

Comptroller General
of the United States

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Washington, D.C. 20548

REDACTED VERSION

Decision

Matter of: Biospherics, Inc.

File: B-253891.2; B-253891.3; B-253891.4;
B-253891.5

Date: November 24, 1993

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Joseph J. Brigati, Esq., and Matthew D. Anhut, Esq., Kirkpatrick & Lockhart, for R.O.W. Sciences, Inc., an interested party.

Terrence J. Tychan, Department of Health and Human Services, for the agency.

Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against proposed contract award under solicitation requiring that offerors disclose whether proposed personnel are offered in other pending proposals is sustained where intended awardee's best and final offer misrepresents the commitments of its proposed personnel by stating that none is proposed in any other proposal when, in fact, several personnel, including all of the "key personnel," were offered as dedicated staff in another proposal.

DECISION

Biospherics, Inc. protests the proposed award of a contract to R.O.W. Sciences, Inc., under request for proposals (RFP) No. NCI-CO-33003-61, issued by the Department of Health and Human Services, National Cancer Institute (NCI) for technical writing and publication storage and distribution services. The protester alleges, among other things, that

The decision issued on November 24, 1993, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

R.O.W. improperly "double bid" the same personnel in two separate proposals without advising the agency.

We sustain the protest.

NCI is responsible for preparing and distributing information on cancer to patients and family members, the general public, health professionals, students and educators, and government officials. To assist in meeting that responsibility, NCI contemplated the award of a cost-plus-fixed-fee contract to provide technical writing and publications storage and distribution services in response to cancer-related inquiries over a 5-year period. The RFP stated that, among other tasks, the contractor is to respond to written and telephonic inquiries, answer a toll-free telephone line for publication orders, maintain and distribute NCI publications, and maintain a library of appropriate medical texts and journals for reference.

The RFP required offerors to identify existing contracts to which their essential proposed staff were committed and specify the level of commitment under those contracts. Additionally, the RFP required offerors to disclose "outstanding proposals" which "commit levels of effort" by the same proposed personnel. Finally, offerors were to provide a "statement of the level of effort to be dedicated to any resultant contract awarded to your organization for those individuals designated and cited in this proposal." The RFP also cautioned that:

"OFFERORS SHOULD ASSURE THAT THE PRINCIPAL INVESTIGATOR, AND ALL OTHER PERSONNEL PROPOSED, SHALL NOT BE COMMITTED ON FEDERAL GRANTS AND CONTRACTS FOR MORE THAN A TOTAL OF 100% OF THEIR TIME. IF THE SITUATION ARISES WHERE IT IS DETERMINED THAT A PROPOSED EMPLOYEE IS COMMITTED FOR MORE THAN 100% OF HIS OR HER TIME, THE GOVERNMENT WILL REQUIRE ACTION ON THE PART OF THE OFFEROR TO CORRECT THE TIME COMMITMENT."

The RFP provided that the technical proposals would receive paramount consideration in the award selection and that, where two or more offerors are approximately equal in technical ability, cost may become a significant factor. The RFP also stated, however, that the agency had the right to make award "to the best advantage of the Government, cost and other factors considered." The RFP listed the following technical evaluation factors and their relative weights:

1. technical approach (40 percent);
2. personnel (30 percent);
3. staffing and management (20 percent); and
4. facilities and management (10 percent).

Under the personnel factor, offerors were to "[d]escribe the experience and qualifications of personnel who will be assigned for direct work on this program" and to provide information which will "show the composition of the task or work group, its general qualifications, and recent experience with similar equipment or programs." Several subfactors were also listed such as "[w]orking experience with cancer or with cancer-related topics," "[e]xperience in communicating health information," and the "experience and communication skills of the writing staff."

NCI received five proposals. Three proposals, including those submitted by Biospherics and R.O.W., were determined to be within the competitive range. After discussions were held, the agency requested best and final offers (BAFO), including the following: "For all individuals proposed, list/update the list previously submitted . . . concerning time commitments." (Emphasis in original.)

R.O.W. submitted its BAFO by the February 25 closing date. R.O.W.'s BAFO contained a chart, as had its initial proposal, labeled "Availability of Proposed Staff." The chart listed [deleted] individuals who were proposed for 100 percent of their time, including [deleted]. The chart stated that [deleted] individuals were committed on existing projects for some portion of their time but that each would be relieved of all other contractual responsibilities upon award of this contract. The chart listed the "Time Proposed on Other Projects" for each of the [deleted] proposed individuals as "0."¹

After submission of the February 25 BAFOs, the NCI evaluators concluded that R.O.W.'s BAFO was technically superior to Biospherics' BAFO and lower in cost. Biospherics' costs for the 5-year contract period were evaluated as [deleted], while R.O.W.'s costs were evaluated at [deleted]. The agency prepared a "Source Selection Determination" signed by the contracting officer on March 26, which set forth the strengths and weaknesses of the proposals in the competitive range. Among other strengths noted in R.O.W.'s proposal were [deleted]. The contracting officer concluded that R.O.W. should be selected for award. The proposed award selection was approved by several agency officials in March. NCI has not awarded the contract, pending our resolution of the protest.

¹ROW's proposal did not otherwise indicate that any proposed individual was proposed in any capacity in an outstanding proposal. However, R.O.W.'s chart included a footnote which qualified the category "Time Proposed on Other Projects" by adding the phrase "as key personnel."

Biospherics argues that NCI's technical evaluation of R.O.W.'s proposal under the personnel factor was flawed since, contrary to the instruction in the RFP, and in the BAFO request, R.O.W. failed to disclose in its proposal that several of its proposed personnel, including the [deleted] were also offered as dedicated staff under another RFP. The record shows that on August 19, 1992, prior to submitting its BAFO under this RFP, R.O.W. had submitted a proposal to the National Heart, Lung, and Blood Institute (NHLBI). That offer included as "dedicated staff" [deleted] individuals later proposed under the NCI RFP for 100 percent of their time. The individuals proposed by R.O.W. in both offers included [deleted].² This "overlap" of proposed personnel was not disclosed in R.O.W.'s BAFO under the NCI solicitation.

The protester points out that the personnel factor was worth 30 percent of the technical evaluation under the NCI solicitation and that the agency considered personnel a strength of R.O.W.'s proposal. According to the protester, since R.O.W. never disclosed that it was proposing some individuals on both the NCI and the NHLBI contracts, the agency did not have an opportunity to assess the risk that if R.O.W. received the NHLBI contract some proposed personnel would not be available for the NCI contract. Biospherics contends that to allow R.O.W. to receive evaluation credit for personnel that may not actually perform the contract undermines the integrity of the competitive procurement process.

NCI and R.O.W. argue that, with respect to the overlap of personnel on the two contracts, R.O.W. intends to propose satisfactory substitutes. They argue also that there is no overlap among the personnel considered "key" under each contract. In this regard, the agency states that "it has protected the government's interests by specifying that four of the personnel proposed by R.O.W. are "key personnel," while only one person was designated as "key" under the NHLBI contract. R.O.W. also argues that there is nothing improper in proposing the same personnel in more than one proposal, provided they are offered "in good faith."

Proposing to employ specific personnel that the offeror does not expect to actually use during contract performance has an adverse effect on the integrity of the competitive procurement system and generally provides a basis for proposal "rejection." Unisys Corp., B-242897, June 18, 1991, 91-1 CPD ¶ 577. However, since a vendor has no assurance that it

²R.O.W.'s BAFO for the NHLBI contract, submitted March 15, 1993, removed from the dedicated staff for that contract the individual proposed on the NCI contract as [deleted].

will be awarded every contract for which it submits a proposal, the fact that a vendor offers the same individuals for more than one on-going procurement does not mean that the proposed individuals are being offered without any expectation of this availability. Nonetheless, where an offeror does misrepresent the availability of proposed personnel, the validity of the technical proposal evaluation can be compromised where proposals are evaluated based upon the qualifications of the personnel proposed. CBIS Federal Inc., 71 Comp. Gen. 6 (1992), 92-1 CPD ¶ 308.

Here, we agree with the protester that R.O.W.'s BAFO contained misrepresentations, and we conclude that these misrepresentations compromised the agency's evaluation of R.O.W.'s proposed personnel. Despite the RFP's specific requirement that offerors identify outstanding proposals which commit levels of effort by the same proposed personnel, R.O.W.'s February 25 BAFO did not disclose that [deleted] of its proposed personnel were also proposed in the firm's pending proposal submitted to NHLBI on August 19, 1992. While we agree with R.O.W. that the agency anticipated the possibility that individuals proposed for the NCI contract might also have been proposed for other contracts, the RFP itself and the BAFO request specifically addressed this possibility by requiring that offerors disclose such information. This information was required presumably to allow the agency to consider, in evaluating proposals, the possibility that individuals proposed might become unavailable because of other contract commitments that would arise. The agency was precluded from doing that here because R.O.W.'s BAFO incorrectly stated that none of its proposed personnel were proposed for other contracts.

As explained above, personnel was the second most important evaluation factor and, under the RFP, was to account for 30 percent of the overall technical evaluation score. Moreover, it is clear from the source selection statement, which was approved by the contracting officer and several other agency officials, that R.O.W.'s high technical evaluation rating reflected the agency's favorable view of R.O.W.'s proposed personnel. [deleted]. Had R.O.W.'s proposal been candid, NCI's technical evaluation and overall conclusions about R.O.W.'s staff strength might have been different and R.O.W. might not have been selected for award.

We are not persuaded by NCI's argument that it protected the government's interests by identifying [deleted] key personnel who could not be substituted without the agency's approval. The solicitation required offerors to identify, for the project director, the principal investigator, and other "proposed key professional individuals," existing contracts and outstanding proposals under which these individuals were or would be committed, and the BAFO request explicitly

required R.O.W. to disclose whether any proposed personnel had been offered in other proposals. As stated above, this information presumably was to be considered in the evaluation of proposals and, as noted, the evaluators identified as an R.O.W. strength that all proposed staff "offer dedicated expertise."

The designation of key personnel was not related to these RFP and BAFO requirements. The RFP incorporated by reference Department of Health and Human Services Acquisition Regulation (HHSAR) Clause No. 352.270-5, entitled "Key Personnel." This clause provides:

"The personnel specified in this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, the Contractor shall notify the Contracting Officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the program. No diversion shall be made by the contractor without the written consent of the Contracting Officer."

The RFP did not define "key personnel." Instead, it included a second clause titled "KEY PERSONNEL" which provided that the individuals "considered to be essential to the work being performed hereunder" would be "determined during negotiations." These key personnel clauses did not require offerors to identify key personnel in their proposals--they provided only that key personnel would be "determined during negotiations," and in fact R.O.W.'s key personnel were designated after completion of the evaluation process, "in anticipation of award." Thus, it is clear that the concern for key personnel--those for whom substitutes could not be provided without agency acquiescence--was separate and distinct from the requirements regarding "all" personnel and their existing or proposed use on other contracts; we fail to see how the designation of key personnel cures an evaluation that was predicated on inaccurate information and may have resulted in a selection that would not have been made if accurate information had been provided in R.O.W.'s proposal.

R.O.W. clearly understands this to be the case. In its initial proposal and in its BAFO R.O.W. identified [deleted] personnel to be used in contract performance and identified (as "O") their time proposed on other projects--none of these people was identified in the proposal as "key."

We sustain the protest. Since award has not been made, we recommend that the agency reopen discussions with the competitive range offerors and request new BAFOs from those firms. Since we understand that R.O.W. has been awarded the NHLBI contract, the agency should ensure that R.O.W.'s new BAFO here accurately reflects the personnel it will use on this contract if it receives the award.⁴ We also find Biospherics to be entitled to reimbursement of its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. §§ 21.6(f) and 21.6(d) (1993). In accordance with 4 C.F.R. § 21.6(f), Biospherics' certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

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⁴In four other protests, Biospherics argues that the agency engaged in improper post-BAFO discussions with R.O.W., that the agency unreasonably evaluated Biospherics' BAFO, that an agency employee assigned to evaluate the BAFO was biased against Biospherics, and that R.O.W.'s BAFO is unacceptable [deleted]. In light of our decision and recommendation, we do not decide these protests. Nonetheless, before deciding who should evaluate the new BAFOs, NCI should consider the allegations of bias that have been made.