



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

Decision

Matter of: Sargent Controls & Aerospace
File: B-254976
Date: February 2, 1994

Peter B. Jones, Esq., Jones & Donovan, for the protester.
Jonathan H. Kosarin, Esq., and Harry D. Boonin, Esq.,
Department of the Navy, 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

Under a "public/private" competition for the repair of aircraft components, where the request for proposals (RFP) stated that the government would analyze the apparent successful offer to determine whether the proposal reflected a realistic estimate of the total price required to satisfy the work requirement, the Navy contracting officer was legally obligated to so analyze the successful offeror's proposal. Where Defense Contract Audit Agency (DCAA) conducted audit of depot's proposal and determines that the depot's proposal is acceptable for evaluation and states that it did not perform cost realism analysis, DCAA's report does not satisfy the RFP's requirement to ascertain the realism of the successful offeror's costs.

DECISION

Sargent Controls & Aerospace protests its exclusion from the competitive range and the Department of the Navy's assignment of a work order under request for proposals (RFP) No. N00383-93-R-0410, to the Naval Aviation Depot, Alameda (NADEP), for the repair and overhaul of an aircraft flap actuator. Sargent contends that NADEP's cost was not properly evaluated and certified in the source selection.

We sustain the protest.

The competition was conducted pursuant to statutory authorization contained in the Department of Defense (DOD) Appropriations Act, 1993, Pub. L. No. 102-396, § 9095, 106 Stat. 1876, 1924 (1992) (Appropriations Act) and the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 381, 106 Stat. 2315, 2392 (1992). These statutes permit DOD to acquire the repair of aircraft

components through competition between DOD maintenance activities and private firms with the provision that the Defense Contract Audit Agency (DCAA) "certify that the successful bids include comparable estimates of all direct and indirect costs for both public and private bids." Under a "public/private" competition of this sort, no contract is awarded if a Naval aviation depot is selected; rather, in that circumstance, the government "assigns a work order."

The RFP contemplated the award of a firm, fixed-price requirements contract with a base period of 3 years, plus two 1-year options. The contract was for the repair and overhaul of a flap actuator used on the Navy's ES3A/S3A/S3B aircraft to move the flaps on the trailing edge of the aircraft's wings in order to control the ascent and descent of the aircraft. Sargent is the original equipment manufacturer and is the only authorized source for new actuators. In the past, NADEP was the only certified repair station. The competition was limited to these two sources because the technical data required for full and open competition is not available.

The RFP included a section entitled "L-1283 - Explanation of the Competition," which described the procurement as a "public/private" competition and cited the Appropriations Act. This section also advised offerors that "as part of the evaluation criteria, the Government will analyze the apparent successful offer to determine whether the proposal reflects a realistic estimate of the total price required to satisfy the work requirement." In Section M, "Evaluation Factors for Award," the RFP explained that the quantities listed in the RFP were the Navy's best estimates of the repairs that would be required under the base and option periods of the contract, and that offers would be evaluated on the basis of the total of the prices proposed.

Sargent contacted the Navy to request historical failure data for the actuator or "some type of info to help with pricing." The closing date for receipt of proposals was postponed while the Navy attempted to obtain the information from NADEP. Eventually, the information was transmitted to Sargent, and the closing date was extended to September 30, 1993. Subsequently, a "post-closing amendment" was issued to incorporate additional material and the closing date was again extended, to October 30. Among the additional material was the repair price history from the previous year and the statement that "public activities will include the

comparability factors in their proposals in accordance with the Cost Comparability Handbook,"¹

Again, Sargent and NADEP submitted timely proposals. Because NADEP's price was significantly lower than Sargent's, the contracting officer advised NADEP that there was a disparity between the price NADEP had submitted and "other prices received," and requested that NADEP review its price, including its materials costs, suggesting that NADEP may have made a mistake when preparing its offer. NADEP was instructed to confirm whether its proposed price took into account all specified requirements, including all materials required for the repairs. NADEP confirmed its price as submitted.

The Navy submitted NADEP's proposal to DCAA. The Navy requested that the agency determine whether the proposal was in compliance with the Cost Comparability Handbook (CCH) and also asked DCAA to audit NADEP's accounting and estimating systems and report on the adequacy of the depot's financial system for competition. DCAA issued its draft audit report to the contracting officer, and requested comments on the draft from NADEP. After NADEP had commented, DCAA submitted its final audit report.

The summary of DCAA's audit report states that in DCAA's opinion, "NADEP Alameda's accounting system (i) is not adequate for identifying, accumulating and billing costs under a competitive depot maintenance procurement, (ii) does not produce valid reliable data for pricing follow-on contracts, and (iii) the internal controls require strengthening." DCAA identified certain conditions that needed to be corrected before a competitive award could be made, such as an inadequate timekeeping system and inadequate internal controls in accounting for certain materials, and recommended that the contracting officer request a follow-up accounting system review after NADEP had corrected the cited conditions.

¹The Cost Comparability Handbook was developed by the Defense Depot Maintenance Council Cost Comparability Committee, and is used in public/private competitions to adjust proposals submitted by DOD sources to assure that they include comparable estimates of all direct and indirect costs and thus can be compared with proposals submitted by private vendors. See Canadian Commercial Corp./Heroux, Inc., 72 Comp. Gen. 312 (1993), 93-2 CPD ¶ 144.

The contracting officer determined that Sargent's offer was outside the competitive range, based on the disparity between the two offerors' prices.² The contracting officer apparently took this step notwithstanding the questions that had arisen regarding the validity of NADEF's price (which the contracting officer had suspected of containing a mistake), as well as DCAA's recent statement that the depot's accounting system was inadequate for identifying, accumulating, and billing costs under a competitive depot maintenance procurement, and could not be relied upon to provide valid historical cost data.

On June 14, NADEF submitted a revised proposal in response to recommendations by DCAA that certain comparability factors needed to be adjusted to comply with the CCH. The contracting officer then requested that DCAA audit NADEF's revised proposal for compliance with the CCH.

On July 16, DCAA submitted its report on NADEF's proposal. That report cited the audit report that DCAA had issued after reviewing NADEF's accounting system to discuss circumstances affecting the audit of the proposal. The proposal audit report states that NADEF's "timekeeping policies, procedures, practices, and internal controls are inadequate to ensure accurate segregation and accumulation of labor charges to proper cost objectives. Consequently, there is no assurance that (i) NADEF Alameda is accurately or equitably charging, allocating or billing labor costs to government awards or (ii) labor history can be relied upon for pricing follow-on contracts." The report similarly concluded that "there is no assurance that (i) NADEF Alameda is accurately or equitably charging, allocating or billing material costs to government contracts or (ii) material history can be relied upon for pricing follow-on contracts." In addition, it found that the depot "engages in cost accounting and estimating practices which are noncompliant with Chapters 71 and 76 of the DOD Accounting Manual," pointing out that "compliance with the DOD Accounting Manual is required by the [CCH]." These criticisms were contained in paragraph 2 of the audit report.

In its summary of its audit, DCAA states, "[e]xcept as discussed in paragraph 2 (as quoted above), NADEF Alameda, in our opinion, has submitted adequate cost or pricing data.

²The record includes a handwritten, unsigned, and undated note stating that "the contracting officer has determined that the offer received from Sargent is outside of the competitive range based on [the prices proposed by the two offerors]." However, Sargent was never notified of its exclusion; it first discovered that its offer had been so excluded in the Navy's protest report.

The proposal was prepared in accordance with the Cost Comparability Handbook, applicable Cost Accounting Standards and appropriate provisions of FAR and DFARS. Therefore, we consider the proposal to be acceptable for evaluation by the requester." (Emphasis added.) The Navy contracting officer concluded that the auditors had certified the proposal as acceptable.

The contracting officer prepared a memorandum in which she sought approval to determine NADEP the successful offeror, comparing the prices Sargent and NADEP had submitted and stating "although DCAA identified several areas of inadequacy and non-compliance with the DOD Accounting Manual in the accounting system, they did certify that the proposal was acceptable and in compliance with the (CCH)." The assignment of the work order to NADEP was approved on July 27. The following day, the contracting officer notified Sargent and NADEP that NADEP's offer was the successful one, and provided the unit prices for which the work had been assigned. The prices ranged from \$5,730.24 for the initial year, and increased slightly each year to a final-year price of \$7,146.69.

On July 30, Sargent wrote to the contracting officer, asking to review NADEP's offer and the statement of work on which it was based because of the disparity between its own offered price and the amount of the winning offer. The contracting officer advised Sargent that the statement of work was the same as was contained in the solicitation, and provided a copy of NADEP's cost comparability worksheets, with all proprietary data (i.e., virtually all cost figures) redacted. Sargent submitted a protest to the contracting officer, contending essentially that the two offers could not have been based on comparable estimates or even on the same work. Sargent noted in its protest that it had calculated its own cost estimates based on parts failure data the agency had provided, which listed replacement factors for various materials; according to Sargent's estimates, the total cost for replacement materials for an average unit had to exceed the amount NADEP had submitted as its entire unit price.

In the Navy's response to Sargent's agency-level protest, the contracting officer concluded that the protest was untimely filed, based on her determination that it had to be filed within 10 working days of the date on which Sargent discovered that it was not the successful offeror. However, the contracting officer then discussed the merits of Sargent's protest, concluding that the protest would have

been denied even if it had been timely filed. This conclusion was explained in part as:

"there is no reason to believe that the proposal submitted by [NADEP] was unrealistic in its estimate of its costs. Generally, the prices proposed by [NADEP] were in line with the FY 92 repair price history (i.e., \$7,110.00) which was provided to all prospective proposers. . . . More specifically, after a thorough review, NADEP's proposal was determined to be in compliance with the [CCH], with the applicable Cost Accounting Standards and with the appropriate provisions of FAR and DFARS."

Sargent's protest to our Office followed, asserting essentially the same arguments that were raised before the Navy.

As a preliminary matter, the Navy challenges the timeliness of the protest, since Sargent did not file its agency-level protest within 10 working days of when it learned of the award and the award amount. We disagree. Sargent requested information about the basis of NADEP's price within 2 days of its receipt of the award notice. Given the disparity in prices, Sargent sought to ascertain whether the depot's proposal was based on the same statement of work as its own proposal, and expected that the Navy would respond by revealing to Sargent whether any cost comparability adjustments had been made to the depot's proposal. Since the RFP had explicitly distinguished between "awarding a contract" to a private vendor and "assigning a work order" to a depot, stating that "[a]ny project work order issued to a Naval Aviation Depot, . . . will not have the same terms and conditions as contained in this solicitation," and pointing out that the FAR does not apply to the public sector, Sargent believed that there might be some additional information about the basis of NADEP's offer that would be made available to Sargent for its review. It was not until the agency responded to Sargent's inquiry by asserting that NADEP's offer had been based on the same statement of work as Sargent's that Sargent reasonably concluded that it would not receive the information it sought without filing a formal protest. Since Sargent did so within 10 working days after receiving the Navy's response, the protest to the Navy was timely. 4 C.F.R. § 21.2(a)(2) (1993), Applied Remote Tech., Inc., B-250475, Jan. 22, 1993, 93-1 CPD ¶ 58. Since Sargent's protest to our Office was filed within 10 working days after it received the agency's adverse ruling on its agency-level protest, this protest is also timely. See 4 C.F.R. § 21.2(a)(3).

Sargent protested initially that NADEP's cost figures were neither realistic nor comparable with its own estimates, and that either NADEP had not included comparable estimates of costs or the Navy must have provided different information to the two offerors (referring to the parts failure/replacement data). After reviewing the agency's protest report, Sargent asserts that DCAA failed to provide the certification of comparability that it was required by law to provide. Moreover, it contends that NADEP was not eligible for award because of the inadequacies that DCAA's audit report identified in NADEP's accounting system.

Evaluation and award in negotiated procurements are required to be made in accordance with the terms of the RFP. NITCO, B-246185, Feb. 21, 1992, 92-1 CPD ¶ 212. Here, the solicitation expressly stated that "the Government will analyze the apparent successful offer to determine whether the proposal reflects a realistic estimate of the total price required to satisfy the work requirement." Thus, the agency was legally bound to review NADEP's offer in this manner, whether or not it received assistance from DCAA upon which it could rely.

It is clear from the record that the contracting officer did not analyze NADEP's offer to determine if the total price was a realistic estimate of the work, but relied on "DCAA's audit and certification." However, DCAA's statement that the depot's proposal was "acceptable for evaluation by the requester" [emphasis added] implies that DCAA expected the Navy to perform an evaluation or cost realism analysis itself; indeed, DCAA confirms this view in statements submitted to our Office, asserting that "[cost realism] analyses are a part of the proposal evaluation process under the cognizance of the contracting officer," and that to require DCAA to perform a cost realism analysis would be "contrary to the requirements of the DCAA charter and the FAR." In fact, in its audit of NADEP's accounting system, DCAA reported that "NADEP Alameda's accounting system is not adequate for identifying, accumulating, and billing costs under a competitive depot maintenance contract." Given the deficiencies it found in NADEP's accounting system and timekeeping procedures, DCAA did not quantify the errors that the proposal might contain, instead choosing to qualify its findings.

We think that once it became apparent that DCAA had not performed any cost realism analysis of the depot proposal, the Navy was required--by the terms of the RFP--to satisfy this requirement itself. We think that it was unreasonable for the contracting officer to accept DCAA's report that purported to certify NADEP's proposal for comparability as somehow satisfying the RFP's cost realism requirement, since DCAA only "certified" that it considered the proposal

"acceptable for evaluation by the [Navy]" and since the report contained significant qualifications concerning the validity of the depot's costs.³ Further, while the RFP required that the "apparent successful offer" be analyzed for cost realism, we do not think any reasonable or meaningful competitive range determination could be made, under the facts presented here, prior to a proper cost realism analysis of the depot's proposal. See generally S&M Property Mgmt., B-243051, June 28, 1991, 91-1 CPD ¶ 615. The contracting officer had no basis at the time to conclude that the depot's total cost was reasonable, since there was no reliable historical data or government estimate available. The DCAA preliminary report showed the significant deficiencies in NADEP's accounting system, as described above. Also, the contracting officer had written to NADEP suggesting a mistake in NADEP's proposal cost figures and specifically identified its low material costs as a concern. While NADEP confirmed its costs, it provided no explanation for its low costs that would have resolved the contracting officer's concerns about NADEP's proposal. We see no reasonable basis for the exclusion of Sargent's fixed-price proposal, in light of the lack of any assurance that the only other offer was realistic.

We sustain the protest because the Navy failed to evaluate the proposals in the manner prescribed by the RFP.

³In response to the protester's comments to the agency report, the Navy has furnished DCAA's comments. DCAA's comments do not change our conclusion above. In these comments, submitted after the Navy provided its protest report, DCAA asserts for the first time that its paragraph 2 qualifications do not affect its overall view that NADEP's costs were not materially understated. In essence, DCAA now argues that the degree of uncertainty in NADEP's cost figures was not great enough to invalidate the offer or preclude certification. However, DCAA has not provided any support for these assertions that would contradict the finding, in its audit report, that it could not determine "the full impact of the accounting system deficiencies on NADEP's . . . proposal or whether the proposed costs were understated (or overstated) as a result of these deficiencies." DCAA again concedes that it qualified its audit results "to the extent that direct labor, material, and indirect expenses may be understated." DCAA's comments have not established, to our satisfaction, any basis to disregard the significant qualifications in its original report. Moreover, although DCAA now suggests that NADEP's proposed costs fall within an acceptable range, its continuing insistence that it did not analyze the realism of NADEP's costs renders that suggestion unreliable.

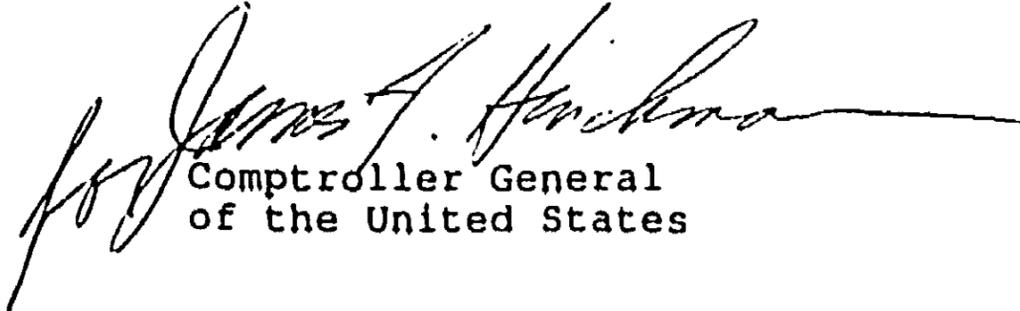
Under Section 9095 of the Appropriations Act, DCAA was required to certify that "successful bids" included comparable estimates of all direct and indirect costs, Canadian Commercial Corp./Heroux, Inc., 72 Comp. Gen. 312 (1993), 93-2 CPD ¶ 144. As described above, DCAA performed an audit of the depot's proposal and concluded that the proposal was acceptable for evaluation. The Navy's position is that DCAA's conclusion that the proposal was acceptable for evaluation constituted the required certification of the cost comparability of the depot's proposal to Sargent's proposal. The protester argues that DCAA found significant problems with NADEP's cost proposal and did not make the required certification. In view of our conclusion that the Navy did not properly evaluate the proposals under the RFP terms, it is unclear which offer would be in line for award under a proper evaluation; therefore, we need not address whether or not DCAA's certification satisfied the Appropriations Act requirement.

Given the uncertainties surrounding the validity of NADEP's prices, we conclude that it was improper for the Navy to exclude Sargent's proposal from the competitive range on the basis of the disparity between its price and NADEP's price. Without a reasonable government estimate of the costs NADEP would incur in performing the work, the agency could not reasonably rely on the price disparity to conclude that Sargent did not have a realistic chance for an award.⁴ Accordingly, we recommend that the Navy re-evaluate the competing proposals, consistent with the evaluation criteria discussed above, before making its competitive range determination.⁵ We note that the Navy may of course take whatever additional steps may be necessary to complete this competition, such as conducting negotiations and requesting best and final offers from offerors in the competitive range.

⁴For example, the protester's assertion that NADEP's total unit cost was less than the cost of replacement materials that would be required to repair an average unit remains unaddressed in the record.

⁵We point out, in this connection, that while the Navy must defer to DCAA's analyses of probable costs where DCAA has performed such analysis, see Canadian Commercial Corp./Heroux, Inc. supra, to the extent that the DCAA's analyses are insufficient to enable an evaluation of cost realism by the Navy, the Navy must take appropriate action designed to assure that the costs relied upon are realistic, be that through its own audit or an independent audit and verification of the depot's cost figures.

Sargent is also entitled to the 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), Sargent should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision.


Comptroller General
of the United States