



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Telos Field Engineering

File: B-253492.2

Date: November 16, 1993

Timothy Sullivan, Esq., and Martin R. Fischer, Esq., Dykema Gossett, for the protester.

Robert E. Casey for Employee Owned Maintenance Company, an interested party.

Edward S. Christenbury, Esq., Tennessee Valley Authority, for the agency.

Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency conducted discussions with offerors but failed to request best and final offers; permitting offerors to submit extensive written responses during discussions did not eliminate the possible prejudice arising from the lack of an opportunity to revise proposals in response to discussions.

DECISION

Telos Field Engineering protests the award of a contract to Employee Owned Maintenance Company, Inc. (EOMC), under request for proposals (RFP) No. YJ-93525E, issued by the Tennessee Valley Authority (TVA). Telos contends that the agency improperly failed to request best and final offers (BAFO) at the conclusion of discussions and unreasonably evaluated both Telos's and EOMC's technical proposals.

We sustain the protest.

TVA issued the RFP on September 3, 1992, seeking proposals for a time and materials contract to provide maintenance services for TVA computer hardware at a number of different locations. The contract is for a 2-year base period, with four 1-year options. Section M of the RFP stated that technical factors (specifically, what the RFP called evaluated optional features) and cost would be given equal weight in source selection, and that award would be made to the responsible offeror whose proposal was determined to be most advantageous to the agency. In this regard, the solicitation further stated the following:

"In order to assure that the most advantageous offer is procured, TVA retains the discretion to examine the technical point scores to determine whether a point differential between offers represents any actual significant difference in technical merit. If it is determined that there is not a significant difference in technical merit, cost will become the overriding factor."

Section M also advised offerors that the agency reserved the right to make award on the basis of initial proposals, without conducting discussions.

To implement the RFP award criteria, the agency established a 930-point scheme, not disclosed to offerors, under which 465 points (50 percent of the total) were assigned through the technical evaluation; the other 465 points were reserved for cost. The technical points were assigned according to how well each proposal scored on various aspects of the RFP's evaluated optional features. On the cost side, the proposal with the lowest proposed price received 465 points, while other proposals' cost scores were based on how close their price was to the lowest one. Technical and cost points were then added, and the proposal with the highest total score was deemed to be the most advantageous to the agency.

The agency received 16 proposals, of which three were either withdrawn or rejected as noncompliant. The evaluators determined that they were unable to evaluate the remaining 13 proposals without additional information. In December 9, 1992, letters to the offerors, the agency so advised the offerors and requested detailed "responses" to items in Sections C and M of the solicitation. In the letters to some of the offerors, including Telos, the agency also identified what it termed "deficiencies" in the proposals and asked the offerors to "clarify" those matters. For example, one offeror was told, with respect to three specified subparagraphs of Section C of the RFP, "Your response is non-compliant"; another offeror was advised that its insistence that callers from TVA must be limited to authorized personnel was unacceptable; another offeror was advised that TVA would not allow the offeror the option of administering drug tests. Offerors responded in writing to the matters raised in the December 9 letters, some in considerable detail (Telos's response was more than 60 pages long).

No further discussions were held with offerors, and BAFOs were not requested. Based on the initial proposals and the offerors' responses to the agency's written questions, the evaluators assigned point scores to each technical and cost proposal. To the extent that the evaluators viewed the

responses as different from initial proposals, they treated the responses as modifications to the proposals. For example, the evaluators appear to have given EOMC credit for improving its proposed principal period of maintenance from that offered in the initial proposal.

The highest-ranked technical proposal was submitted by an offeror which is not a party to this protest ("Offeror C"). EOMC's technical proposal was ranked second, Telos's technical proposal received the third highest score.¹ With respect to cost, EOMC's proposal was low, and the agency therefore assigned it all 465 cost points. Telos's proposed price was next low; Offeror C's proposed price was considerably higher.

The agency totaled the technical and cost points and determined that, since EOMC's proposal received the highest combined point score, it was the "most advantageous" to the agency. Telos's point score was next high. The record does not indicate that the agency considered whether Offeror C's technical proposal's higher score represented technical features worth the proposal's higher price. Instead, based solely on the combined technical and cost point scores, a recommendation was reached that award be made to EOMC.

An April 12, 1993, notice in the Federal Register stated that the new business portion of the TVA Board's April 14 meeting would consider the following topic: "Time and Material On-Site Hardware Maintenance and Support Services Contract with Employee Owned Maintenance Company, Subject to Final Review Prior to Execution."

The notice did not include the solicitation number or otherwise identify the procurement at issue; no notice of the proposed award was published in Commerce Business Daily. The agency advised Telos on May 13 that it intended to award a contract to EOMC. Telos protested to our Office on May 18.²

¹The agency conceded during the course of the protest that Telos's technical score had been incorrectly totaled. Correction of the arithmetical error raises Telos's technical score above that of all other proposals.

²Although the protest was filed prior to award, the agency proceeded to award a contract to EOMC notwithstanding the protest, based on a determination that urgent and compelling circumstances significantly affecting the interests of the United States required that award be made. Award was for an interim 9-month contract, and the agency advises that this award was not intended to supersede the contract to be awarded once the protest is resolved.

Telos contends that the agency improperly failed to request BAFOs at the conclusion of the discussions, and lacked a reasonable basis for the technical scores assigned to Telos's and EOMC's proposals and for the determination that EOMC's proposal was the most advantageous to the agency.³ The agency counters that the protest is untimely, because it was not filed within 10 working days of the April 12 notice in the Federal Register. The agency also alleges that its December 9 letters to offerors constituted mere requests for clarifications, not discussions, and that BAFOs were not required. Concerning the alleged errors in scoring technical proposals, the agency denies most of the alleged errors, and argues that the conceded error in totaling the score of Telos's technical proposal did not prejudice Telos because correction of the error would not raise the protester's proposal's combined technical and cost score above that of EOMC.

We first address the timeliness issue.⁴ The April 12 Federal Register notice cannot fairly be read to alert a reader to the agency's intent to make award under this solicitation. The notice did not mention the RFP number or otherwise identify this procurement, and cannot reasonably be construed to have put the public on notice that award in this procurement was imminent. It thus did not trigger the 10-day timeliness period for filing a protest by providing the information from which the protester knew, or should have known, the basis for protest. See 4 C.F.R. § 21.2(a)(2). We therefore conclude that the protest, which was filed within 10 days of TVA's advising Telos that the agency intended to award a contract to EOMC, was timely.

³Telos's protest of the technical evaluation is based on protected information in the agency report made available to Telos's counsel for the first time on June 24, 1993, under a protective order issued by our Office. A supplemental protest raising the technical evaluation issues was filed with our Office on July 9, 1993.

⁴TVA notes that it does not accede to our Office's jurisdiction. Nonetheless, the agency provided all required documentation and otherwise complied with our Bid Protest Regulations. See 4 C.F.R. § 21.3(c) (1993). It is well settled that TVA is subject to our jurisdiction. See, e.g., Monarch Water Sys., Inc., 64 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146.

The next question is whether the agency was required to request BAFOs from offerors. Resolution of that question is governed by the Federal Acquisition Regulation (FAR).⁵ FAR § 15.611 provides, in pertinent part, as follows:

"(a) Upon completion of discussions, the contracting officer shall issue to all offerors still within the competitive range a request for best and final offers. Oral requests for best and final offers shall be confirmed in writing.

"(b) The request shall include--
 (1) Notice that discussions are concluded;
 (2) Notice that this is the opportunity to submit a best and final offer;
 (3) A common cutoff date and time that allows a reasonable opportunity for submission of written best and final offers"

This provision requires the contracting officer to provide common notification to offerors that discussions have been completed and that offerors must, by a common date, submit their "best and final" offers. The purpose of this requirement is to ensure that all offerors are being treated fairly and on an equal basis. See, e.g., 48 Comp. Gen. 536 (1969).

TVA does not dispute that BAFOs must be requested upon completion of discussions. However, TVA argues that no discussions were conducted here. In the agency's view, the December 9 letters to the offerors did not constitute discussions. Instead, the agency contends that the letters and the offerors' responses were simply clarifications.

The difference between clarifications and discussions is set forth in FAR § 15.601:

" 'Clarification' . . . means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. . . . Unlike discussion . . . , clarification does not give the offeror an opportunity to revise or modify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision."

⁵The FAR applies to automatic data processing equipment procurements for all federal agencies, even where such procurements would not otherwise be subject to the FAR. 40 U.S.C. §§ 472 (a)-(b), 759(a) (1988); 41 C.F.R. § 201-39.102(b) (1992). TVA agrees that the FAR applies to this procurement.

"'Discussion' . . . means any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification) . . . that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal."

The issues raised in the agency's December 9 letters to offerors were plainly more than clarifications. The letters identified deficiencies in proposals, and they stated that the information requested was essential for determining the acceptability of proposals. The agency's evaluation of offers assumed that the responses to its letters modified offerors' proposals, at least as to those offerors that were informed of specific aspects of their initial proposals which were unacceptable. EOMC's relatively high score for its principal period of maintenance was apparently based on what the agency perceived to be a proposal modification introduced for the first time in that company's response. The communications between TVA and the offerors here thus fall within the definition of discussions, not of clarifications. Because discussions were conducted, it was improper for TVA to make award without first providing all offerors an opportunity to revise their proposals. Astro-Med, Inc., B-232000, Nov. 21, 1988, 88-2 CPD ¶ 500.

TVA contends that Telos was not prejudiced by the agency's failure to request BAFOs. Specifically, the agency argues that all offerors were treated equally and that Telos's lengthy response to the December 9 letter demonstrated that the agency had afforded the company an adequate opportunity to provide additional information.

We conclude that the offerors were not treated equally and that Telos was prejudiced. While the agency argues that offerors were permitted only to clarify their proposals rather than modify them, this was clearly not the case. The record shows that the letters to several offerors identified specific areas of non-compliance with requirements. EOMC, which received a more general notice of deficiencies, was allowed to modify its proposal at least in the area of the proposed principal period of maintenance, and this modification had a favorable effect on EOMC's ultimate technical score. On the other hand, Telos does not appear to have understood the TVA letter as allowing significant revision to its offer. Given the offerors' different responses to TVA's discussion request, it is clear that offerors were not treated equally. Telos alleges that, if given the opportunity to submit a revised proposal, including prices, it would have made significant revisions.

There is no basis to assume that this would not have occurred, and the outcome of the competition may well have been different.

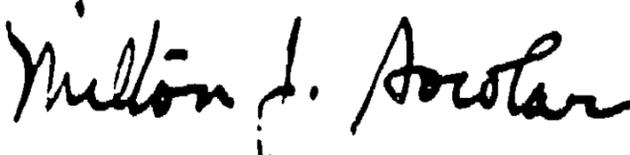
We think the existence of prejudice is further suggested by the agency's concession that Telos's proposal was higher rated technically than the awardee's. Thus, any BAFO price reduction by Telos which would have narrowed the price difference between Telos and the awardee could have resulted in a different award decision. In the circumstances present here, the protester was prejudiced by the agency's failure to request BAFOs, and we therefore sustain the protest.⁶

We recommend that TVA reopen negotiations with all offerors whose proposals are in the competitive range, conduct discussions, and request BAFOs. The agency should then make award on the basis of the BAFO which the agency finds represents the most advantageous proposal.⁷ If an offeror other than EOMC is selected for award as a result of the evaluation of BAFOs, the interim contract with EOMC should

⁶Telos also challenges various specific aspects of the technical evaluation of both Telos's and EOMC's proposals. Because of our conclusion regarding the requirement that BAFOs be requested, we need not address the specific technical evaluation issues. We note, however, that at least some of the disputed technical scores involve straightforward informational questions which should be readily resolvable during reopened discussions, as recommended below.

⁷If evaluation of BAFOs creates the need for a cost/technical tradeoff, the agency must determine, consistent with the RFP weighting of cost and technical factors, whether the qualitative benefit which the agency expects to derive from the proposal with the higher technical score is worth its higher cost. International SOS Assistance, Inc., B-245571.5, Jan. 26, 1993, 93-1 CPD ¶ 273; NUS Corp.; The Austin Co., B-221863; B-221863.2, June 20, 1986, 86-1 CPD ¶ 574. While point scores can provide guidance to decisionmakers in resolving a cost/technical tradeoff, the scores alone may not serve as a substitute for reasoned analysis in reaching a source selection decision. See Met-Pro Corp., B-250706.2, Mar. 24, 1993, 93-1 CPD ¶ 263; NUS Corp.; The Austin Co., supra. Here, the agency improperly relied exclusively on combined technical and cost point scores instead of performing a reasoned cost/technical tradeoff analysis--both in the initial selection of EOMC's proposal rather than Offeror C's, and in the argument that Telos's proposal would not be in line for award, even after it became apparent that Telos's technical proposal, once the scores were added correctly, was ranked highest.

be terminated or, if that contract is near completion, the award under the RFP should commence upon completion of the interim contract. We find that Telos is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees, 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f)(1), Telos's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to TVA within 60 days after receipt of this decision.

for 
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