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J. Cohen
Proc I

DECISION



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

FILE: D-188787

DATE: January 31, 1978

MATTER OF: Analysis & Computer Systems, Inc.

DIGEST:

1. As required, initial offer named three individuals to designated positions, and listed on cost or pricing data form their hourly wage rates. In best and final offer (BAFO), hourly rates were reduced without justification therefor. Contracting officer, concerned that unexplained price reductions meant different individuals would be used, or that substantial cost overruns were possible, rejected BAFO. Rejection was not improper since offeror must clearly demonstrate proposal's merits, and contracting officer's concerns were reasonable.
2. Contracting agency's allegation, disputed by protester, that oral request for BAFOs included requirement to justify price changes from those in initial offer is not conclusive against protester, since subsequent written request confirming oral request contained no such advice.

Request for proposals (RFP) No. F19628-77-R-0061 was issued on October 29, 1976, by the Air Force Systems Command for the analysis of atmospheric sensor data. A cost-plus-fixed-fee contract was contemplated. Offerors were required to submit initial technical and cost proposals by November 26, 1976. Each offeror was also required to prepare a DD Form 633-4, "Contract Pricing Proposal (Research and Development)." Paragraph 29 of the RFP's Instructions, Conditions and Notices to Offerors advised:

"29. COST AND PRICE ANALYSIS FORMS, DD Form 633-4. The Offeror is authorized to reproduce DD Form 633-4. In its preparation the Offeror shall employ all actual or estimated costs or pricing data as of the date of the proposal in preparing his price estimate; he should be prepared to make such data known to the Government Contracting Officer or his representative for use in evaluating each estimate together with any significant changes in such data which may have

B-188787

occurred subsequent to date of his proposal and prior to completion of negotiations on price."

The RFP also required the offeror to list by name an individual to be assigned to each of the following "labor categories": "Senior Math Analyst" (to work approximately 2,000 hours), "Program Analyst" (3,000 hours), "Junior Programmer" (4,000 hours), and "Technical Secretary" (250 hours).

Analysis & Computer Systems, Inc. (ACSI), was one of five firms that responded to the RFP. ACSI named in its initial proposal the three personnel as required. On the DD Form 633-4 submitted with its initial proposal, ACSI listed under "Direct Labor" the positions of Senior Math Analyst, Math Analyst, and Junior Math Programmer, and an estimated number of hours, a rate per hour, and an estimated cost for each.

Initial proposals were evaluated by the contracting activity's technical staff, and negotiations were conducted with the five offerors. Negotiations were concluded on February 4, 1977, at which time offerors were orally advised by the buyer that best and final offers (BAFOs) would be due on February 9. The buyer states that his oral contact with the offerors on February 4 also included advice that any changes in a BAFO must be explained therein. A confirming letter dated February 4 was sent to each offeror, which stated in part:

"* * * cut-off for negotiations and further discussion of your proposal is 5:00 PM, ET, Friday, 4 February 1977. You were further advised that your Best and Final Offer must be received at this office on or before close of business 5:00 PM, ET, Wednesday, 9 February 1977. As a minimum, your Best and Final Offer should consist of a Current DD Form 633-4, Certificate of Current Cost and Pricing Data, dated 9 FEB 1977 and a letter confirming negotiations.* * *"

The ensuing technical evaluations concluded that all proposals were essentially equal, with only minor deviations. Estimated cost, therefore, became the deciding factor.

B-184787

ACSI's BAFO price was the lowest of those received. However, on the revised DD Form 633-4 submitted with its BAFO, ACSI reduced the hourly rates for the three positions listed from those in its initial proposal, resulting in a significant decrease in its estimated cost. The Air Force states:

"* * * The submitted BAFO did not explain the basis for these significant rate reductions and left serious doubt in the mind of the contracting officer as to whether ACSI did, in fact, contemplate using the specified individuals for this effort or substitute other less costly and/or less qualified personnel. The latter action would have required a reevaluation of the ACSI offer. This would have involved a reopening of negotiations and a new BAFO for ACSI and the other offerors in order to maintain the integrity of the procurement process."

The referenced reevaluation would have been required by the following RFP provision:

"The experience and technical competence of the on-site personnel, being a critical component in the successful completion of the work, shall be an important consideration in the technical evaluation. Any changes of proposed personnel after technical evaluation will require a technical re-evaluation of the total proposal."

The contracting officer determined that clarification of ACSI's offer was necessary before the price proposal could be evaluated. However, the contracting officer believed that such clarification, if obtained by him, would constitute a reopening of negotiations, which would be unfair to the other offerors, was not in the best interest of the Government, and would delay the award. He therefore had the Defense Contract Audit Agency (DCAA) obtain by telephone the actual current wage rates of the named personnel from ACSI, which he felt did not involve reopening negotiations. The Air Force states that this contact was made pursuant to paragraph 5 of the RFP's Instructions to Offerors and was contemplated by the instructions to the DD Form 633-4. The cited paragraph 5 provides:

D-188787

"By submission of this proposal, offeror, if selected for negotiation, grants to the contracting officer, or his authorized representative, the right to examine, for the purpose of verifying the cost or pricing data submitted, those books, records, documents and other supporting data which will permit adequate evaluation of such cost or pricing data, along with the computations and projections used therein. This right may be exercised in connection with any negotiations prior to contract award."

The instructions to DD Form 633-4 provided in pertinent part:

"* * * the offeror must submit with this form * * * cost and pricing data (that is, data which is verifiable and factual and otherwise as defined in FAR 3-807.3). * * *

* * * * *

"* * * the cost or pricing data must be accurate, complete and current, and the judgment factors used in projecting from the data to the estimates must be stated in sufficient detail to enable the contracting officer to evaluate the proposal. For example, provide * * * justification for an increase in labor rates * * *"

The rates given DCAA were considerably higher than those proposed in ACSI's BAFO and approximated the rates in the initial proposal. The contracting officer states that an examination of the information obtained indicated that the BAFO rates "were a serious understatement of the rates that are presently being paid to the those named personnel." He concluded that if there were no personnel changes, award to ACSI:

"* * * would have caused a serious Cost/Risk factor to occur and raised the spectre of a built-in cost overrun at some point in the future."

"Therefore, because of the inability of this contracting officer to ascertain what personnel

B-188787

were to be used in ACSI proposal, and because of the possibility of a built-in overrun * * * [the contracting officer] determined ACSI to be an unacceptable offeror.

Award was made to RDP, Inc. In the April 6 notice of award sent to ACSI, the contracting officer stated:

"Your proposal, although judged technically acceptable, failed to provide cost trackability and justification regarding changes made in your Best and Final Offer (BAFO) to labor rates, thereby raising doubt as to the personnel you intended to use in contract performance. As specified in the solicitation, the experience and technical competence of the assigned personnel were a critical and important consideration in the evaluation of proposals. Your BAFO, as received, raised serious doubt as to whether the personnel you originally proposed were still contemplated to be used."

ACSI argues that the request for a BAFO did not indicate a necessity to, as the letter rejecting its proposal stated, "provide cost trackability and justification regarding changes made * * * to labor rates." ACSI asserts that it fully complied with the requirements in the February 4 request for BAFOs. In this connection, ACSI denies that it was advised by telephone on February 4 to justify changes in its BAFO. ACSI also argues that the contracting officer's conclusions reached on the basis of the information obtained by DCAA were erroneous and improperly drawn.

In a negotiated procurement, all offerors in the competitive range are free to revise their proposals, including price, in response to a request for BAFOs. In fact, it is not uncommon for an offeror to withhold its lowest price until the BAFO. See Fordel Films, Inc., B-186841, October 29, 1976, 76-2 CPD 370.

The Air Force argues that ACSI was adequately advised in the solicitation that price revisions in its BAFO had to be accompanied by justification, specifically in paragraph 29 of the RFP and the instructions to DD Form 633-4, set out above. The Air Force also relies on the oral advice allegedly given ACSI by the contract specialist on February 4.

B-188787

In our view, the cited RFP provisions do not explicitly require an offeror to submit with its BAFO substantiation for price reductions. While it might be argued that implicit in the RFP provisions is a requirement for justification for price reductions which would cause an offeror to so justify, this situation is distinguishable from that in, for example, Electronic Communications, Inc., 55 Comp. Gen. 636 (1976), 76-1 CPD 15. There, the written request for BAFOs specifically advised that revisions must be accompanied by complete and detailed support, and we approved the rejection outright of a BAFO deficient in detailed support. Concerning the alleged oral advice from the contract specialist, which ACSI denies having received, although we recognize that a protester has the burden of affirmatively proving its case, Reliable Maintenance Service, Inc.—request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337, since the written request for BAFOs issued as confirmation of the oral request (see Armed Services Procurement Regulation § 3-805.3(d) (1976 ad.)) did not require justification for any changes, we do not consider the contract specialist's record of his oral advice on that subject as conclusive. We note here that as a result of this protest the contracting activity has modified its written request for BAFOs to include the following instruction:

"You are advised that a best and final offer containing changes from your previously negotiated proposal, which are not adequately explained, or which fail to provide complete traceability from your previous position may not be considered credible in the final evaluation and selection, and may become a specific minor factor in the technical/cost/price realism area. Such changes may affect the acceptability of your offer and could render your offer unacceptable."

Thus, ACSI's proposal should not have been rejected merely because ACSI "failed to provide cost trackability and justification regarding changes made" in its direct labor rates. However, an offeror runs the risk of the rejection of a BAFO if it fails to clearly demonstrate its merits. See Kinton Corporation, B-183105, June 16, 1975, 75-1 CPD 365. Thus, we must consider whether the contracting officer's determination that ACSI's BAFO was unacceptable based on the changes made therein and the information obtained by DCAA was reasonable.

B-186787

As stated above, the contracting officer had two problems with the BAFO: (1) doubt as to the personnel to be used in contract performance, and (2) the possibility of a substantial cost overrun.

Although ACSI did not enter in the BAFO names different than those in the initial proposal, it did not repeat those names with the changes in the hourly rates. In view thereof, and since the importance of the on-site personnel to the project was clearly expressed in the solicitation, it would certainly have been prudent to explain the reductions, notwithstanding that an explanation may not have been explicitly required by the RFP and the request for BAFOs. In this connection, the awardee, who also reduced the direct labor rates in its BAFO, specifically indicated a change in personnel. Under the circumstances, we believe that the contracting officer's concern about a possible change in personnel was not unreasonable.

In regard to the possibility of a substantial cost overrun even if the personnel named initially were to be utilized, we have recognized that in a cost-plus-fixed-fee contract evaluated costs provide a sounder basis than proposed costs for determining the most advantageous proposal. TAC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35; 52 id. 870, 874 (1973). The determination of the realism of proposed costs is a matter for the judgment of procuring officials and will not be subject to objection from our Office unless there is no rational basis therefor. Educational Computer Corporation, B-187330, November 30, 1976, 76-2 CPD 460. We believe that the unexplained direct labor cost reduction in the BAFO could reasonably cause the contracting officer to doubt the realism of the proposed costs. We emphasize here that although we have agreed with ACSI that justification for changes in its BAFO was not explicitly required, it remained ACSI's responsibility, as stated above, to submit a clear and unambiguous proposal.

The contracting officer states that he did not contact ACSI directly for clarification because such contact would have constituted a reopening of negotiations, which would have been unfair to the other offerors. Parenthetically, we note that a request that an offeror explain a price reduction which does not afford an opportunity to modify or revise a BAFO does not constitute "negotiations" within the meaning of the procurement regulations. B-170989, B-170990, November 17, 1971.

B-188787

Nevertheless, under the circumstances and since ACSI raised reasonable concerns in the contracting officer's mind by its unclear BAFO, we cannot criticize the contracting officer's caution in attempting clarification by utilizing the procedure involving DCAA. Although ACSI alleges that the information obtained by that mechanism confused rather than clarified the situation, consideration of such information in conjunction with the unexplained BAFO reductions was not unreasonable.

The protest is denied.

R. J. Keenan
Deputy Comptroller General
of the United States