees in which they recall that the contracting officer only questioned BIMCO's general and administrative (G&A) expenses, overhead, and proposed raises for certain employees. BIMCO asserts that because the contracting officer did not discuss BIMCO's

^{1/} BIMCO's allegation that the solicitation was defective because it did not adequately define the qualifications and experience for the labor categories listed in section B is untimely. BIMCO was aware of this alleged deficiency from the RFP, and the agency, in an amendment responding to an offeror's question concerning the job descriptions, had reiterated the solicitation requirements. Under our Bid Protest Regulations, protests based upon alleged apparent improprieties in a solicitation must be filed not later than the time for closing. 4 C.F.R. § 21.2(a)(1) (1990). Because BIMCO did not protest until after award, this portion of its protest is dismissed as untimely.

"overlapping excesses/weaknesses in its technical and cost proposals," or inform BIMCO that, unlike the predecessor contract, the current requirement called for oversight functions only, BIMCO incorrectly assumed that the contracting officer considered BIMCO's personnel to be consistent with the agency's minimum needs, and that BIMCO's direct labor rates were reasonable.

As a result, BIMCO claims that it simply reduced its G&A, decreased one proposed salary raise, lowered the rates for two unfilled positions, and slightly increased the labor rates for three of the eight positions. Conversely, in other instances, BIMCO's direct labor rates and escalation factor were slightly increased. Accordingly, BIMCO maintains that its staffing and pricing were excessive because meaningful discussions were not conducted.

The Customs Service concedes that discussions were limited to cost issues but states that the discussions encompassed BIMCO's direct labor rates. According to the contracting officer, she informed BIMCO that its proposed labor rates were too high and that its "over-all" rates, i.e., labor rates plus overhead, escalation, and profit, were not competitive. In addition, she recalls telling the firm, while discussing its labor rates, "to sharpen its pencils."

In the context of this procurement, the record shows that Customs Service held meaningful discussions with BIMCO. Where, as here, the evaluators identified no deficiencies in the technical proposals, the contracting officer is not required to inform an offeror of areas in its technical proposal that could be improved. The protester asserts that the contracting officer was required to discuss qualifications in "excess" of the government's needs. However, the contracting officer did not determine that BIMCO personnel were overqualified. On the contrary, while the technical evaluators did rate BIMCO's proposal highest technically (61 out of 70), it was also noted that several senior BIMCO personnel lacked college degrees but that this was compensated for by their extensive experience in large scale database systems. In our view, the record reflects that BIMCO could not simply have substituted less qualified, lower-paid personnel, without suffering a corresponding diminution in its technical score. Thus, we find that the contracting officer had no basis to advise BIMCO that the qualifications and wages of its proposed personnel were "excessive."

Regarding the content of the cost discussions, the record contains an apparent dispute between the parties regarding the discussion of direct labor rates. As noted above, BIMCO

furnished sworn statements from its employees concerning this issue. In one such statement, the affiant states "[a]t no point was any discussion held on direct labor rates--either for BIMCO personnel or subcontractors." However, the same affiant also states:

"[a]t no time do I recall [the contracting officer] giving any indication other than she was doing her **standard** negotiation. In fact, my feeling was that she was doing the normal **get the best deal for the government job.**"
(Emphasis in original).

The agency's written memoranda of discussions held with BIMCO indicate that prior to discussions the contracting officer identified low and high objectives for negotiation of each labor category in BIMCO's initial offer. Her post-negotiation memorandum sets forth the negotiated rates for each such category. In its BAFO, BIMCO stated that it had made "some significant adjustments." The adjustments noted all pertain to price decreases, including labor rate decreases for four of eight listed staff positions. While BIMCO insists that the contracting officer did not discuss the most substantial weakness in its cost proposal--BIMCO's "inflated" direct labor rates--the changes in its BAFO together with BIMCO's statement that the contracting officer was negotiating the "best deal for the government" support the contracting officer's position that BIMCO was advised that its pricing was not competitive. See FAA Seattle Venture, Ltd., B-234998.2, Aug. 9, 1989, 89-2 CPD ¶ 116.

Although the record does not establish that specific, direct labor rates were discussed, it is clear that BIMCO was advised that all of its proposed costs, which consist primarily of direct labor costs, were not competitive. While BIMCO argues that it was entitled to detailed discussion regarding the excessiveness of each of its specific labor rates, we believe that the agency reasonably provided BIMCO with more general guidance concerning its high cost. In this regard, we note that the Federal Acquisition Regulation (FAR) prohibits agency disclosure to one offeror of its price standing relative to another offer during discussions, FAR § 15.610(d)(3)(ii), thus it would have been inappropriate for the contracting officer to have advised BIMCO of the level of its direct labor rates relative to its competitors' rates. Further, the content and extent of discussions is a matter of the contracting officer's judgment based on the particular facts of the procurement. Randtron Sys., B-237354, Feb. 14, 1990, 90-1 CPD ¶ 277. There is no requirement that agencies conduct all-encompassing discussion; rather, agencies are only

required to reasonably lead offerors into those areas of their proposals considered deficient within the context of the procurement. Syscon Serv., Inc., 68 Comp. Gen. 698 (1989), 89-2 CPD ¶ 258. Given the totality of the record we find that the contracting officer reasonably apprised BIMCO that its cost proposal was not competitive.

As to BIMCO's assertion that it assumed that programming responsibilities were included in this contract, based on its experience as an incumbent, the simple answer is that no such tasks were described in the statement of work, and while BIMCO may have performed such work in conjunction with initiating the system under the prior contract, there was no reasonable basis for an offeror to conclude that the current, follow-on RFP encompasses such a requirement.

Next, BIMCO challenges the evaluation of cost proposals on the basis that the evaluation was inconsistent with the RFP. BIMCO alleges that the agency utilized a "mechanistic government formula" in evaluating BAFOs which precluded consideration of several specific cost realism variables, to its prejudice. Clause M.5 of the RFP entitled "Cost Evaluation" requires in relevant part:

". . . a cost/price evaluation will be performed . . . [and] will consist of conducting an analysis of each individual proposal to first determine if proposed costs accurately and adequately portray the work that is to be performed, and if they are reasonable and realistic. This review will also take into consideration the probable cost to the Government, including the evaluation of any options and any other costs that the Government may bear or incur from selection of the individual proposal. Once that is completed, each proposal will be compared with other proposals that are considered technically acceptable and otherwise qualified for award. The lowest evaluated technically acceptable offeror will receive the maximum consideration in terms of the cost/price evaluation, and other higher evaluated offerors will receive proportionally less . . ."

It is BIMCO's view that the contracting officer did not adhere to the required evaluation scheme. BIMCO maintains that the contracting officer's determination of price reasonableness merely consisted of the breakout of the base labor rates into their component part, i.e., labor, overhead, G&A, escalation and profit; and, her determination of most probable cost to the government consisted solely of multiplying the base rates times the level of effort without

consideration of "other costs" that the government would incur as a result of an award to an individual offeror.

Generally, the requirement for a cost realism analysis arises when an agency contemplates the award of a cost reimbursement contract. Where a fixed-price contract is contemplated, "cost realism" need not be considered. Here, the award is for an indefinite quantity service contract which encompasses elements of both fixed-price and cost-type contracts. While an in-depth cost analysis is not required when an agency contemplates award of an indefinite quantity fixed-price contract, contracting agencies should conduct a review of the proposals adequate to ensure that the proposed prices are reasonable. Research Management Corp., B-237865, 69 Comp. Gen. ___, Apr. 3, 1990, 90-1 CPD ¶ 352. In this case, the agency determined that Synetics' proposal was technically acceptable, and the work was essentially to be accomplished by using the full-time services of the eight listed employees. The RFP provided that evaluation would be based on extension of the loaded hourly labor rates for these positions by a full year's work (2,080 hours) for each, for a total just under 17,000 hours per year. Under these circumstances, we believe that the cost evaluation clause required the agency to do no more than it did--analyze proposed labor rates, overhead, escalation rate, profit and extend the rates by the estimated hours to determine the most probable cost to the government. Here, after performing these calculations, the agency reasonably determined that the prices received were fair and reasonable.

Finally, BIMCO notes that prior to the award of Synetics, the agency had issued a purchase order to one of BIMCO's former subcontractors. BIMCO asserts that this purchase order encompasses work which will have to be performed under this RFP and which was included in BIMCO's proposal but not the awardee's. The protester contends, therefore, that the cost of the purchase order should have been considered an "other cost" to the agency of making award to Synetics, and that had the agency done so, BIMCO's proposal would have been evaluated as most advantageous to the government. This argument reflects BIMCO's misperception, to which we referred above, that the present RFP merely duplicates its prior contract. Since the requirement contained in the

purchase order does not fall within the scope of the contract awarded to Synetics, the contracting officer properly did not consider the purchase order in her evaluation of proposals.

The protest is denied in part and dismissed in part.



James F. Hinchman
General Counsel

