



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

Decision

Matter of: Evaluation Research Corporation
File: B-246869
Date: April 7, 1992

DECLASSIFIED

Ronald K. Henry, Esq., John B. McDaniel, Esq., Sue Ann Dilts, Esq., and Clifford E. Stevens, Jr., Esq., Baker & Botts, for the protester.
Jonathan H. Kosarin, Esq., and Brian Kau, Esq., Department of the Navy, for the agency.
Jennifer Westfall-McGrail, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester diligently pursued the information providing the basis for its protest where it filed a Freedom of Information Act request approximately 3 weeks after it was orally notified of the award to another offeror.
2. Protest is sustained where record shows that cost realism analysis was flawed because, but for its error in computing the protester's general and administrative costs, agency would have determined that protester's proposal represented the lowest realistic cost.

DECISION

Evaluation Research Corporation (ERC) protests the award of a contract by the Naval Surface Warfare Center to General Electric-Government Services, Inc. (GE) for technical and engineering support services for electromagnetic compatibility improvement programs pursuant to request for proposals (RFP) No. N60921-91-R-A316. ERC contends that as the technically acceptable offeror proposing the lowest realistic price, it was entitled to award.

We sustain the protest.

BACKGROUND

The RFP, which contemplated the award of a cost-plus-fixed-fee contract, advised offerors that award would be made to the technically acceptable offeror with the lowest realistic cost for the base and option periods. As relevant here, the solicitation stated that in assessing cost realism, the

[Protest by Mr. C. B. ...]

government would consider how accurately an offeror's estimated costs reflected its technical approach to the effort in terms of staffing and labor hours and would compare proposed labor rates and indirect rates with Defense Contract Audit Agency (DCAA) recommendations. The RFP further stated that after this cost realism assessment, each offeror's proposed cost and fee would be adjusted for realism to determine which offer represented the lowest realistic cost to the government.

Six offerors responded to the RFP. The Navy rejected three of the proposals as unacceptable and included the remaining three, ERC, GE, and EG&G, Inc., in the competitive range. The agency conducted two rounds of discussions with the remaining offerors concerning deficiencies in their technical and cost proposals. At the conclusion of the second round of discussions, the agency determined that cost concerns had been resolved and technical deficiencies corrected; it then requested best and final offers (BAFO) from all three offerors. In its request for BAFOs, the Navy cautioned offerors that they must fully support any further revisions to their proposals and that the failure to furnish complete and detailed support for any change could result in elimination of the proposal from consideration for award.

Upon receipt of the BAFOs, the Navy conducted a cost realism analysis of each offeror's proposed price, the results of which were summarized in the acquisition documentation record. GE's proposed price of \$4,800,127, which was low, was adjusted upward to \$5,211,617 to take into account the fact that, without any supporting explanation, it had proposed in its BAFO all new junior engineers who were 1991 college graduates with no applicable experience at a rate of compensation lower than the rate that it had originally proposed for a 1991 college graduate with no experience. GE's proposed labor costs were also adjusted to account for its failure to escalate its proposed rates for the first option period. In addition, the Navy did not use GE's proposed overhead rate in its analysis since during discussions it had informed GE that it would not accept the proposed rate, which it viewed as unrealistically low, unless it was capped, and GE had not agreed to accept a cap. The Navy also adjusted GE's travel cost upward to account for GE's apparent underestimate of the number of trips to be made during the final option period.

ERC's proposed cost of \$5,304,373 was adjusted downward to \$5,237,145.¹ The principal difference between ERC's proposal and the government's estimated costs was in the area of travel costs, where ERC's proposal exceeded the government estimate by approximately \$113,000.² The Navy also adjusted ERC's proposed direct labor, fringe benefit, and overhead costs upward slightly to account for ERC's failure to escalate new employees' salaries from the base period to the first option period.

The Navy determined, based on this analysis, that GE's proposal represented the lowest realistic cost for the services. On October 1, the Navy notified the other two offerors by telephone that it had selected GE for award, and on October 2, it awarded to GE.

On October 23, the Navy received a Freedom of Information Act (FOIA) request from ERC for information concerning the technical and cost evaluation of proposals received in response to the subject RFP. The Navy responded to ERC's FOIA request on November 18. By telephone call of November 25, ERC notified the Navy that in reviewing the materials furnished it in response to its FOIA request, it had discovered that the Navy had made a material error in computing the realistic cost of its proposal. Specifically, ERC pointed out that the Navy had erred in computing its general and administrative (G&A) costs, and as a consequence, had overstated the realistic cost of its proposal. The Navy admits that this material error was made. Although the Navy and ERC disagree as to the extent of the impact that correction of this error will have on the government's realistic cost assessment--according to ERC, correction of the error would reduce its realistic cost to \$5,211,157, while the Navy contends that correction of the error would result in a realistic cost total of \$5,210,355--they both agree that correction of the error reduces ERC's realistic costs to an amount lower than GE's realistic costs of \$5,211,617.

Based on the corrected figures, ERC complained to the Navy that it was entitled to award since it had offered the lowest realistic price. The Navy responded that ERC's realistic price was not in fact lower than GE's since the final cost figures in the record were not the result of a

¹Both EG&G's proposed and realistic costs were higher than ERC's and GE's; thus they have no bearing on the outcome of this protest and will not be discussed.

²In its cost assessment, the Navy normalized travel costs. The Navy used the same estimate for travel costs--\$499,770--in analyzing the realistic costs of all three BAFOs.

"neutral cost realism assessment." The agency explained that it had conducted the realism assessment on a "worst case for GE/best case for other offerors" basis: that is, where it had been faced with an uncertainty as to the proper amount to be assessed for any particular element of GE's realistic cost, it had used the higher amount, whereas when faced with such an uncertainty with regard to the other offerors' proposals, it had used the lower amount. According to the Navy, this methodology had affected its assessment of GE's realistic cost in two ways: first, it had used a higher overhead rate than the one proposed by GE, and, second, it had not used the labor rate for junior engineers proposed by GE in its BAFO, but had instead used the higher rate originally proposed by GE for an individual with the same qualifications. With regard to ERC's proposal, the Navy states that this methodology had affected a single cost element: the labor rate for junior engineers. Like GE, ERC had proposed new personnel for the junior engineer positions in its BAFO at a lower rate than the rates proposed for two of the individuals who were being replaced. In assessing the realistic cost of ERC's proposal, the Navy had used the newly proposed lower rate rather than the originally proposed rates. The Navy insisted that under a neutral cost realism assessment, in which all offerors were given or not given the benefit of the doubt with regard to the uncertain rates, GE remained the low, realistic offeror. On December 4, 1991, ERC protested to our Office.

TIMELINESS

The Navy argues first that we should dismiss ERC's protest as untimely. The agency concedes that ERC filed the protest within 10 days of its receipt of the Navy FOIA response, but maintains that the protest is nonetheless untimely because ERC failed to diligently pursue the information on which the protest is based by waiting more than 3 weeks after it had received oral notification of the award to file its FOIA request.

We do not think that ERC's protest to our Office is untimely. Although the agency is correct in its assertion that a protest based on information disclosed pursuant to a FOIA request will be considered timely only if the protester diligently pursued release of the information under FOIA, Robbins-Gioia, Inc., B-229757, Dec. 28, 1987, 87-2 CPD ¶ 632, a delay of approximately 3 weeks in filing a FOIA request does not, in our view, constitute a lack of due diligence. See Alan Scott Indus.; Grieshaber Mfg. Co., Inc., B-212703, B-212703.2, Sept. 25, 1984, 84-2 CPD ¶ 349

(delay of approximately 1 month in filing FOIA request not sufficient to constitute a lack of due diligence).³

DISCUSSION

ERC contends that as the technically acceptable offeror whose proposal represents the lowest realistic cost to the government, it was entitled to award. The protester maintains that the record does not support the Navy's contention that in assessing the realistic costs of competing proposals it employed a best case/worst case methodology; instead, ERC asserts, the record demonstrates that an even-handed analysis was conducted, pursuant to which it was entitled to award.⁴

We agree with the protester. First, there are no contemporaneous documents or other evidence suggesting that the Navy conducted a cost realism analysis employing a best case/worst case methodology for ERC and GE. Indeed, the Navy "admits that the written record does not expressly support its contention." Second, although it is clear from the record that the Navy did not use the overhead rate or the labor rate for junior engineers proposed by GE in its BAFO in assessing the realistic cost of GE's proposal and that it did use the labor rate for junior engineers proposed by ERC in its BAFO in evaluating the realistic cost of ERC, there is no evidence that this was done pursuant to a best case/worst case methodology. As discussed below, the record reveals that the Navy had specific reasons for accepting the lower labor rate proposed by ERC in its BAFO, while not accepting the overhead or BAFO labor rates proposed by GE.

³The agency cites our decision in National Sys. Mgmt. Corp., B-198811, Oct. 10, 1980, 80-2 CPD ¶ 268, as support for its argument that ERC failed to diligently pursue the information on which it bases its protest by delaying 3 weeks before filing its FOIA request. In that case, we found that a protester who waited more than 3 weeks to file its initial FOIA request, who then, when notified by the agency that the request would not be honored until the protester promised to pay search and reproduction costs, delayed an additional 4 weeks before agreeing to pay these costs, had failed to diligently pursue the information. We did not find the delay of 3 weeks in initially filing the FOIA request by itself sufficient to constitute a lack of due diligence.

⁴The protester also complains that the Navy failed to conduct meaningful discussions with it, principally concerning travel costs. Since the Navy normalized travel costs in its evaluation, this alleged failure on the part of the agency did not affect the evaluation and is not material.

With regard to GE's overhead rate, the Navy informed GE during discussions that it considered the overhead rate proposed by GE as unrealistically low and would accept it only if it were capped. The record shows that, in response, GE failed to state that it would accept a cap and that the Navy therefore declined to use GE's proposed overhead rate in its cost realism analysis. Thus, the Navy's decision not to use GE's lower proposed overhead rate in its cost realism analysis was based on GE's failure to agree to a cap and not on a worst case approach to assessing GE's realistic costs.

With regard to the labor rates for junior engineers, in its last letter of discussion, GE proposed all new junior engineers who were 1991 college graduates with no applicable experience. In the revised cost proposal submitted with its BAFO, GE, without any explanation, proposed a new rate of compensation for these individuals which was lower than the rate that it had originally proposed for a 1991 college graduate with no applicable experience. The newly proposed individuals did not state that they agreed to the proposed rate of compensation in the letters of commitment submitted with their resumes. Because GE failed to provide any support for the newly proposed rate, the Navy used the originally proposed rate in its realism analysis.

ERC also proposed new junior engineers in its BAFO at a rate of compensation that was equivalent to the rate that it had originally proposed for one of its three junior engineers and lower than the rate it had originally proposed for the other two. In evaluating the realism of ERC's cost proposal, the Navy determined that "the newly proposed rates are realistic in comparison to the original proposal." Although the evaluators do not explain their basis for this conclusion, we think that it is supported by ERC's BAFO. ERC had submitted with its BAFO signed letters of commitment from its newly proposed junior engineers setting forth the proposed rate of compensation. Thus we find that the Navy had specific legitimate reasons for treating the labor rates for junior engineers proposed by the two offerors in their BAFOs differently.

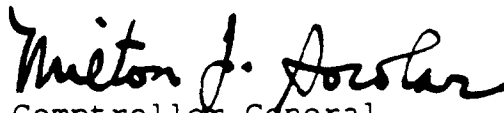
We recognize that correction of the error in ERC's evaluated costs reduces its estimated costs only slightly below GE's. Nevertheless, since the RFP provided that the award would be made to the offeror with the lowest realistic cost, we believe that ERC should receive the award.

CONCLUSION

In our view, the record conclusively demonstrates that an even-handed cost realism analysis was conducted, pursuant to which, but for the error in the computation of its G&A cost, ERC would have been determined low. Accordingly, we sustain ERC's protest.

We recommend that the Navy terminate the award to GE for the convenience of the government and make award to ERC. In addition, ERC is entitled to recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6 ~~(d)-(1)~~ (1991). ERC should submit its claim for protest costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.


Acting Comptroller General
of the United States