DOCUMENT RESUME

02400 - [A1592577]

[Evaluation of Technical Proposal]. B-186842. June 1, 1977. 8 pp.

Decision re: Centro Corp.; Systems Research Labs., Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Department of the Air Force: Wright-Patterson AFB, OH.
Authority: Freedom of Information Act (5 U.S.C. 552). 10 U.S.C. 2304(g). B-185242 (1976). B-184412 (1976). B-183957 (1975). B-183054 (1975). B-187153 (1976). B-187435 (1977). B-187489 (1977). 53 Comp. Gen. 533. 51 Comp. Gen. 479. 51 Comp. Gen. 431. 50 Comp. Gen. 117. A.S.P.R. 3-805.3.

Corporation protested the rejection of its technical proposal as outside the competitive range and the award of a contract to another company. A contractor who has acted in good faith and did not induce an error may still be subject to corrective action. GAO has no authority to determine what information must be disclosed by Government agencies. Since negotiations were conducted, the offerors should have been given an opportunity to submit best and final offers. The Air Force should reopen negotiations while the contract is being performed. (Author/SC)

2577

B. Chatkin
Proc I

02400

DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-186842 **DATE:** June 1, 1977

MATTER OF: Centro Corporation; Systems Research Laboratories, Inc.

DIGEST:

1. Contention by contractor/protester that it has valid and legally binding contract with Government is not disputed; however, GAO has sustained agencies which have corrected deficient award procedures when deficiencies were not induced by parties erroneously awarded contracts. GAO has rejected argument that contractor who has acted in good faith and did not induce error cannot be subject to corrective action.

2. GAO has no authority under Freedom of Information Act, 5 U.S.C. § 552 (1970), to determine what information must be disclosed by Government agencies.

3. Questions posed to offerors during technical evaluation constituted negotiations and not mere clarifications since questions went to heart of proposals, and had substantial effect on Government's determination of technical acceptability. Whether discussions have been held is matter to be determined from actions of parties and not characterizations of contracting officer. Since negotiations were conducted, offerors should have been given opportunity to submit best and final offers.

4. Contractor/protester contends that precedent is lacking for Air Force's directive to reopen negotiations while contract is being performed unless it is terminated prior to reopened negotiations; however, GAO has recommended same remedy.

Centro Corporation (Centro) protested the rejection of its technical proposal as outside the competitive range and the award of a contract to Systems Research Laboratories, Inc. (SRL), under request for proposals (RFP) No. F33615-76-R-2095, issued by the Department of the Air Force,

Wright-Patterson Air Force Base. The RFP solicited proposals to supply nonpersonal services to provide technical assistance in support of concepts developed by Air Force Aero Propulsion Laboratory engineers.

Six sources were solicited and 3 offerors submitted proposals by April 26, 1976, the closing date for receipt of initial proposals. A technical evaluation revealed that clarification information was necessary before the competitive range could be determined. After negotiations were conducted with the 3 offerors, Centro was determined to be technically unacceptable.

The RFP stated that price would be the controlling factor for award if the offeror's technical proposal was determined to be acceptable. Since SRL submitted the lowest-priced, technically acceptable proposal, award was made to it on June 22, 1976. The contract is for a period of 1 year with two options, each for an additional year.

By letter dated June 25, 1976, Centro was informed that its proposal was not technically acceptable. The Air Force considered the offeror to be incapable of supporting a contract of the magnitude and scope anticipated because of the approach of using support personnel that are not employed by the offeror. If these support personnel are not available when required, particular tasks would be delayed and the essential continuity of the program would suffer. Centro was further advised that in some cases support personnel did not possess the experience required by the solicitation.

On June 29, 1976, Centro filed a protest with our Office. Centro alleged that the RFP was defective in that information relative to the estimated use of labor under the contract was distorted, inaccurate, and misleading. Centro contended that this distortion of information was beneficial to the incumbent contractor and a contributing factor to Centro's improperly judged technical unacceptability.

By letter dated July 14, 1976, Centro amplified its initial protest. It still contended that the RFP was grossly distorted in its estimate and distribution of labor time as compared to experience. Centro claimed this distortion gave SRL a distinct competitive advantage. With respect to the Air Force's statement that Centro's use of support personnel not employed by it would delay particular tasks, Centro emphasized that this would only apply to 4 part-time employees submitted by Centro. All other employees proposed were full-time Centro employees. Centro also pointed out that the RFP indicated a requirement of 400 hours per year of work in the category where Centro was offering 1 full-time and 4 part-time employees.

Centro admitted that it offered only 1 machinist; however, it stated that the RFP provided that the number of machinist hours was 1,100 per year and that this could easily be handled by a single machinist. Centro stated that, if the Air Force had any questions concerning the availability of additional machinists, it could have easily inquired about it when it requested clarification information prior to the determination of Centro's technical unacceptability.

In regard to the Air Force's contention that support personnel do not possess the requisite experience, it seems that Centro transposed the names of the personnel submitted for the position of junior designer and senior draftsman. Neither person was qualified for the other's position. Centro stated that this was the only instance where support personnel were not qualified and that this obviously was easily correctable.

In summary, Centro insisted that there was no basis for finding it to be technically unacceptable and that its proposal more than substantiated its ability to carry out the responsibilities of the contract.

By letter dated September 17, 1976, the Air Force notified the procuring activity that in its view the award, as made, would be extremely difficult to support. It was the Air Force's position that the clarifications requested of the 3 offerors prior to the technical evaluation constituted negotiations within the purview of 10 U.S.C. § 2304(g) (1970) as interpreted by our Office. Since negotiations were therefore conducted, the Air Force determined that award should not have been made on the basis of the initial proposals, but that the contracting officer should have requested best and final offers.

In addition, the Air Force believes that Centro's proposal was determined to be technically unacceptable without sufficient justification for the following reasons. The normal test of unacceptability requires the proposal to be so far out of line in price or so technically deficient that meaningful negotiations cannot be conducted. Further, a proposal is unacceptable if it does not address the salient technical aspects of the requirements which indicates a complete lack of understanding of the requirements or that a complete rewrite of the proposal would be required to become technically acceptable. The reasons given for Centro's technical unacceptability did not meet these criteria.

Consequently, the contracting officer was instructed to (1) reopen negotiations with all offerors responding to the solicitation and (2) request best and final offers from all offerors in the competitive range. Further, the contracting officer was advised that upon selection of a successful offeror, the existing contract should either be terminated

for the convenience of the Government or modified to reflect the award in accordance with the successful offeror's final proposal.

By letters dated October 14, 1976, all offerors were informed that negotiations would be reopened.

By letter dated October 18, 1976, SRL protested the actions contemplated by the Air Force in its letter of October 14. Centro in a letter dated October 22, 1976, also objected to the reopening of negotiations on the grounds that the Air Force had all the information necessary to make an award based on the original proposal. Centro voiced fears that the contracting officer was determined to award the contract to SRL and would find other reasons to exclude it from the competitive range.

By letter dated January 18, 1977, counsel for SRL placed the following issues before our Office: (1) the award to SRL created a valid and legally binding contract; (2) SRL has not been afforded a reasonable opportunity to prepare its case; (3) the award to SRL should be recognized as valid; (4) slander of the contracting officer is not evidence to support a protest; (5) the best interest of the Government will be served by allowing this contract to continue as awarded; (6) the Air Force has improperly ordered the reopening of negotiations; (7) Centro's contention that it was denied data from previous SRL contracts is erroneous; and (8) the proper remedy for Centro is recovery of its bid preparation costs.

Centro has chosen not to pursue the aspects of this protest raised by its letter of July 14, 1976. At the conference conducted at our Office on January 10, 1977, Centro also agreed to negotiate with the Air Force pursuant to the Air Force's letter of October 14, 1976. Therefore, the only issues before our Office are those raised by SRL.

While we agree that SRL's contract is valid and legally binding on the Government, our Office is in the position of having to determine whether the Air Force has taken the appropriate legal position by reopening negotiations. If the competitive process is to maintain integrity, it is important that our Office have the authority to remedy errors. The Air Force contended that errors were made in procedures that culminated in an award to SRL and has suggested a possible remedy.

Our Office has sustained agencies where they have corrected what they have considered to be deficient award procedures and the deficiencies were not induced by the parties erroneously awarded the contracts. The Ohio State University Research Foundation, B-185242, June 16, 1976, 76-1 CPD 381; Electronic Associates, Inc., B-184412, February 10, 1976, 76-1 CPD 83. Further, we have specifically rejected the argument that a contractor who has acted in good faith and did not induce the error cannot

be subject to corrective action. In Dynamic International, Inc., B-183957, December 29, 1975, 75-2 CPD 412, we stated:

> "Since the contractor did not contribute to the mistake resulting in the award and was certainly not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the Government. * * * "

SRL requested the right to review the files containing Centro's technical evaluation and the proposal itself. The Air Force rejected SRL's request under the Freedom of Information Act, 5 U.S.C. § 552 (1970). SRL contends that this information, which has been released to our Office, deprives SRL of procedural due process.

This Office has no authority under the Freedom of Information Act, supra, to determine what information must be disclosed by Government agencies. Dewitt Transfer and Storage Company, 53 Comp. Gen. 533 (1974), 74-1 CPD 47.

SRL argues that the Air Force elected "in its sound judgment" not to negotiate on this particular procurement. SRL contends that the evidence shows that simple clarifications were requested of the 3 offerors and that this did not constitute discussions. Also, SRL states that the contracting officer reserved the right to negotiate and elected not to do so.

Whether discussions have been held is a matter to be determined upon the basis of the particular actions of the parties and not merely upon the characterizations of the contracting officer. Food Science Associates, Inc., B-183054, April 30, 1975, 75-1 CPD 269; The Human Resources Company, B-187153, November 30, 1976, 76-2 CPD 459. We have held that discussions occur if an offeror is afforded an opportunity to revise or modify its proposal, regardless of whether such opportunity results from action initiated by the Government or the offeror. 51 Comp. Gen. 479 (1972).

The technical evaluation dated May 13, 1976, revealed that each company's proposal was found lacking in necessary information. The information requested from the offerors included the following:

> "a. Show an understanding of each task.
>
> "b. State names of personnel, category of labor and percentage of time available.
>
> "c. Provide a description of a plan that assures item meets Government standards."

The Government considered these questions as clarifications only and not negotiations.

By letter dated May 14, 1976, the Air Force requested that Centro clarify its proposal. On May 20, 1976, Centro answered all the questions in detail posed by the May 14 letter.

The following deficiencies were noted by the Air Force with respect to Centro's proposal:

> "a. Of the fifteen people listed for support personnel, seven were employed by other companies and two were unemployed. The evaluators assumed that the people employed by the other companies were moonlighting and would not be available when needed.
>
> "b. Providing the minimum amount of manhours and manpower as set forth in the solicitation was not enough to assure completion of the tasks in a timely manner. The evaluators did not cite a Government estimate which would be sufficient."

The contracting officer made the award based upon the June 2, 1976, technical evaluation without further discussion and on the basis of the original prices submitted. No best and final offers were requested from those offerors within the competitive range.

It is the position of the Air Force that the additional information requested constituted negotiations. We agree. The questions asked of the offerors went to the heart of their proposals and had a substantial effect on the Government's determination of acceptability.

In 51 Comp. Gen. 431 (1972), we enunciated the following rule regarding the conduct of negotiations:

> "It is a well-established principle in negotiated procurement that such discussions must be meaningful and furnish information to all offerors within the competitive range as to the areas in which their proposals are deficient so that competitive offerors are given an opportunity to fully satisfy the Government's requirements."

This standard of negotiation has been incorporated in the Armed Services Procurement Regulation (ASPR) § 3-805.3(a) (1976 ed.) which provides as follows:

> "All offerors selected to participate in discussions shall be advised of deficiencies in their proposals and shall be offered a reasonable opportunity to correct or resolve the deficiencies and to submit such price or cost, technical or other revisions to their proposals that may result from the discussions. A deficiency is defined as that part of an offeror's proposal which would not satisfy the Government's requirements."

If negotiations are conducted with an offeror, the Government is required to advise the offeror of the deficiencies in its proposal before it can be rejected. 50 Comp. Gen. 117 (1970). Centro was never questioned about its proposed support personnel allegedly employed by other companies nor was it questioned about its proposed man-hours and manpower. These two areas were partially responsible for Centro's technical unacceptability.

Based on the record, "meaningful" discussions were not held with Centro. Further, once it is decided that negotiations were conducted, ASPR § 3-805.3(d) (1976 ed.) specifically requires that offerors be given an opportunity to submit best and final offers.

SRL states that there is no legal basis for the action taken by the Air Force--specifically, that the Air Force cannot reopen negotiations while a contract is being performed unless it is terminated prior to the reopened negotiations. We do not agree. Where an improper award has been made in a negotiated procurement, we have concluded that negotiations should be reopened for another round of best and final offers and that, after the negotiations, if the contractor is not the low responsible offeror, the contract should be terminated for the convenience of the Government and award made to the low offeror. If the contractor is the low offeror and the price is less than the current contract, the contract should be modified to conform to the newly offered price. This manner of recompetition permits the Government to continue to receive its needs during the reopening of negotiations. See Informatics, Inc., B-187435, March 15, 1977, 77-1 CPD 190.

We recognize that by concurring with the Air Force's recommendation to reopen negotiations, the possibility exists for an auction atmosphere. Although ASPR § 3-805.3(c) (1976 ed.) provides that auction practices be avoided, a possible auction is one of the consequences of an improper award. However, we do not believe that an improper award should be allowed to stand solely to avoid the implications of an auction situation. See Bristol Electronics, Inc., et al., supra.

We will not address ourselves to contentions 4, 7, and 8 made by SRL since they have no bearing on the outcome of this decision.

Accordingly, the SRL protest is denied.

However, while termination for convenience was proper when first considered by the Air Force, in view of the advanced state of the first year of the contract at this time, we believe that it would be more appropriate now not to exercise the option in the contract and to re-solicit instead the requirement for the option years. See Amram Nowak Associates, Inc., B-187489, March 29, 1977, 56 Comp. Gen. ____, 77-1 CPD 219.

Deputy Comptroller General
of the United States