



Comptroller General
of the United States
Washington, D.C. 20548

K. Ayer

Decision

Matter of: Food Services, Inc.
File: B-241408
Date: February 12, 1991

Katherine S. Nucci, Esq., Dykema Gossett, for the protester. Michael S. Roys, Esq., Department of the Navy, for the agency. Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency did not engage in improper auction techniques in the course of a negotiated procurement when, during discussions, it twice advised the protester that the labor element of the protester's proposal was unrealistically low and that the agency would reject the proposal if the protester did not increase the element's low price to a realistic level; the record does not support the protester's allegation that the agency mentioned a minimum acceptable price increase--at least \$10,000--for this element.

DECISION

Food Services, Inc. (FSI) protests the award of a contract to Food Management Services, Inc. (FMSI) under request for proposals (RFP) No. N00612-90-R-0287 issued by the Department of the Navy for food services. FSI alleges that the Navy's buyer used prohibited auction techniques that had the effect of forcing FSI into raising its price to a point where it exceeded the awardee's price.

We deny the protest.

The Navy issued the RFP for a firm, fixed-price contract to provide full food services at the Beaufort Naval Hospital, Port Royal, South Carolina. The RFP required offerors to price two elements: (1) labor (line item 0001), and (2) food (line items 0002 through 0004). The labor element was priced

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on a per month basis and extended for an annual price. The RFP warned against submission of materially unbalanced offers. In this regard, the RFP stated:

"An offer is unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated for other work."

The RFP advised offerors of the incumbent contractor's \$39,718.57 current monthly labor price and that the incumbent's workers were covered by a collective bargaining agreement (CBA). The government estimate (not disclosed in the RFP) was \$703,617, with labor accounting for \$498,000 (\$41,500 per month).

Eight firms submitted proposals. The incumbent's proposal had the highest labor price; it offered a monthly labor price almost double its current price. At the other end of the spectrum, FSI submitted the lowest price with a monthly labor price \$8,368.57 below the incumbent's current labor price and \$10,150 below the government estimated monthly labor price.^{1/}

On August 10, 1990, after reviewing the current price, government estimate, proposals, and the incumbent's letter explaining its higher pricing, the buyer found the incumbent's increased labor price and FSI's low labor price unrealistic. These concerns were incorporated in a document entitled "table top presentation." To ensure that all offerors knew the scope of work and offered realistic prices, the agency amended the RFP to (1) spell out the requirement for a non-working shift leader; (2) remind all offerors that the CBA incorporated in the RFP applied to the resulting contract; and (3) warn offerors that unrealistic offers could be rejected. The buyer phoned all offerors on August 10 advising that the amendment both reopened negotiations and requested revised proposals; she also advised offerors, including FSI, of perceived deficiencies in their respective proposals.

Seven of the eight original offerors responded with revised proposals by the August 24 extended closing date. The incumbent's revised proposal again was accompanied by a letter justifying its high price. On September 5, the buyer contacted all offerors and asked them to verify their prices. The buyer prepared a September 13 business clearance memorandum requesting authority to begin discussions and issue a

^{1/} FSI's initial proposed annual price was \$637,870 of which \$376,200 (\$31,350 per month) was for labor.

further amendment.^{2/} On September 13, having received clearance, the buyer issued the amendment and conducted discussions.

Six offerors submitted BAFOs by the September 18 closing date. On September 25, the Navy awarded the contract to the low offeror, FMSI.^{3/} FSI was second low offering an annual price \$17,994 higher.^{4/} On September 26, after learning that the contract had been awarded to a competitor at an overall price exceeding FSI's initial and revised offers, FSI filed its protest with our Office.

FSI contends that it would have been the low offeror but for the agency buyer's improper actions that resulted in FSI raising the labor element of its price, and consequently its overall price, to a point where it exceeded the awardee's price. Specifically, FSI alleges that the buyer told FSI on two occasions--on August 10, and again on September 13--that its offer would be rejected if FSI did not raise its initial monthly labor price of \$31,350 by at least \$10,000 per month. See Transcript of Fact-Finding Conference (Tr.)^{5/} at 39, 43.

Under regulations applicable to conducting discussions with offerors that have submitted unrealistic prices, contracting personnel generally must disclose the existence of perceived deficiencies in offerors' pricing, see Federal Acquisition Regulation (FAR) § 15.610(c)(2), and afford the offerors an opportunity to revise deficient aspects of their pricing. FAR § 15.610(c)(5). They are expressly authorized to tell offerors that specific prices are considered unrealistic. FAR § 15-610(d)(3)(ii). Indeed, discussions cannot be meaningful if an offeror is not apprised that its price is

^{2/} The amendment incorporated a recently received wage determination, responded to issues raised in incumbent's second letter, and called for best and final offers (BAFO).

^{3/} The awardee's BAFO price was \$729,036 of which \$526,800 (\$43,900 per month) was for labor.

^{4/} FSI's BAFO price was \$747,030 of which \$490,800 (\$40,900 per month) was for labor.

^{5/} In view of the factual conflict between the Navy and protester concerning the content of these discussions, a fact finding conference was conducted. 4 C.F.R. § 21.5(b) (1990). At the conference, the buyer and three FSI employees were examined and cross examined concerning the content of their August 10 and September 13 conversations.

more or less than what the agency believes is reasonable. See Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 154.

On the other hand, contracting personnel are limited in some respects in the advice they may give offerors on how to cure perceived pricing deficiencies because of the FAR prohibition against auction techniques. FAR § 15-610(d)(3). Specifically, contracting officers are prohibited from "[i]ndicating to an offeror a cost or price that it must meet to obtain further consideration." FAR § 15-610(d)(3)(i).

Clearly, the Navy's decision to conduct discussions with FSI regarding its labor prices was appropriate. FSI's initial proposal offered the lowest labor price of all seven offerors; it was lower than the incumbent's current labor price, lower than the government's estimated labor price, and substantially below the incumbent's proposed labor price.^{6/} FSI's revised offer, although higher than its initial offer, was still less than the current labor cost.^{7/} The government's labor estimate was even higher since the Navy believed the RFP contained additional requirements. While FSI contends its initial monthly labor rate should not have been a topic for discussions since its price covered the anticipated increase in the cost of wages and provided a profit, see Tr. 37-38, it was reasonable for the Navy to point out to FSI during the discussions on August 10 and September 13 what it perceived as unreasonably low labor costs. See Pan Am World Servs., Inc. et al., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446.

Since the agency can advise an offeror that a price is considered unrealistic, an agency may also advise an offeror of the consequences of failing to offer a realistic price (i.e., rejection of its offer). Consequently, the protest's outcome turns on whether a technical violation of procurement regulations occurred--the mentioning of a specific cost or price that had to be met to avoid rejection.

The record contains a dispute regarding whether a specific cost or price was mentioned during discussions. There are two different versions of what transpired during the buyer's August 10 and September 13 telephone discussions with FSI.

^{6/} FSI's proposal contained nothing that justified this low labor price.

^{7/} FSI's revised proposal again did not justify its low labor price, even though it was advised of the agency's concerns in this regard.

As told by FSI, on August 10, FSI's Secretary/Treasurer used a speaker phone to call the buyer to inquire as to the status of the procurement. Tr. 39. Two people besides the Secretary/Treasurer--another FSI employee and a friend of the Secretary/Treasurer--overheard the conversation. Tr. 38, 82. According to the people on FSI's end of the line, the buyer said FSI's price for the labor element was too low to the point it was unrealistic and it had to be increased "at least \$10,000." Tr. 39, 83. FSI disagreed with this assessment during the conversation. Tr. 40, 83-84. FSI's revised offer after this conversation increased FSI's labor monthly price by \$6,250 to \$37,600, instead of the \$10,000 allegedly specified by the buyer. Tr. 41.

FSI reports two conversations with the buyer on September 13. Tr. 42. The first conversation was a call from the buyer to the Secretary/Treasurer with no other parties involved. Tr. 42. FSI says the buyer announced that she was "faxing" an amendment to FSI, that BAFOs were being requested, and that FSI's "labor price was still too low, and it would have to be revised if FSI's offer was going to be considered responsive."^{8/} See FSI's Secretary/Treasurer's Affidavit dated Nov. 26, 1990.

The second conversation on September 13 resulted from a call placed by the Secretary/Treasurer to the buyer after the Secretary/Treasurer asked two FSI employees to enter his office to listen to his side of the conversation--the speaker phone was not used. Tr. 42-43. The Secretary/Treasurer states that the buyer said, "I told you, you were at least \$10,000 too low."^{9/} Tr. 43. He states he replied to this statement as follows:

"You mean \$7,000 to \$10,000? It just doesn't make any sense, Ms. Coleman. It's ridiculous. It doesn't make any sense. My bid is real good as is. It's more profitable than I would ever hope for it to be." Tr. 43.

^{8/} As discussed below, the October 8 affidavit of the Secretary/Treasurer does not mention this first conversation, nor does his testimony at the fact finding conference elaborate on this conversation.

^{9/} As discussed below, this is inconsistent with earlier submitted affidavits.

The Secretary/Treasurer understood the above dollar amounts to be in reference to his initial labor price. Tr. 44, 67. One of the two employees in the Secretary/Treasurer's office reports hearing the Secretary/Treasurer say: "\$7,000 to \$10,000 is just too high. It will put us out of the bid." Tr. 71. The other employee recalls hearing "\$7,000 to \$10,000 is too high, too much." Tr. 86.

The Navy buyer has a different recollection of the discussions on the dates in question. According to the buyer, she placed a series of telephone calls on August 10 to all of the offerors one after the other. Tr. 28. The buyer placed the call to FSI, not the other way around. Tr. 2. The buyer has no recollection of or any awareness that the conversation with FSI was taking place over a speaker phone. Tr. 5, 13. The buyer recalls telling FSI that the Navy was currently paying \$39,000 per month for labor; that FSI was proposing more labor, more hours, and increased benefits for \$31,000 a month; that FSI's labor price was unrealistic; and that FSI needed to take another look at its labor price and submit a revised proposal. Tr. 1-3, 14.

Concerning the September 13 conversation, the buyer states that she again called all the offerors in a row. Tr. 28. She placed the calls to request BAFOs. Tr. 5. During her discussions with FSI, she again advised FSI's Secretary/Treasurer that:

"I had determined his price to be unrealistic and requested that he take another look at his entire proposal, and I also reminded him that the Government reserved the right to reject unrealistic proposals." Tr. 6.

The buyer denies ever telling FSI--during either the August or the September discussions--that FSI had to raise its monthly labor price at least \$10,000, or any set amount of money. Tr. 7.

After the September 13 conversation, the buyer "faxed" amendment No. 4 to FSI that requested BAFOs. Tr. 6. The buyer's affidavit and testimony, including cross examination, make no mention of receiving a call from FSI on September 13 following the transmission of the amendment to FSI; it is reasonable to presume that the Navy position is that no such conversation took place.

It is apparent that if the buyer directed FSI to raise its price a specific amount or be found unacceptable, this would be a violation of the prohibition against auction techniques, FAR § 15-610(d)(3)(i), and, if the protester was prejudiced would result in our sustaining the protest. On the other

hand, if the buyer's version of these discussions is to be believed, her actions were entirely proper.

We have examined the record thoroughly in an effort to resolve the inconsistencies in the testimony of the opposing parties. Although it is not free from doubt, we find it more probable than not that the buyer did not mention a specific sum by which FSI had to increase its price in order to receive further consideration. We find the buyer's version of what transpired between the parties more credible for a number of reasons.^{10/}

First, the protester's position regarding the content of the September 13 discussions is not credible because it is inconsistent with other evidence of record and since it is not logical. For example, although FSI asserts that it was told by the buyer that it was \$10,000 per month too low as compared to its initial \$31,000 monthly labor price, this testimony is inconsistent with earlier submitted affidavits. In his October 8 affidavit in support of the protest, the Secretary/Treasurer stated that the buyer told him in the September 13 discussions that FSI was "still about [\$10,000] a month off" and in his November 26 affidavit he asserted the buyer stated "that if FSI's labor price was not increased by at least \$10,000, [FSI's] offer would be rejected." The only reasonable construction of these statements in the affidavits is that FSI alleges that it was told to raise its price yet another \$10,000 in the September 13 discussions from its revised \$37,600 monthly price. However, this would be unlikely advice, since, if followed, it would make FSI's price significantly higher than either the current monthly price or the government estimate.

Moreover, if the buyer mentioned specific figures in the September 13 conversation, it would be more likely that she would advise how much FSI should raise its price from the revised price, not the initial price as FSI now claims. Otherwise, it would be reasonable to assume that FSI would be confused by this conversation, given its then current offer or would respond that it had already raised its price \$6,250. Yet FSI claims it had no confusion over what was communicated, even though the \$10,000 or \$7,000 to \$10,000 figures allegedly related back to the initial offers. Nor does FSI assert that it responded by saying it had already significantly raised its price; instead, it claims that its response (that there was no

^{10/} Although the protester has asserted that the buyer's testimony showed her lack of understanding of the RFP's food services requirements and of applicable procurement requirements, these matters, even if assumed to be true, do not reflect on the buyers' credibility.

reason for FSI to raise its price \$7,000 to \$10,000) also related back to the initial offer. We do not find FSI's account of this conversation to be credible.

Another inconsistency in FSI's version of the September 13 events relates to the first call of that date. This is critical since the Navy admits no second call, and the buyer's reported improper remarks on that date are only alleged to have occurred during the second call. Further there is no evidence, other than FSI's employees' affidavits and testimony, that this second call was made. As indicated above, FSI asserts that the buyer initiated the first call. However, FSI's Secretary/Treasurer provided no details of this call in his testimony. Tr. 42. The only FSI evidence of the first call's contents is in FSI's Secretary/Treasurer's affidavit of November 26 that responded to the buyer's affidavit in the agency report on the protest. As indicated above, he claimed the buyer told him that his price was too low and FSI's proposal would be rejected if it was not revised. However, the Secretary/Treasurer's earlier affidavit dated October 8 in support of the protest does not mention this phone call and neither his November 26 affidavit nor any other submissions of the protester explain this oversight.

Moreover, the contemporaneous documentation tends to support the buyer's story. Before entering discussions with FSI, the buyer prepared documentation--the August 10 "table top presentation" and the September 13 "business clearance memorandum"--that outlined the topics she would discuss with the respective offerors.^{11/} Tr. 10. These documents were submitted for, and received, higher level approval before the buyer conducted discussions. Neither of the documents contrasts the difference between FSI's labor rate and the government's estimated labor rate--a comparison that would show an approximate \$10,000 difference. Both documents contrast FSI's labor rate to the \$39,000 labor rate of the current contract that was disclosed in the RFP. This comparison is consistent with the buyer's testimony as to the substance of the discussions--that is, she found FSI's labor rate unrealistic because it was lower than what the Navy was currently paying.

The record also contains notes the buyer made on her copies of the approved documents during discussions. Tr. 30. Tab 22 (notes of August 10 discussions) has a five-pointed star drawn in immediately after the comparison of the current labor rate to the FSI labor rate, and Tab 6 (notes on September 13 discussion) has two bracket-like "doodles" surrounding the current labor rate and FSI's revised labor rate. These marks,

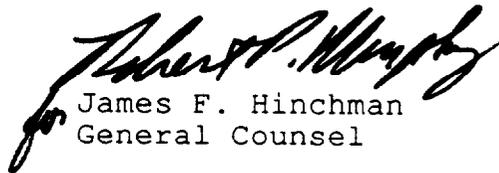
^{11/} Agency report Tabs 8 and 22.

and the fact there is no notation of \$10,000 on these documents, indicate that the buyer probably did not mention a \$10,000 figure.

For its part, FSI states that its employees took no notes of the price aspects of the discussions. Tr. 91. Given the business importance of the buyer's alleged pricing instructions, we find it peculiar that FSI did not document what its states was a shocking, Tr. 45, and first-time occurrence--being told to raise its price--in its dealings with the government. Tr. 47

Based on the foregoing, we conclude that the Navy did not engage in improper auction techniques in the course of discussions with the protester. Nor do we think the discussions improperly forced FSI to raise its price to a point where it could not receive the award. See Pan Am World Servs., Inc. et al., B-231840 et al., supra. Indeed, as discussed previously, we think the discussions concerning FSI's unrealistic price were reasonable and required by the FAR. See Price Waterhouse, 65 Comp. Gen. 205, supra.

The protest is denied.


James F. Hinchman
General Counsel