



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: HFS, Inc.
File: B-248204.2
Date: September 18, 1992

Garry R. Boehlert, Esq., and Shelly L. Ewald, Esq., Watt, Tieder, Killian & Hoffar, for the protester, Cyrus E. Phillips, IV, Esq., Keck, Mahin, & Cate, for Oakcreek Funding Corporation, an interested party. Joseph M. Goldstein, Esq., Department of the Air Force for the agency. Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency's communications with the low offeror after the closing date for the receipt of best and final offers (BAFO), that were required in order obtain certain material pricing information on work required under the solicitation, constituted post-BAFO discussions which required the contracting agency to conduct discussions with the other offeror in the competitive range.

DECISION

HFS, Inc. (HFSI) protests the award of a contract to Oakcreek Funding Corporation under request for proposals (RFP) No. F33600-92-R-0057, issued by the Department of the Air Force, Wright-Patterson Air Force Base (AFB), Ohio, for computer hardware maintenance and system analyst support. Among other things, HFSI objects to the Air Force's alleged conduct of improper post best and final offer (BAFO) discussions with Oakcreek.

We sustain the protest.

The RFP was issued on December 19, 1991, to obtain preventive, remedial, and on-call computer hardware maintenance for the "Computational Resources for Engineering and Simulation Training and Educational" (CREATE) computer

system and system analyst support, including installation and support of software for the "World Wide Military Command and Control System," "Weapon System Management Information System," and CREATE computer systems at Wright-Patterson AFB. The RFP contemplated a firm, fixed-price, labor hour contract with a base period from February 1, 1992, to September 30, 1992, and 1 fiscal-year option period. HFSI, and its predecessor Honeywell, Inc., is the incumbent contractor for this work.¹

The RFP requested the submission of technical and cost proposals, providing that award would be made to the lowest priced, technically acceptable, responsible offeror complying with the terms of the RFP. For the work involving maintenance of the CREATE system hardware, the statement of work required the contractor to perform preventive and remedial maintenance to that CREATE system equipment listed in "tables" B-1A through B-1C and B-2A through B-2C during the basic and option periods.

The RFP required each offeror to enter on each "B-table" a monthly unit price and a monthly extended price for each piece of equipment listed, as well as a total monthly price for the table. The RFP schedule contained several line items, both for the base and option periods, which contemplated the insertion of total prices for the hardware maintenance work.² Each of these line items referenced a particular B-table. The total price for each of these base period line items was to be calculated by multiplying the total monthly price for the pertinent referenced B-table by the 6-month period of performance.³ In addition to completing the schedule, the RFP instructions expressly required offerors to complete and return all B-tables with their proposals. The RFP also incorporated Federal Acquisition Regulation (FAR) § 52.215-13, "Preparation of Offers," which required offerors to submit requested unit prices.

¹All of the computer systems utilize an array of computer equipment manufactured by Honeywell, Inc., which operate with HFSI proprietary software. The CREATE system has been maintained by HFSI since 1970 and the other systems, which are classified secret and top secret, have been operated since the 1980s. HFSI previously was noncompetitively awarded the work.

²The schedule also included line items for on-call maintenance and system analyst support.

³Similarly, the option hardware maintenance line item price was calculated by multiplying the 12-month period of performance times the referenced B-table total.

In response to the RFP, the Air Force received proposals from HFSI and Oakcreek. Oakcreek's proposal included completed B-tables.⁴ The record shows that the Air Force initially found Oakcreek's proposal unacceptable (for reasons not related to the B-tables) and HFSI's proposal acceptable. The Air Force conducted discussions with both HFSI and Oakcreek during which the Air Force raised various concerns (unrelated to the B-tables) regarding Oakcreek's technical proposal. Based upon Oakcreek's response, the Air Force determined Oakcreek's technical proposal to be acceptable.

The Air Force then requested BAFOs to be submitted by March 13. The Air Force attached revised B-tables to the BAFO request. These revised tables reflected various changes made by the Air Force in the CREATE equipment list since the issuance of the RFP. In the letter requesting BAFOs, the Air Force required the offerors to complete and submit the revised B-tables with the BAFOs.

After receipt of BAFOs, the Air Force determined that Oakcreek had submitted the lowest priced BAFO at \$953,712, considering the total prices entered on the submitted schedule. HFSI's BAFO price was slightly higher at \$1,041,660.⁵

Oakcreek did not submit any B-tables with its BAFO. In view of Oakcreek's incomplete BAFO, the Air Force requested Oakcreek to clarify that the monthly charge for hardware maintenance was exactly the same as in its initial proposal.⁶ On March 16, Oakcreek submitted the revised B-tables, which showed the same total monthly prices as shown on Oakcreek's initial proposal's B-tables, although the revised

⁴HFSI asserts that Oakcreek initially submitted B-tables that varied from those required by the RFP. We need not resolve this issue since the B-tables that were required to be submitted with BAFOs had been revised from those initially required.

⁵HFSI also submitted an alternate proposal at an even lower price of \$991,567 based upon contract performance beginning on April 1.

⁶Oakcreek's monthly prices for these line items, as calculated by dividing the total prices by the number of months in the base and option periods, were the same.

item prices on the B-table reflected various differences to reflect the changed requirements. On March 27, the Air Force awarded Oakcreek the contract, whereupon this protest was filed.⁷

HFSI protests that Oakcreek's failure to submit the B-tables with its BAFO rendered its BAFO unacceptable, and the solicitation and acceptance of the tables constituted improper post-BAFO discussions, since HFSI was not provided an opportunity to submit a revised proposal.

Regarding the decision to accept Oakcreek's late submitted B-tables, the Air Force essentially contends that the B-tables were not material because Oakcreek's total price was evaluated utilizing the schedule prices and the late submitted B-tables were consistent with the schedule prices. The Air Force asserts that the B-tables had no effect upon price, period of performance, warranty, or time of delivery, since the amounts to be paid under the contract were to be based upon the line item prices in the schedule, not the B-tables. The Air Force asserts that the B-tables were for administrative convenience only and their late submission only required a clarification and did not constitute discussions.

Contrary to the Air Force's assertion, the B-tables are a material element of the proposals in two respects. First, under the RFP, the tables identify the CREATE equipment that the contractor is obligated to maintain under the contract. The Air Force admits that if there are any changes to the individual equipment items reflected on the B-tables, a modification to the contract is required to formalize these changes, and that the B-tables are necessary to make such pricing adjustments. Second, as the Air Force recognizes, the B-tables are used to calculate maintenance credits where system components are not properly maintained in a particular month.⁸ The Air Force expressly requested that the revised B-tables be submitted with the BAFO and stated that an offeror could not rely upon the prices submitted in the B-tables submitted in the initial proposal. Given their significance in administering the contract, as admitted by the Air Force, we believe that the B-tables constitute an

⁷The Air Force has authorized performance under the contract, notwithstanding the protest.

⁸The formula for calculating maintenance credits for system components is contained in subparagraph H-772(g) of the RFP.

essential element of Oakcreek's BAFO.⁹ See generally Space Servs. of Ga., Inc., B-214499, Aug. 15, 1984, 84-2 CPD ¶ 183 (bid on formally advertised procurement that only contained a total price for indefinite quantity work but not the requested unit prices was nonresponsive, since the unit prices were necessary to establish the material terms of the contractor's obligations).

While the Air Force asserts that Oakcreek was bound to maintain all CREATE equipment since it submitted completed B-tables with its initial proposal, the record shows that the revised B-tables contain variations from the initial B-tables. Thus, there is arguably doubt whether Oakcreek's BAFO obligated it to maintain the different equipment listed on the revised B-tables, and, given the variations between the B-tables, there are no applicable unit prices for some of the system components contained in the BAFO, even though the prices are admittedly a necessary part of the contract. See SWD Assocs., B-226956.2, Sept. 16, 1987, 87-2 CPD ¶ 256; see also Pacer Contracting Corp., B-242644, Feb. 20, 1991, 91-1 CPD ¶ 193 (bid, that acknowledged amendment incorporating new work but which did not include a new schedule that incorporated new work, created a doubt whether the bidder had legally obligated itself to perform the new work and rendered the bid nonresponsive). Therefore, Oakcreek's March 13 BAFO was technically unacceptable since it did not conform to a material term of the RFP and thus created doubt as to Oakcreek's legal obligations.¹⁰ See SWD Assocs., supra; Burroughs Corp., 56 Comp. Gen. 142 (1976), 76-2 CPD ¶ 472.

⁹The fact that the monthly payments to be made under the contract should be the same as indicated in the schedule until a change to the equipment list is formalized by contract modification does not render the B-table pricing immaterial, since the equipment list is the embodiment of the contractor's precise legal obligation.

¹⁰Since Oakcreek's failure to submit the B-tables with its BAFO created doubt concerns its legal obligations to service the equipment listed on the tables, the fact that Oakcreek did not change its average monthly prices for these line items from its initial proposal to its BAFO does not render Oakcreek's failure immaterial. See generally Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555 (bid that contains conditions that materially change legal relationship of the parties is nonresponsive, even if the incremental cost impact of meeting the excepted requirement is immaterial).

In permitting Oakcreek the opportunity to submit revised B-tables after the due date for receipt of BAFOs, the Air Force conducted discussions. Discussions occur whenever (a) the information requested from an offeror is essential for determining the acceptability of its proposal, or (b) the government provides the offeror an opportunity to revise or modify its proposal. FAR § 15.601; Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227. As discussed above, the submission of the revised B-tables was necessary to determine whether Oakcreek is bound to maintain the equipment listed on the revised tables and is thus acceptable.¹¹

The conduct of discussions after receipt of BAFOs with one offeror is generally improper. FAR § 15.611(c); SWD Assocs. supra. In order to treat offerors equally, discussions must be conducted with all offerors whose offers are within the competitive range and all competitive range offerors given the opportunity to submit revised offers, even where post-selection negotiations do not directly affect the offerors' relative standing. Microlog Corp., supra; compare Hawaii Int'l Movers, Inc., B-248131, Aug. 3, 1992, 92-2 CPD ¶ 67 (request for unit prices from selected contractor after BAFO submission did not constitute improper post-BAFO discussions, where the unit price schedule had not changed from initial proposals and the information was not necessary to evaluate BAFOs). Since Oakcreek was provided the opportunity to make its BAFO acceptable, which constituted discussions, the Air Force was required to provide HFSI the opportunity to submit a revised proposal. See SWD Assocs., supra.

In view of the close proximity of the offerors' prices, HFSI was prejudiced by the Air Force's actions, because it is not clear that the outcome of the competition would have remained the same had HFSI been provided an opportunity to revise its proposal. See Information Ventures, Inc., B-245128, Dec. 18, 1991, 91-2 CPD ¶ 558; Microlog Corp., supra. In this regard, it is well-established that in a new round of proposal revisions, it is not uncommon for offerors to offer substantial price reductions or to restructure their pricing, even when the government's requirements have not changed. Information Ventures, Inc., supra. We sustain the protest on this basis.

¹¹It is also clear from the facts above that the Air Force could not accept Oakcreek's B-tables under either FAR § 52.215-10(c), governing the late receipt of BAFOs, or FAR § 52.215-10(f), which allows for the consideration of a late modification from an otherwise successful proposal. See Environmental Tectonics Corp., B-225474, Feb. 17, 1987, 87-1 CPD ¶ 175.

HFSI also alleged that the Air Force wrongly determined that Oakcreek was technically capable of providing HFSI proprietary software required to perform the contract. The solicitation provided that the contractor will be required to acquire access to listed proprietary software owned by HFSI. Oakcreek stated in its proposal that the firm agreed to the requirement and was "prepared to comply by executing any normal and customary non-disclosure agreement(s)." In response to an Air Force question concerning whether Oakcreek had acquired access to the HFSI software (or had acquired similar access before), Oakcreek stated as follows:

"ISC [an Oakcreek subcontractor] has in place agreements which allow access to HFSI/Bull proprietary software and are used on other on-going contracts. ISC believes that HFSI/Bull is in direct competition for this contract. We feel that it would be counter productive and inappropriate to request a proprietary agreement specific to this solicitation at this time. However, upon notification of contract award, ISC will negotiate an agreement with HFSI as stated in our proposal."

Evidence presented at a hearing conducted on this issue pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.5 (1992), showed that Oakcreek has not met these requirements.¹² In this regard, an HFSI officer stated that its corporate policy is not to allow competitors, such as Oakcreek, access to the HFSI proprietary software in question. See Tr. at 186.

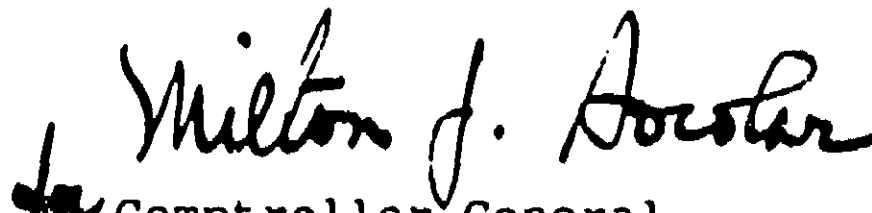
Based on the evidence in the record, we cannot say that the contracting officer knew or should have known that HFSI does not as a rule provide access to its proprietary software to competing firms. Consequently, we do not find that the Air Force should have concluded that Oakcreek was not capable of meeting a material requirement of the contract. On the

¹²See Hearing Transcript (Tr.) at 81 and 90. Although the Air Force claims that Oakcreek is successfully performing the contract without the software, the Air Force project manager testified that access to the software was absolutely necessary to make repairs (1) in an emergency catastrophic failure, (2) in site unique situations, and (3) to debug the computer systems. Tr. at 71-75, 87-90, and 92. In addition to admitting that these were material contract requirements, the manager further testified that the software was necessary to successfully perform the contract and that the contract obligated Oakcreek to meet these requirements. Tr. at 87, 90-91. Indeed, the contracting officer testified that Oakcreek would be terminated for default if any of the circumstances requiring access were to occur. Tr. at 50.

other hand, it is evident at this time that Oakcreek cannot do so.

We therefore recommend that the Air Force reassess and resolicit its requirements since the record contains evidence that some of the RFP work can only be performed by HFSI; that is, Oakcreek is unable to obtain access to HFSI's proprietary software as required by the RFP. Alternatively, the Air Force should reject Oakcreek's BAFO as technically unacceptable and make award to HFSI, as the only technically acceptable offeror. HFSI is also entitled to the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.¹³


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¹³HFSI also alleged in this protest that: (1) Oakcreek's proposal failed to satisfy the RFP requirements regarding personnel qualifications and experience, (2) that Oakcreek's proposal did not meet the RFP's security requirements, and (3) that the Air Force failed to properly evaluate HFSI's alternate proposal. We have not found these allegations to be meritorious; in any event we need not discuss them in light of our recommendation.