

4516
044333

DECISION



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

FILE: B-188807
MATTER OF: SEMCOR

DATE: November 28, 1977

DIGEST:

1. Where technical proposals are evaluated by agency as essentially equal, price or cost properly becomes determinative factor in making award. No basis is seen to object to Navy's conclusion that three technical proposals, numerically scored in range from 742 to 768 on 1,000-point scale, were essentially equal.
2. Even assuming merit in protester's objections to cost analysis of successful proposal for engineering services, prejudice to protester is speculative in view of its competitive position. However, GAO agrees with protester that evaluation of successful offeror's proposal was deficient or doubtful in areas of material and travel costs, and this conclusion is called to attention of Secretary of Navy.
3. Under GAO Bid Protest Procedures, protests concerning apparent improprieties in RFP must be filed by initial closing date, or, depending on circumstances, by closing date for receipt of best and final offers at latest. Objections in protest after award concerning fixed number of manhours specified in RFP, failure to adopt protester's suggestion that firm, fixed-price contract be awarded, and alleged improper procurement of personal services relate to apparent RFP improprieties and are therefore untimely and not for consideration.

This is our decision on a protest by SEMCOR concerning the award of a contract to TECHPLAN Corporation under request for proposals (RFP) No. N62269-77-R-0134, issued by the Naval Air Development Center (NADC), Warminster, Pennsylvania. The RFP contemplated a cost-plus-fixed-fee (CPFF), level-of-effort contract for a 1-year term to provide services and data system engineering analysis in regard to NADC's Joint Tactical Information Distribution System (JTIDS) program. Primarily, SEMCOR complains of a possible "buy-in," due to a lack of cost realism in TECHPLAN's proposal. Also, the protester alleges certain improper procurement practices by NADC.

B-188807

Five offerors submitted proposals in response to the RFP. Two offerors' proposals were rejected as technically unacceptable while the proposals of SEMCOR, TECHPLAN and Analytical Systems Engineering Company (ASEC) were considered technically acceptable. Discussions were held, and the three offerors submitted best and final offers. NADC requested and obtained a Defense Contract Audit Agency (DCAA) report concerning TECHPLAN's cost proposal.

In this regard, the RFP essentially established technical and management considerations as the most important evaluation factors, and cost as the least important. In the evaluation, the "raw" technical scores were SEMCOR - 767.5, ASEC - 759.2 and TECHPLAN - 741.7. NADC awarded the contract to TECHPLAN because it regarded the three offerors' technical proposals as being essentially equal, and because TECHPLAN's proposed best and final CPFF (\$121,607) was lowest. ASEC's proposed best and final CPFF was \$159,108; SEMCOR submitted alternate best and final offers (\$194,513 and \$150,111).

The raw scoring and the proposed CPFF's were also translated by NADC into numerical scoring on a 100-point scale (comprised of 90 points for technical considerations and 10 points for cost). On this basis, TECHPLAN's proposal was rated at 97.0 and SEMCOR's at 96.3. One of the protester's contentions is that since certain cost elements of TECHPLAN's proposal were unrealistic, a reevaluation would result in TECHPLAN receiving fewer points and in SEMCOR having the highest score on the 100-point scale.

As discussed infra, we believe that in several respects the cost analysis of TECHPLAN's proposal was deficient or of doubtful adequacy. However, even if SEMCOR is correct that the realistic, probable CPFF of TECHPLAN's proposal would be more than \$121,607, it does not follow that SEMCOR would have been entitled to award on the basis of having achieved the highest score on the 100-point scale. This is because where technical proposals are determined by the agency to be essentially equal, price or cost properly becomes the determinative factor in making an award. See Analytic Systems, Incorporated, B-179259 February 14, 1974, 74-1 CPD 71; 5C Comp. Cen. 246 (1970). As we stated in Computer Data Systems, Inc.--Reconsideration, B-187892, August 2, 1977, 77-2 CPD 67:

"* * * [W]hen no one proposal is perceived as offering a distinct technical advantage, the technical evaluation does not provide any

effective discriminator for source selection purposes. The fact that an agency may have used a numerical scoring scheme in performing the technical evaluation and assigned somewhat different scores to competing proposals does not mean that the higher rated proposal must be perceived as offering a technical advantage of any significance. * * * Once the agency determines that a particular point spread in technical scores does not indicate the technical superiority of any one proposal, it is apparent that the technical evaluation criteria, no matter how heavily weighted vis-a-vis price, do not provide a meaningful basis for selection of a contractor. Under such circumstances, price obviously must become the determinative factor."

Deciding whether a given difference in point scoring is significant, or whether the technical proposals are essentially equal despite the difference in point scoring, involves the exercise of judgment and discretion on the part of the contracting agency. See Gray Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. In the present case, the Navy decided that the spread of approximately 26 points in the raw scoring of the three acceptable technical proposals (from 741.7 to 767.5 points) was not significant and that the proposals were essentially equal. We see no grounds to conclude that this determination clearly lacked a reasonable basis.

Accordingly, even if the realistic, probable CPFF of TECHPLAN's proposal was higher than \$121,607, it is entirely possible that TECHPLAN would still have been in line for award. In this regard, we note that SEMCOR's alternate proposal with a proposed CPFF of \$150,111 was reportedly based on a total of 8,440 hours, as called for by the RFP, but that SEMCOR proposed to charge the Government for only 5,680 hours, because it believed the JTIDS work duplicated work being done by SEMCOR under other Government contracts. NADC notes that more than once during the procurement, SEMCOR had alleged that it could accomplish the contract work in a lesser number of hours than 8,440. For example, SEMCOR's initial proposal had offered 3,985 manhours of effort. NADC's evaluators believed the possibility of other contract work being directly applicable to the JTIDS work was very remote if not altogether impossible, and accordingly concluded that SEMCOR's position was unreasonable. The record further indicates that NADC apparently had some doubts whether SEMCOR's \$150,111 best and final offer was acceptable. However, NADC found it unnecessary to resolve this issue, because SEMCOR was not the low offeror in any event.

As discussed infra, SEMCOR has objected to the fixed number of manhours specified in the RFP, but that objection was not timely raised. In view of the foregoing, there appears to be serious doubt whether SEMCOR's \$150,111 proposal would have been considered acceptable by NADC. If the proposal were unacceptable, we note that the offeror next in line for award after TECHPLAN (and therefore in a position to be prejudiced by any defects in NADC's cost analysis of TECHPLAN's proposal) would be ASEC, which has not protested.

Thus, even assuming for the purposes of argument that NADC's cost analysis of TECHPLAN's proposal was substantially deficient, any prejudice to the protester is quite speculative in view of its competitive position. For example, SEMCOR has contended that analysis of TECHPLAN's proposals in prior procurements, allegedly involving less sophisticated engineering effort, shows that TECHPLAN's fully loaded hourly rates were about 28 to 36 percent in excess of those proposed for the current contract. However, increasing TECHPLAN's fully loaded hourly rate for the present procurement by factors of 28 or 36 percent would result in adjusted CPFF's of \$153,657 or \$165,386, both considerably below SEMCOR's \$192,513 proposal. We believe the same observation applies to the protester's allegation that NADC ignored cost realism in regard to TECHPLAN's overhead rate, a charge which NADC denies. Further, we do not attach compelling weight to the protester's contention that TECHPLAN's CPFF was unrealistic because it was substantially below the Government's estimate of \$215,000, in view of the fact that all four of the best and final offers' proposed CPFF's were below the Government estimate.

To a large extent these issues relate to a controversy between the protester and NADC over the extent to which NADC should have investigated or caused DCAA to investigate certain cost elements of the successful proposal, with SEMCOR alleging that the DCAA report was too limited in scope and NADC pointing out that the report found no unsupported cost elements in the proposal. In this regard, it may be noteworthy that the contracting officer has indicated that the decision to award to TECHPLAN at the proposed CPFF of \$121,607 was based upon a comparison of TECHPLAN's proposal with the others received and past experience, in addition to the DCAA report. Finally, in regard to the protester's contention that the contractor may not pay its employees in accordance with applicable labor standards legislation, we note that the RFP incorporated by reference the pertinent Armed Services Procurement Regulation Service Contract Act clause but did not contain any determination of the minimum wages and fringe benefits required to be paid to particular classes of service employees.

B-188807

However, we note that on several other points the record clearly offers support for SEMCOR's contentions that the cost analysis of TECHPLAN's proposal was inadequate, and some discussion of these issues is therefore warranted. SEMCOR has pointed out that TECHPLAN's cost proposal did not include any estimate for material. In this regard, the RFP's Form DD 1423 called for various technical reports (seven copies of each) to be furnished on 37 different occasions under the contract. The protester alleges that several of the reports involve considerable artwork, illustrations, diagrams and graphic support.

The record indicates that TECHPLAN did not include an estimate for material because it believed that no material, as such, was identified in the RFP. It appears that NADC did not make any upward adjustment to TECHPLAN's estimated cost to cover the cost of material. The Navy's report on the protest does not specifically address the issue.

We agree with the protester that the cost analysis in this area was deficient. While substantial cost may not be involved, it is apparent that the contractor will incur some cost for material. NADC should have raised this point in the discussions with TECHPLAN, or, if necessary, made an estimate of the cost of material and adjusted TECHPLAN's proposed best and final cost upwards accordingly.

SEMCOR has also alleged that TECHPLAN proposed unrealistically low travel costs of \$4,200. In this regard, the RFP as amended estimated that monthly trips would be required to 20 sites on the East Coast and bi-monthly trips would be required to seven West Coast sites. While it appears possible that a single trip could cover a number of separate sites, if the trips are considered individually the estimated total is 282, at an average cost per trip (given TECHPLAN's proposed cost) of \$14.89. NADC accepted TECHPLAN's proposed cost without adjustment. The Navy has not specifically responded to the protester's contentions regarding this issue.

There are some indications in TECHPLAN's proposal that TECHPLAN believed less travel would be required to accomplish the contract work than the Navy had estimated. For example, the proposal mentions four West Coast trips as opposed to NADC's estimate of six. Also, TECHPLAN believed that travel from its strategically located eastern

B-188807

facilities (in Pennsylvania and elsewhere) to East Coast sites would not involve substantial cost. As to some locations this may well be true; on the other hand, the TECHPLAN proposal does not indicate that the company has facilities in close proximity to other eastern sites to be visited, such as in New York and Florida.

In the absence of evidence that the Navy evaluated TECHPLAN's travel plans and had a rational basis for concluding that they were adequate and could be accomplished at the cost proposed, we are of the view that the protester's contention has merit. On the record, it appears that in light of the large number of trips estimated by the Navy and the estimated cost proposed by TECHPLAN, the adequacy of the cost evaluation in this area was doubtful. However, it is unlikely that an upward adjustment to TECHPLAN's travel costs would have altered the relative standing of the offerors.

SEMCOR also alleges improper procurement practices by NADC. The protester complains that prior to the submission of best and final offers NADC required SEMCOR to quote on the basis of a fixed number of direct labor manhours (as specified in the RFP) despite SEMCOR's claims that its past experience and current work would permit it to accomplish the work with a lesser number of manhours. SEMCOR believes this in effect transformed the procurement from a negotiated to an advertised one. In this connection, the protester notes that during the procurement it expressed its willingness to contract on a firm, fixed-price basis, but that it was told by the contracting officer its proposal would be rejected unless it responded in conformity with the RFP and the number of direct labor manhours specified therein. Finally, SEMCOR believes the NADC procurement approach may in fact amount to the acquisition of personal services rather than engineering services. The Navy has considered these objections and believes they are without merit.


We believe these contentions by SEMCOR relate to alleged improprieties in the RFP. Under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977), alleged improprieties which are apparent in an RFP as originally issued must be protested prior to the closing date for receipt of initial proposals. Alleged improprieties which do not exist in the original RFP but which are subsequently incorporated therein must be protested prior to the next closing date for receipt of proposals following the incorporation.

B-188807

Also, where an offeror has raised objections to the RFP during written or oral discussions, but the contracting agency does not accede to the objections, the offeror is charged with notice of adverse agency action at the time when best and final offers are due. Cf. Sperry Rand Corporation (Univac Division) et al., 54 Comp. Gen. 408, 413 (1974), 74-2 CPD 276. The closing date for receipt of best and final offers in this case was February 28, 1977. SEMCOR's protest was filed with our Office on April 11, 1977, after the award, and these objections are therefore untimely and will not be considered.

In view of the foregoing, the protest is denied. However, by letter of today we are calling to the attention of the Secretary of the Navy our conclusions, discussed supra, concerning the inadequate evaluation of material and travel costs in the successful proposal, and suggesting that this information be brought to the attention of responsible procurement personnel with a view towards precluding a recurrence in future procurements.

Deputy


Comptroller General
of the United States



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

IN REPLY
REFER TO:

B-188807

November 28, 1977

The Honorable
The Secretary of the Navy

Dear Mr. Secretary:

We refer to a letter dated August 8, 1977, with enclosures, from the Deputy Commander, Procurement Management, Naval Supply Systems Command, which reported on the protest of SEMCOR concerning an award under request for proposals No. N62269-77-R-0134, issued by the Naval Air Development Center.

Enclosed is a copy of our decision of today. While the protest has been denied, we conclude in the decision, for the reasons indicated, that in several respects the cost analysis of the successful proposal was deficient or of doubtful adequacy. We suggest that our conclusions in this regard be brought to the attention of responsible procurement personnel with a view towards precluding a recurrence of these problems in future procurements.

Sincerely yours,

Deputy

R. A. K. H.
Comptroller General
of the United States

Enclosure