



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

Decision

Matter of: Steinhoff & Sadler, Inc. d/b/a SSI
File: B-246604; B-246604.3
Date: March 20, 1992

Nancy O. Dix, Esq., and David A. Renas, Esq., Gray, Cary, Ames & Frye, for the protester.
Michael W. Clancy, Esq., Pettit & Martin, for Transcontinental Enterprises, Inc., an interested party.
L. Carol Roberson, Esq., Environmental Protection Agency, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency did not employ improper auction techniques in the course of a negotiated procurement when, during discussions, it advised the protester of areas in its proposal where the agency perceived the potential for cost overruns and advised the protester that a failure to either justify its cost proposal as initially submitted or to revise it accordingly could affect the protester's chances for award.
2. Alleged inaccuracies in the labor-mix included in a solicitation must be protested prior to the time for receipt of initial proposals; allegation that the protester was compelled during discussions to adopt such estimates is not supported where protester's own account of discussions shows that discussions were proper.
3. Where contracting agency determines that three offers in the final competitive range are technically equal and awards the contract to the low offeror on the basis of price, protester whose offer is third low is not an interested party to challenge the award where it has not challenged the technical equality of the intervening, second low offeror.

DECISION

Steinhoff & Sadler, Inc. d/b/a SSI protests the award of a contract by the Environmental Protection Agency (EPA) to Transcontinental Enterprises, Inc. (TEI) under request for proposals (RFP) No. D10004N1 for Facilities Maintenance and

Support Services at an EPA facility in Research Triangle Park, North Carolina. We deny the protest in part and dismiss it in part.

The RFP was issued as a total small business set-aside procurement, and contemplated the award of a level-of-effort, cost-plus-fixed-fee contract for a base term of 1 year, with four 1-year options. The contract covers a variety of requirements, consolidating support services that had been procured under five separate contracts and six purchase orders/blanket purchase orders in the past, and adding some new services. The activities required under the contract, which range from in-house moving support, locksmith services, and mailroom operations to audio-visual program support and equipment maintenance, were listed on four separate attachments to the Statement of Work. The RFP contained a government estimate for the level-of-effort, applicable wage rate determinations, and a dollar amount for other direct costs and parts and materials. Basically offerors were to provide their own general and administrative rates, profits, and future wage escalations. The RFP advised offerors that the government would make award to the responsible offeror whose offer conformed to the solicitation and was most advantageous to the government, cost or price and other factors considered. Technical quality was stated to be more important than cost or price. The RFP stated that as proposals became more equal in technical merit, the evaluated cost would become more important. Technical evaluation factors, and points assigned to each factor, were provided in the RFP.

Ten firms submitted initial proposals by the closing date of May 31, 1991. The technical proposals were reviewed and evaluated by a Technical Evaluation Panel (TEP) convened for this purpose. The TEP prepared a report for the contract specialist, including a discussion of the evaluation process, the TEP consensus ranking of the 10 proposals (by point scores), and a narrative description of the strengths and weaknesses in each proposal. Based on the proposals' point scores, the TEP found 3 offerors technically unacceptable, 3 marginally acceptable, and 4 technically acceptable (including SSI and TEI). A Business Evaluation Panel (BEP), composed of the contracting officer, the contract specialist, and a cost analyst, also prepared a report. This report was presented to the chairperson of the Source Evaluation Board (SEB), as was the TEP report. The SEB chairperson reviewed all of this information and recommended a competitive range to the Source Selection

¹A second offeror, Contract Services Company, Inc., has also protested the award. We are considering its protest under B-246604.6.

Official (SSO). The SSO concurred in the SEB's determination that the five highest-ranking proposals-- including Contract Services Company, Inc., Transcontinental Enterprises Inc., and SSI--had a reasonable chance for award and should be included in the competitive range.

Discussions were held with all five offerors in the competitive range on two separate occasions, July 29 and October 11. The discussions were conducted by telephone and confirmed in writing. After the first set of discussions, offerors were asked for various clarifications of their initial proposals and were permitted to submit revised proposals. At that time, the agency had not completed its cost realism analysis. In order to evaluate cost realism, a cost analysis was performed on each potential contractor and major subcontractor. The Defense Contract Audit Agency (DCAA) also conducted reviews and provided audit reports for each of these firms. The EPA cost advisory services staff (CASS) reviewed the audit reports, provided some additional cost analysis, and issued a CASS report for each offeror. The second set of discussions included technical issues remaining after the evaluation of the revised technical proposals and cost issues that had been identified as a result of the agency's cost realism analysis.

Each of the competitive range offerors submitted a best and final offer (BAFO), and these were reviewed by the SEB. In the report, the SEB eliminated two firms from further consideration because of technical weaknesses and/or unreasonable cost, retaining only SSI, TEI, and CSC in the final competitive range. The SSO approved the SEB report which found that these three offers were technically equal, based on the SEB's review of the technical evaluations and a comparison of the particular strengths and weaknesses of each proposal. Since price then became the determining factor under the RFP scheme, and since TEI had offered the lowest price, the SSO selected this firm for award. The contract was awarded to TEI and this protest followed.

SSI protests that the agency employed improper auction techniques during negotiations, allegedly requiring SSI to raise its price in order to be considered further; that the agency improperly required SSI to revise its offer to conform with allegedly unreasonable cost estimates and allegedly erroneous labor-mix and wage-rate data during

negotiations; that TEI's proposal was not technically equal to the protester's and therefore should not have been selected for award; and that the agency failed to provide pre-award notice to the other offerors, as required under a small business set-aside, and improperly permitted TEI to substitute key personnel after award.'

SSI contends that the contract specialist essentially coerced the firm into increasing its price by approximately \$1,035,000 by threatening during the October 11 discussions that SSI would risk losing evaluation points if it failed to do so, and that SSI would have been the low offeror but for the agency's improper actions in this regard, since the result was that SSI's final price exceeded the awardee's price. Specifically, SSI objects to concerns that the contracting specialist raised regarding potential cost overruns that the agency anticipated in connection with the labor element of SSI's price; when SSI asked what the overrun was, the contracting specialist allegedly responded that it was perceived to be approximately \$1,035,000 or more, based on the protester's failure to provide for any annual wage escalations in its proposal. SSI states that it reasonably believed these statements required it to increase its proposal by that amount, and contends that EPA was employing an improper auction technique by imposing a target price that the protester had to meet in order to obtain further consideration.

Under regulations applicable to conducting discussions with offerors that have submitted unrealistic prices, contracting officials generally must disclose the existence of perceived

²SSI has furnished with its protest transcripts which SSI claims constitute the discussions held between SSI and EPA negotiators. The EPA objects to the use of these transcripts. The agency states that the tapes were made by SSI without the knowledge or consent of the agency employees and that this secret taping violates the California penal code, which prohibits the taping of confidential telephone communications without the consent of all parties. We need not resolve the question of the propriety of our considering the transcripts as independent evidence since they confirm the agency's version of the contents of the discussions as reported in affidavits of agency employees.

³Our decision responds to the protest issues which the protester has pursued in its comments after receiving a full report under a protective order issued by our Office. Other issues raised in the earlier protest correspondence are deemed abandoned. Engineered Air Sys., Inc., B-236932, Jan. 19, 1990, 90-1 CPD ¶ 75.

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(e)(2)(ii). Indeed, discussions cannot be meaningful if an offeror is not apprised that its price is more or less than what the agency believes is reasonable. See Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54. 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 employing auction techniques, FAR § 15.610(e)(2). Specifically, contracting officials are prohibited from indicating to an offeror a cost or price that it must meet to obtain further consideration.

We do not find that the record supports SSI's allegation that EPA, during the second discussion session, presented the firm with a price-increase ultimatum; rather, the protester's own account of the discussions shows that while the contract specialist identified areas in which the agency considered SSI's proposed costs to be unrealistic and estimated the potential cost overrun that would result from the firm's apparent failure to provide for any escalation in wages during the 5-year contract term in its proposal, the contract specialist also clearly advised that it was within the protester's discretion how to respond to these concerns. In this regard, we note that contracting officials are not prohibited, per se, from quantifying their price-related concerns during discussions; it is not improper, for example, for a contracting agency to disclose a price objective as a negotiation tool for reaching an agreement on a fair and reasonable price. See Professional Review of Florida, Inc.; Florida Peer Review Organization, Inc., B-215303.3; B-215303.4, Apr. 5, 1985, 85-1 CPD ¶ 394.

Since the agency can advise an offeror that a price is considered unrealistic, an agency may also advise an offeror of the possible consequences of failing to offer a realistic price (for example, rejection of the offer). See Food Servs., Inc., B-241408, Feb. 12, 1991, 91-1 CPD ¶ 150.

Here, the record shows that while the contract specialist apparently did raise the figure of \$1,035,000 during negotiations with SSI, it was to indicate the extent to which the agency believed SSI's initial cost proposal had understated one aspect of its labor costs; this figure was not presented as a "target price" that the protester had to meet or else face rejection of its proposal. Further, while the agency did state that how the protester proposed in its BAFO could affect its score, the agency, at several points in the discussions essentially advised that it was within

the protester's discretion as to how to propose and that it would be scored based on what it submitted. The negotiators further stated that the firm could attempt to explain and support its rationale, and this would be reviewed. Although the protester contends that it believed at the time that it was being forced to increase its final price by this amount, we note that the firm did not in fact do so. It made adjustments in its costs which fell somewhat short of the overrun figure provided by the agency negotiators, and did not include a provision for wage escalations in two of the four option years. Thus, we conclude that the agency did not engage in improper auction techniques in the course of discussions with the protester.

SSI also objects to the agency's alleged insistence, during these discussions, that the firm revise its offer to comply with the labor-mix estimates and wage-rate data included in the RFP. The protester contends that the revisions were inconsistent with actual historical data available and were thus erroneous.

SSI's offer was based on subcontracting most of the work to the incumbent contractor under one of the five contracts being consolidated in the RFP. SSI states that it calculated its labor costs in its initial bid primarily based on the proposed subcontractor's experience at the Research Triangle Park facility. According to SSI, the proposed subcontractor believed that the agency's methodology for determining the required labor-mix was flawed and did not accurately reflect the actual needs of the facility. Therefore, SSI decided to rely on that firm's historical experience as to the labor-mix, rather than the government estimates contained in the RFP. During discussions, however, SSI states that the contract specialist "strongly urged" the firm to amend its offer to conform its labor-mix, wage escalation, and certain other costs to the government estimates included in the RFP. The protester contends that it reasonably believed it was required to do so, and as a result of these revisions, raised its price and ultimately lost the award.

To the extent this portion of the protest challenges the accuracy of the labor-mix estimates that were included in the RFP, it is untimely raised. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals shall be filed prior to the time set for initial proposals. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). The cost-related estimates were included in the RFP as it was initially issued and amended, and thus SSI was aware of the allegedly erroneous standard against which its proposal would be evaluated at that time. Accordingly, SSI should

have protested the agency's use of these estimates before the closing time for receipt of initial proposals, not after BAFOs were evaluated and the award was made. See Victor Assocs., Inc., B-241496, Feb. 6, 1991, 91-1 CPD ¶ 12'.

To the extent this portion of the protest is directed against the manner in which discussions were conducted, we do not agree that SSI was improperly forced to revise the labor portions of its proposal. We find, rather, that it was proper for the contract specialist to identify, during discussions, concerns that the agency had with the labor-related cost realism of SSI's proposal.

In order for discussions in a negotiated procurement to be meaningful, contracting agencies must advise all offerors within the competitive range of weaknesses, excesses, or deficiencies in their proposals unless doing so would result either in disclosure of one offeror's technical approach to another offeror or in technical leveling, and providing them the opportunity to revise their proposals to fully satisfy agency requirements. See Bauer Assocs., Inc., B-229831.6, Dec. 2, 1988, 88-2 CPD ¶ 549. As discussed above in connection with cost realism discussions, contracting officials are expressly authorized by the FAR to tell offerors that specific prices are considered unrealistic. See FAR § 15.610(e)(2)(ii). Similarly, we have specifically found discussions proper where the agency advised the protester that its proposed manning was not consistent with the government estimate and then identified to the protester the precise area where the manpower levels appeared deficient, e.g., Tate-Griffin Joint Venture, B-241377.2, Jan. 7, 1992, 92-1 CPD ¶ _____, and have found discussions inadequate where the agency failed to advise the protester of its concerns with the protester's proposed wage rates. DOT Sys. Inc., B-186192, July 1, 1976, 76-2 CPD ¶ 3.

While an agency may not consciously mislead or coerce an offeror into raising its price, see Johns Hopkins Univ., B-233384, Mar. 6, 1989, 89-1 CPD ¶ 240, here the record does not support SSI's allegation that it was misled or coerced. The protester's own account of the discussions shows, for example, that the contract specialist questioned how SSI intended to retain its proposed labor force over a period of 5 years without any wage escalation during that time, and questioned why SSI had taken certain exceptions to the labor mix proposed in the RFP (including areas where SSI had proposed fewer personnel in some categories and more personnel in other categories than the government estimate). In discussing these matters, the contract specialist expressed concern that SSI might not be able to perform the contract or retain its labor force for the prices proposed in its offer. While these areas were identified as "major concerns," the record does not support SSI's contention that

it was forced to make specific changes to its labor mix or labor estimates, or to conform its BAFO to the government estimates. Rather, the record reasonably supports the contract specialist's statement that SSI was informed of the agency's concerns and advised to respond to these concerns, either by revising its approach or by supporting its departure from the government estimates in greater detail. In our view, it is self-evident that an unexplained deviation from government estimates disclosed in the RFP could possibly affect the offeror's chances for award, and a statement to this effect during negotiations does not rise to the level of coercion. We again find nothing in the record to support SSI's allegations that it was forced to revise its proposal in specific ways.

SSI also protests that the agency failed to follow the evaluation scheme established in the RFP when it made its award decision based on cost instead of technical merit, since the RFP stated that technical quality would be considered more important than cost. The protester recognizes that the RFP also provided that as proposals became more equal in their technical merit, the evaluated cost or price would become more important. However, the protester disagrees with the agency's determination that TEI's and SSI's proposals were essentially equal technically. It asserts the TEI's proposal was not technically equal to SSI's proposal because its total score was 4.4 percent higher than TEI's and TEI was found "less than adequate" in one area.

We point out that CSC's proposal was also evaluated as technically equal to SSI's and TEI's. In its protest, SSI does not challenge this fact; indeed, while discussing an alleged weakness in TEI's proposal, the protester argues that "SSI and CSC had no such weakness." Since CSC's evaluated price was lower than SSI's, and its technical merit was found to be equivalent, it is apparent that CSC would be next in line for award if we were to sustain this portion of the protest, rather than SSI. We therefore find that SSI lacks the "direct economic interest" that is necessary to make it an interested party to raise this issue under our Bid Protest Regulations. 4 C.F.R. § 21.0(a) (1991); see Rantec Microwave & Elecs., Inc., B-241151, Dec. 20, 1990, 90-2 CPD ¶ 510; Data Com. Sys. Corp., B-227212, June 11, 1987, 87-1 CPD ¶ 587. Accordingly, this portion of the protest is dismissed.

SSI has raised a number of other challenges to the award to TEI, alleging for example that TEI improperly substituted certain key personnel after the contract was awarded and

that other offerors were not given the requisite pre-award notice. Having found that SSI is not an interested party to challenge the award to TEI, we dismiss these portions of the protest.⁴

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel

⁴The protester also asked that we obtain and review the EPA Inspector General's report concerning possible mail tampering in connection with this procurement. The EPA has furnished us a copy of this report. The investigation report states that no breach of security was substantiated, and that there was no indication any bidder obtained an unfair competitive advantage. The report recommends that the matter be closed. We have no basis to dispute these findings.