

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

Decision

Matter of: Hercules Engines, Inc.
File: B-246731
Date: March 19, 1992

Gene E. Easterday for the protester.
Richard A. Couch, Esq., Department of the Army, for the agency.
Aldo A. Benejam, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Award to a higher-priced offeror is unobjectionable under a request for proposals that stated that technical considerations were more important than cost and agency reasonably found higher-priced proposal to be technically superior compared with protester's lower-priced, lower-scored technical proposal and reasonably concluded that the protester's price advantage over the awardee's was outweighed by the protester's evaluated higher risk.
2. Protest that the government should not evaluate "best commercial practices" for overhauling engines--the stated objective of the solicitation--is untimely filed and will not be considered where the evaluation areas and elements within each area were announced in the solicitation and protest was not filed until after the closing date receipt of proposals.

DECISION

Hercules Engines, Inc. protests the issuance of a work order to the Tooele Army Depot (Tooele) under request for proposals (RFP) No. DAAE07-91-R-J201, issued by the U.S. Army Tank-Automotive Command, for the overhaul of 900 LD 465-1 multi-fuel engines (with container) for the 2-1/2 ton series truck. The protester contends that in evaluating its proposed costs, the Army incorrectly evaluated freight charges for government-furnished equipment. The protester also argues that Tooele proposed unrealistically low costs.

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

BACKGROUND

On April 16, 1991, the agency synopsisized the requirement in the Commerce Business Daily, announcing that the competition would include private firms as well as government depots.¹ The RFP, issued on May 31 as an unrestricted solicitation, contemplated the award of either a contract to a private firm, or the issuance of a work order to a government depot for the overhaul of 900 engines, with an option for 900 additional engines. Offerors were required to propose firm, fixed unit and extended prices for all efforts involved in overhauling the engines (e.g., inspection, tear down, replacement of mandatory items, upgrading components, cleaning, and reassembly) for the basic and option requirement. The RFP cautioned that the contractor might be required to "tear down" about 1,500 engines in order to deliver the basic quantity of 900 overhauled engines.

Section M of the RFP, as amended, listed (1) technical; (2) price/cost; and (3) production/management, as the three evaluation areas, and emphasized that the technical area was more important than price/cost, which was significantly more important than the production/management area. Offerors were required to submit separate proposals addressing each of the three evaluation areas. The RFP stated that a most probable cost to the government for the basic and option requirements would be developed and evaluated for each offeror, and that government depot proposals would be subjected to the same conditions as private offers, including adjustments deemed necessary to achieve parity with the private sector. Award was to be made to the offeror whose proposal represented the best value to the government.

Of the 34 firms solicited, 5 offerors, including Tooele and the protester, submitted proposals by the July 15 closing date. One of the five offerors subsequently withdrew its offer. Following evaluation of initial proposals and discussions, the agency requested and received best and final offers (BAFO) from the four remaining offerors by September 12. A proposal evaluation board assigned numerical ratings to the technical area and adjectival ratings to the production/management area. Tooele's proposal, which earned 81 points in the technical area (out of 100 possible points), was the highest-rated proposal in this area, while Hercules's proposal earned 69 points in the technical area. Hercules's total evaluated cost was \$11,805,966, while Tooele's was \$11,773,350. Both proposals were rated "Good"

¹This procurement was part of a competition initiative authorized by the Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8072, 104 Stat. 1856, 1891 (1990).

in the production/management area. On September 25, after determining that Tooele's proposal represented the best value to the government, the Tank-Automotive Command issued a work order to Tooele at unit costs of \$6,256 for the basic requirement and \$6,249 for the option quantity.

On October 1, immediately following a debriefing by the agency, Hercules filed an agency-level protest arguing that in evaluating its proposed cost, the agency improperly included freight charges for transporting all engines to Hercules's overhaul facility, as well as the costs of returning to the Army the excess engines (i.e., the "torn down" engines, over and above the 900 overhauled engines).

The Army conducted an extensive review of the allegations Hercules raised, which included a recalculation of the freight charges and a review by the Source Selection Authority (SSA) of the initial award decision. In a detailed letter dated November 7, the Army explained its rationale and denied Hercules's agency-level protest. This protest to our Office followed.

EVALUATION OF TRANSPORTATION COSTS

Protester's Contention

In its protest, Hercules renews the argument it made in its agency-level protest that in developing probable costs, the Army should not have considered any freight charges, other than the cost of shipping the basic and option quantities (1,800) of overhauled engines from the protester's facility to Tooele. Hercules asserts that section M of the RFP did not include freight costs as an evaluation factor, and points to various RFP provisions which allegedly indicate that all engines will be provided as "government-furnished equipment" and make no mention of freight costs.² The protester also points to Federal Acquisition Regulation (FAR) § 52.247-55, "F.O.B. Point for delivery of government-furnished property," a clause incorporated by reference in the RFP as required by FAR § 47.305-12(a)(2) where government property is to be furnished under a contract and where the government will be responsible for transportation arrangements and costs. According to Hercules, since the RFP did not expressly provide for including any freight charges in the evaluation of proposals, and since the RFP indicated that all engines would be provided as government-furnished property, the Army's probable cost analysis was

²For example, Hercules points to paragraph A.12.1 of the RFP which states in part that "THE GOVERNMENT WILL PROVIDE AS GOVERNMENT FURNISHED EQUIPMENT AS MANY AS 1,500 . . . ENGINES AND CONTAINERS"

flawed. Hercules states that it was prejudiced by the agency's actions because, had it known that the additional freight charges were to be included in the evaluation, it would have structured its proposal differently.

Discussion

The Army calculated Hercules's most probable cost by adding a transportation charge of \$521 per engine to Hercules's proposed unit price, for total evaluated unit prices of \$6,556 for the basic requirement and \$6,560 for the option quantities.³ Transportation charges for Hercules were based on shipping a total of 2,100 engines to and from the protester's facility for the basic requirement and 2,100 engines for the option quantity. The Army explains that rather than 1,500 engines, as estimated by the agency, Hercules indicated during discussions that it would require 2,100 engines in order to deliver 900 overhauled engines. Total round-trip transportation charges for the 4,200 engines required by Hercules was estimated at \$939,510. The agency amortized that amount over the basic and option quantities to arrive at the \$521 freight charge per deliverable overhauled engine.

In response to Hercules's agency-level protest, and without conceding that the protester was correct regarding the solicitation's evaluation scheme, the agency reevaluated proposed costs for each offeror, based on the costs of transporting 1,800 overhauled engines (representing the basic and option requirement) from each offeror's facility to Tooele. The revised charge of \$119 per unit one way, from the protester's facility to Tooele, resulted in a reduced total evaluated cost of \$11,081,844 for Hercules, approximately \$724,000 below that of Tooele's. The reevaluation of freight charges did not affect the relative standing of the other offerors' cost proposals; and technical ratings were not affected for any offeror.

In light of the revised figures, the contracting officer requested the SSA to review his prior selection decision. In affirming his earlier decision that Tooele offered the best value to the government, the SSA specifically concluded

³For Hercules, the Army also added unit cost realism adjustments of \$13 to the basic requirement and \$17 to the option requirement, due to scheduled wage increases during the term of the contract. The most probable cost developed for Tooele of \$6,544 per unit for the basic quantity and \$6,537 per unit for the option quantity did not include any transportation costs, since all engines to be worked on will be located at the depot.

that Tooeele's superior technical proposal justified the cost premium.

Cost/Technical Tradeoff

An agency may award to an offeror with a higher technical score and higher cost where it reasonably determines that the cost premium is justified considering the technical superiority of the awardee's proposal and the result is consistent with the evaluation criteria. See Computer Based Sys., Inc., 70 Comp. Gen. 172 (1991), 91-1 CPD ¶ 14; Pacific Architects and Eng'rs Inc., B-236432, Nov. 22, 1989, 89-2 CPD ¶ 494. Based on our review of the record, we find that the SSA reasonably determined that Tooeele's proposal was so technically superior, that despite Hercules's lower cost, Tooeele's proposal represented the best value to the government.

For example, Tooeele proposed to perform all work in-house, a plan which, according to the SSA, has a proven track record. By contrast, the SSA considered Hercules's lack of experience overhauling the LD 465-1 engine a disadvantage. Hercules also proposed to subcontract certain work (receiving inspection, "tear down," and cleaning), which was considered a disadvantage by the SSA. In this regard, the SSA concluded that Hercules's extensive reliance on subcontractors would introduce higher risks associated with subcontractor's lack of reliability and lack of direct management, oversight, and control over the overhaul process.

Tooeele also proposed an assurance inspection plan and testing procedures that met or exceeded the RFP's requirements, including procedures to identify internal damage to the engines that may not be readily apparent using traditional acceptance tests; both procedures engendered a considerably higher confidence level in Tooeele's proposal over the protester's. Tooeele further exceeded the RFP's requirements by unequivocally committing itself to determining wear limits and functional integrity of the engines using the RFP's technical data package and the depot's maintenance work requirement. Although Hercules referenced both of these documents in its proposal, the firm did not commit itself to abide by the wear limits and functional tolerances contained therein, thereby adding another unacceptable risk element to its proposal.

In reconsidering the selection decision, the SSA, in our view, properly weighed the technical merit and costs of Hercules's and Tooeele's proposals, and reasonably found that the protester's cost advantage was not worth its significantly higher risks and deficiencies. Such decision, especially in the context of a best value procurement where

technical merit was more important than cost, is unobjectionable. See, e.g., Pathology Assocs., Inc., B-237208.2, Feb. 20, 1990, 90-1 CPD ¶ 292, and cases cited therein.

TOOELE'S PROPOSED COSTS

Hercules also argues that compared to the \$9,769 per unit Tooele currently charges to perform the work described in the RFP, Tooele's proposed cost of \$6,256 per unit is unrealistically low. Except for comparing the price the depot currently charges for overhauling the engines--on essentially a sole-source basis--to its proposed price under this competition, Hercules alleges no specific facts in support of its contention. The protester merely states that a private contractor offering a similar reduction in price would be subjected to close scrutiny.

Although it is not at all improper for contractors to offer goods or services at different or even substantially reduced prices under different circumstances, see, e.g., FRC Int'l, Inc., B-244299, Oct. 1, 1991, 91-2 CPD ¶ 274, the record shows that the agency nevertheless subjected Tooele's cost proposal to close scrutiny. The Army conducted a cost realism analysis which found that Tooele's proposal included all direct and indirect cost elements. A comparison between proposed direct material costs and labor hours and the government's independent estimates also revealed that Tooele's proposal supported all direct and indirect cost elements. In addition, an audit of Tooele's proposal performed by the Army Audit Agency revealed that Tooele's proposed costs were adequately supported. The head of the contracting activity was debriefed concerning the results of the cost evaluation and he certified that Tooele's proposal included all direct and indirect costs. The Army asserts that instead of improperly excluding costs, as Hercules argues, Tooele's reduced unit cost was the result of preparing a proposal under intense competition with private firms. We find no evidence in the record to contradict the Army's conclusion.

SOLICITATION IMPROPRIETY

Finally, the protester asserts that one objective stated in the solicitation was that the overhaul program utilize "best commercial practices." The protester argues that the government, a non-commercial entity, should not evaluate proposals using that concept. This allegation concerns an apparent alleged impropriety, which the firm should have protested prior to the time on July 15 set for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Paragraph A.12.1 of the solicitation stated "THE LD465-1 ENGINE WILL BE OVERHAULED USING THE BEST COMMERCIAL PRACTICES THAT WILL

PRODUCE AN ENGINE WHICH IS FULLY SERVICEABLE WITHOUT RESTRICTION." Additionally, the evaluation areas and elements the agency would consider within each area were announced in the RFP. Since Hercules did not file its protest until November 21, its challenge is untimely and will not be considered. See Englehard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel