Comptroller General
of the United States

Washington, D.C. 20548

1021196

Decision

Matter of: L&E Associates, Inc.

File: B-258808.4

Date: June 22, 1995

Jacob B. Pompan, Esq., and Neil H. Ruttenberg, Esq., Pompan, Ruffner & Werfel, for the protester.
Rosie L. Allen for MELA Associates, Inc., an interested party.
Mike Colvin, Department of Health and Human Services, for the agency.
Christina Sklarew, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly rejected best and final offer under procurement for a firm, fixed-price contract because the offer allegedly did not provide firm labor rates is sustained where the protester's price structure--including fixed rates for the base and option years and noting that any wage increases for labor categories subject to the Service Contract Act (SCA) would only be adjusted by changes in Department of Labor wage tables--did not render its offer indeterminable, but was in fact consistent with the SCA.

DECISION

L&E Associates, Inc. protests the award of a contract to MELA Associates, Inc. by the Department of Health and Human Services (HHS) under request for proposals (RFP) No. 263-94-P(DF)-0611, for telephone switchboard operators for the National Institutes of Health.

We sustain the protest.

The solicitation contemplated the award of a firm, fixed-price services contract with a base year and 4 option years. The fixed prices were based on multiplying fixed rates per hour proposed by the offeror by hours specified in the schedule. Award was to be made to the offeror submitting the proposal considered most advantageous to the

government. Under the solicitation, price and technical merit were each to be worth 50 points in the selection decision.

MELA and L&E submitted proposals. When the agency awarded the contract to MELA as the low-priced offeror, L&E protested the agency's evaluation of proposals. In response to that protest, the agency decided to reopen the competition. In addition, the agency reviewed both proposals and concluded that L&E's proposal was unacceptable because it allegedly did not provide fixed labor rates for all labor categories in the option years.

The second BAFO request to L&E stated the following:

> "The contract type is firm fixed price with fixed labor rates for the base year and all option years". Escalation factor(s) if any, must be applied to all labor categories in the option years."

MELA's second BAFO was identical to its first BAFO. L&E's second BAFO offered a lower overall price but no change in the pricing structure that the contracting officer had found unacceptable. When the contracting officer reviewed the second BAFOs, she decided that L&E's offer still contained contingent prices and rejected the offer. The initial decision to award the contract to MELA was affirmed. L&E protested again, arguing that its offer was not contingent and that the agency failed to conduct meaningful discussions with the firm concerning the perceived errors in L&E's pricing structure.

Based on our review of the record, we conclude that the agency improperly rejected L&E's proposal. In our view, L&E's prices were not indeterminable because of any wage rate contingency.

Because the procurement is primarily for the provision of services, it is subject to the Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. §§ 351-358 (1988), which requires that employees must normally be paid at least the minimum hourly wages set forth in Department of Labor (DOL)

area wage determinations. 41 U.S.C. § 351(a)(1).[1] The RFP advised offerors that:

> "A detailed cost or price proposal shall be submitted for this requirement and shall include all direct costs, indirect costs, profit, and any other factor which contributes to the proposed total, firm fixed rate. Personnel information to be shown shall consist of, but not be limited to: individual staff position (including name), hourly rate, and estimated number of hours to be contributed by each individual."

In its BAFO price proposal, L&E completed the RFP schedule, inserting unit prices as required. L&E's price proposal also included pages entitled "Unburdened Cost Summary" for the base year and each of the option years. For labor categories that were subject to the SCA, those summary pages included the same fixed hourly rates for the base and option years.[2] On a page entitled "Escalation of L&E's Unburden Labor Rates," L&E also provided a table showing the escalation of its base rates for each of the option years, arranged in columns. Instead of hourly rates in the option-year columns for the three labor categories that are subject to the SCA, however, L&E inserted the phrase "(adjusted by changes to DOL wage table)."

Based on this parenthetical expression, the contracting officer concluded that L&E had not provided a definite price to be evaluated, but rather, had submitted prices subject to a contingency. The agency cites the RFP instruction which directed offerors to show the unit price for all items on the schedule and points out that the option years are subject to evaluation and the prices for the wage labor

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[1]Under Federal Acquisition Regulation (FAR) § 22.1006(c)(1), solicitations subject to the SCA are required to include FAR clauses implementing the SCA, e.g. FAR 52.222-42, 52.222-43, and 52.222-44. Although the RFP in this case did not include these clauses, this omission did not affect the procurement or prejudice the offerors, since all parties have stated that they were aware of the requirements of the SCA and its application to the procurement. In addition, the agency asserts that the inclusion of the wage determination in the RFP was sufficient to place offerors on notice of the applicability of the SCA, and that both offerors understood the operation of the wage determination in a multi-year contract. We note also that the applicable clauses were included in the contract that was awarded.

[2]L&E increased its wages for labor categories that are not governed by the SCA for each of the option years.

personnel were required to be proposed, not projected as contingency rates. The agency argues that the alleged contingency "added the element of undefinability which took the error out of the range of mistake in offer and placed it in the realm of undeterminable offer."

Where an RFP requires fixed prices, and a proposal does not offer fixed prices, the proposal as submitted cannot be considered for award. Georgetown Univ., B-249365.2, Jan. 11, 1993, 93-1 CPD ¶ 87. This is so because in a negotiated procurement, any proposal that fails to conform to the material terms and conditions of the solicitation is considered unacceptable and may not form the basis for award. Cajar Defense Support Co., B-239297, July, 24, 1990, 90-2 CPD ¶ 76.

Here, however, we disagree with the agency's premise that the reference to DOL wage table increases on the "Escalation of L&E's Unburdened Labor Rates" table represented a contingency that rendered the protester's pricing unacceptable. First, L&E's price proposal included the RFP schedule, as required, with all prices presented as firm, fixed-prices and also included unburdened fixed hourly rates for the base year and each option year for all labor categories subject to the SCA.

Second, the alleged "contingency" did not alter those figures, but simply reflected applicable provisions in the SCA. FAR clause 52.222-43(b) requires the contractor under a contract governed by the SCA to warrant "that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause." If a contractor is later entitled to a wage increase under the SCA, it is done as an equitable adjustment under the contract. The contract price or contract unit price labor rates will be adjusted to reflect the contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the contractor as a result of certain events such as increased or decreased wage determinations. See FAR § 52.222-43(d).

Thus, estimates of wage increases covered by the SCA are not to be included in the offeror's prices, presumably because any applicable DOL wage increase will be passed through to the government when it actually happens--as opposed to when the contractor is speculating (in its option-year pricing) that it might happen. The agency essentially acknowledged this principle in a response it submitted to our inquiry. The agency states: "If L&E had bid a flat rate in the out years, with the intention of adding any escalation that resulted from future wage determinations, the contracting

officer would have evaluated it at face value, since such a strategy was within its business judgment." In our view, this is exactly what L&E did in its proposal. The agency then argues, however, that "L&E put no fixed amount at all in the space for out-year prices (i.e., L&E did not repeat the first-year rates) but simply annotated its bid at that place with the remark that the out-year rates would be determined based on changes in the wage determination." This is simply inaccurate, since the notation concerning labor categories subject to the SCA appeared on the summary pages showing escalation of rates during the contract and did not replace or modify the fixed rates presented elsewhere; other pricing data presented fixed rates for each category of labor for each contract period, as required. In any event, the notation did not represent any contingency that would render the rates indeterminable, but merely acknowledged the application of the SCA.

In response to L&E's protest, HHS informed this Office that, in addition to the failure to include fixed labor rates in the option years, L&E's proposal was unacceptable for another reason. According to HHS, L&E's proposal applied fringe benefits to part-time positions in spite of L&E's company policy, as stated in the proposal, not to compensate part-time employees with fringe benefits. HHS states that this "creat[ed] another set of rates which are not finitely determinable and inflate the cost of the evaluation price."

In response, the protester argues that any misapplication of fringe benefits for its employees would be at most a violation of its own corporate policy, and not a violation of the terms of the RFP. Because the contract is to be based on firm, fixed-prices, the risk of performance will be on the contractor, not the government.

We agree. L&E offered firm, fixed-prices for these positions. It did not propose, as the agency appears to argue, a fringe benefit rate that would vary during the life of the contract, requiring a burdened hourly rate to be adjusted accordingly in annual negotiations.[3] L&E simply made a business judgment to provide fringe benefits for two positions that presently are filled by part-time employees, on the assumption that they may be filled by full-time employees in the future. While L&E's fixed price is higher than it would be if it did not plan to provide fringe benefits for these two positions, its decision to do so did not make its price indeterminable. Regardless of the fringe benefits which L&E proposes to pay its employees, L&E's

[3]Compare Georgetown Univ., supra, wherein the protester's prices for a firm, fixed-price labor hour contract included such a contingency in its fringe benefits.

proposal included fixed rates for all employees for the base year and all option years. Consequently, the agency's belief that L&E's proposed rates were "indeterminable" was unreasonable and provided no basis for rejection of the proposal.

The record shows that the agency considered the two technical proposals to be essentially equal, although L&E had received a slightly higher technical score. Since MELA's second BAFO price was $7,418,915 and L&E's second BAFO price was $7,118,129, L&E's offer represents the best value. We recommend that the agency terminate the contract that was awarded to MELA and award the contract to L&E, if otherwise appropriate. We also find that L&E is entitled to its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1995). L&E should submit its certified claim for its protest costs directly to the agency within 60 working days of the receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

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