



Comptroller General
of the United States
Washington, D.C. 20548

208184

Decision

Matter of: Free State Reporting, Inc.
File: B-259650
Date: April 14, 1995

Edward J. Tolchin, Esq., Fettmann & Tolchin, for the protester.
Rees Griffiths, Esq., and Paul W. Minnich, Esq., Barley, Snyder, Senft & Cohen, for York Stenographic Services, Inc., an interested party.
Lloyd M. Weirnerman, Esq., and Jonathan A. Baker, Esq., Department of Health and Human Services, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee engaged in "bait and switch" tactics with regard to its proposed personnel is denied where awardee did not represent in its proposal that it intended to rely exclusively on the individuals named in the proposal in performing the services and agency did not rely on this assumption in evaluating the proposal.
2. Protest that awardee's price should be adjusted upward to account for its use, in arriving at its proposed price, of a wage rate for its proofreaders lower than the specified Service Contract Act rate is denied where a firm, fixed-price contract was awarded.

DECISION

Free State Reporting, Inc. protests the award by the Department of Health and Human Services, Social Security Administration (SSA), of a contract for transcription services to York Stenographic Services under request for proposals (RFP) No. SSA-RFP-94-1645. The protester contends that York misrepresented in its proposal the personnel that

¹Although the Social Security Administration became independent of the Department of Health and Human Services on March 31, 1995, it was still part of the department at the time this procurement was conducted.

it had available to perform the transcription services and the wage rate that it intended to pay certain of its employees.

We deny the protest.

The RFP, which was issued on March 23, 1994, contemplated the award of a firm, fixed-price requirements contract for a base and 2 option years to provide transcription typing services for SSA's Office of Hearings and Appeals. The contractor was to transcribe adjudicatory hearings relating to various Social Security, Medicare, and Medicaid programs from audio cassette recordings. The solicitation requested prices for 1-, 5-, and 10-day delivery of transcripts.

The RFP advised offerors that technical merit would be the paramount consideration in selection of an awardee (i.e., price would not be point-scored in the evaluation), but that price could become the determinative factor if proposals were judged to be technically equal. Factors to be considered in the technical evaluation included understanding the scope of work (10 points); technical approach, management, and management workplan (40 points); project organization, staffing, and management (15 points); facilities and equipment (25 points); and organization qualifications (10 points).

To demonstrate that their contractual efforts would be adequately staffed, offerors were instructed to identify in their proposals the transcriber/typists, proofreaders, and auditors whom they would employ and to describe the recruitment and pre-employment or probationary evaluation procedures and training program that they would use to ensure that sufficient numbers of qualified workers were available for assignment to the project. In addition, to demonstrate that their proposed work force was adequately qualified, offerors were instructed to submit resumes for all employees expected to work on the project.

Fourteen proposals were received by the May 6 closing date. The technical panel concluded that two of the proposals were so incomplete as to preclude their consideration and that 10 of the remaining 12 were unacceptable. Only the proposals of Free State and York, which had received scores of 93.2 and 91.4 respectively, were recommended for inclusion in the competitive range.

The agency conducted discussions with both Free State and York on September 1 and requested best and final offers (BAFOs). After evaluating the BAFOs, the evaluators determined that both offerors had clarified all issues to the satisfaction of the committee and that both proposals were fully acceptable; they assigned Free States's proposal

a final technical score of 98.8 and York's a perfect score of 100. The contracting officer concluded that the two proposals were essentially equivalent technically, and that the determinative factor for award would therefore be price. Since York's prices were lower than Free State's for each delivery period, the contracting officer concluded that it would not be in the government's best interest to make multiple awards.² On September 26, SSA awarded a contract for all delivery periods to York. Free State filed an agency-level protest on October 11. SSA denied the protest on December 2, whereupon Free State protested to our Office.

ALLEGED "BAIT AND SWITCH" TACTICS

Free State argues that York engaged in "bait and switch" tactics with regard to its proposed personnel and that the contract awarded to it should therefore be terminated.³

²The RFP advised offerors that the agency might make more than one award if it was determined to be in the government's best interest.

³Free State also alleged in its initial protest that York was not preparing the transcripts using WordPerfect version 5.0, as required by the RFP, and that York's transcribers were not certifying as to the correctness of the transcripts by signing them, as further required by the RFP. As evidence that York's typists were not signing their transcripts, Free State noted that York was requiring the typists who performed their work at home to return floppy disks to its office, where the transcripts were then printed.

The agency responded to these allegations in its report, noting, with regard to the version of WordPerfect used, that the RFP did not require that the awardee employ WordPerfect 5.0 in all phases of the transcription and document preparation process; rather, it required only that in the event that the agency requested a disk version of a transcript, that the transcript be formatted using WordPerfect 5.0, which York had confirmed it would do. With regard to the certification issue, the agency noted that York had stated in its proposal that it understood that "the transcriptionist, proofer, and auditor [would] certify the correctness of the transcript on the last page thereof by their full and original signatures." The agency also furnished a statement from York which explained that although most of its typists were returning floppy disks to its office, the typists were signing the transcripts at the office after printing.

(continued...)

Specifically, the protester alleges that York began advertising for additional typists shortly after the SSA contract was awarded to it, indicating that it did not have adequate staff on hand, and that much of the transcription work under the contract actually has been performed by individuals other than the ones named by York in its proposal.

"Bait and switch", as the term is used here, refers to an offeror's misrepresentation in its proposal of the personnel that it expects to use during contract performance. BMAR & Assocs., Inc., B-252273, June 16, 1993, 93-1 CPD ¶ 465. Where such a misrepresentation materially influences an agency's evaluation of an offeror's proposal, it undermines the integrity of the competitive procurement system and generally provides a basis for proposal rejection or termination of a contract award based upon the proposal. Mantech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326. To demonstrate that a "bait and switch" has occurred, a protester must demonstrate not only that personnel other than those proposed are performing the services (i.e., that a switch has occurred), but also that the awardee represented in its proposal that it would rely on certain specified personnel in performing the services, that the agency relied on this representation in evaluating the proposal, and that it was foreseeable that the individuals named in the proposal would not in fact be available to perform the contract work. See BMAR & Assocs., Inc., supra.

The record here reflects that during the initial months of contract performance a portion of the transcription work was performed by typists other than those named by York in its

³(...continued)

In commenting on the agency report, Free State failed to offer any rebuttal to the agency's arguments; accordingly, we view it as having abandoned these arguments. Arjay Elecs. Corp., B-243080, July 1, 1991, 91-2 CPD ¶ 3.

proposal,⁴ but fails to demonstrate that York engaged in "baiting"; we therefore deny this ground of Free State's protest.

York identified in its proposal 80 typists "who [might] be engaged in the performance of this contract," but it did not represent that it would rely exclusively on these individuals for typing services.⁵ To the contrary, York stated in its BAFO that it was aware, based on its past experience with this particular project, that subcontractor typists from the incumbent prime contractor tended to "travel with the contract," and that it would do its best to accommodate these typists, provided they could pass its spelling, grammar, and punctuation tests. In addition, it is clear from the terms of the RFP--which asked offerors to describe their recruitment and pre-employment/probationary evaluation procedures and training programs--that the agency anticipated that substitution of personnel would be made. It is also apparent from the record that the technical evaluators did not assess the qualifications of individual

⁴We cannot determine based on the documentation furnished to us by the agency the percentage of transcripts prepared by typists other than those named by York in its proposal. (Although Free State requested in its initial protest that the agency produce the covers, first pages, and signature pages of each transcript prepared under York's contract with SSA from the beginning of the contract to the date of its protest, we agreed with the agency that the request was unduly burdensome--since, according to the agency, to comply, it would have been required to produce somewhere between 4,500 and 9,000 pages--and requested that the agency instead produce the lists prepared by York in response to the RFP requirement for a random sample audit of 10 percent of the transcripts prepared each week.) Since the RFP section governing these lists required that they include the name of the transcriber/typist who had prepared the transcript and that all typists be proportionately included in the sampling based on the number of transcripts typed, we thought that these lists would furnish enough information to permit us to determine the approximate percentage of transcripts prepared by typists other than those named in the proposal. York has advised us that the listings were compiled incorrectly, however, and do not accurately reflect the percentage of transcripts prepared by the experienced typists who were listed in the proposal.

⁵In fact, York's proposal stated that "[a]ny or all of the typists listed will be utilized to complete the transcription," and that "[i]f necessary, additional in-house typists will be hired to complete the project as specified in the bid requirements."

typists in evaluating proposals; instead, they looked at the overall number and general quality of the offeror's available typists. Since York did not represent that it intended to rely on specified individuals in performing the services, and the agency did not rely on this assumption in evaluating York's proposal, we do not think that York can be said to have "baited" the agency.⁶

SERVICE CONTRACT ACT WAGE RATE

Free State alleges that York is paying some of its proofreaders less than the required wage rate and that the agency should have adjusted York's price upward to reflect the additional expense that York will incur in complying with the prescribed rate. According to the protester, such adjustment would make York's prices higher than its own for the 10-day delivery portion of the work; Free State contends that, as a consequence, it should have received award for this portion of the work since the proposals were considered to be technically equal.

The RFP incorporated Federal Acquisition Regulation (FAR) § 52.222-41, "Service Contract Act of 1965, as Amended" (SCA), subparagraph (c) of which requires that the contractor and any subcontractors compensate any service employees engaged in the performance of this contract in accordance with any Department of Labor (DOL) wage determination attached to the RFP. The solicitation elsewhere advised offerors that their proofreaders belonged to the job classification "Word Processor II." The DOL wage determination attached to the RFP fixed the minimum hourly rate for Word Processor II in the Northeast Region at \$10.75. The RFP also included FAR § 52.222-42, "Statement of Equivalent Rates for Federal Hires," which stated that

⁶Since we find that York did not engage in baiting, we need not address the issue of whether or not it in fact "switched" employees. We note with regard to the latter issue, however, that the fact that York may have used typists other than those named in its proposal during the initial months of contract performance does not necessarily demonstrate that it has replaced the named typists with the others; it may simply demonstrate that it has temporarily substituted other typists for those named. In this regard, York maintains that some of the typists that it had originally intended to assign to the SSA contract were unavailable to work on it during the first 2 months of performance because their services were required on another ongoing project, but that subsequent to expiration of the other contract on November 30, these typists again became available.

the equivalent wage rate for a GS-4, Step 1 "Transcript Proofreader" was \$7.88.

York's president conceded, in response to Free State's agency-level protest on this issue, that her company had in fact been paying some of its proofreaders less than the required rate of \$10.75 per hour. She explained that she had misread the solicitation as requiring that proofreaders be compensated at the federal equivalent rate of \$7.88; she assured the agency that as of November 22 (the date of her communication to the agency), all proofreaders working on the SSA project were being compensated at the rate of \$10.75 per hour or more.

With regard to the protester's argument that York's prices should have been adjusted upward to account for the additional expense that it will incur in complying with the higher rate of compensation, the solicitation here provided for award of a fixed-price contract; thus, the awardee was required to perform the specified services, in compliance with the terms of the solicitation,⁸ including compensation of its employees at the required rate, at the price it proposed. See Logistical Support, Inc., B-255073.3, Mar. 15, 1994, 94-1 CPD ¶ 193. In other words, even if York did use a wage rate lower than the required rate for proofreaders in arriving at its proposed price, it is still required to compensate these employees at the prescribed rate. Thus, adjustment of York's price is not in order.

⁷The fact that York was for a brief time compensating some of its employees below the required SCA rate is not a matter for our consideration since responsibility for the administration and enforcement of the SCA is vested in DOL, not our Office, and whether contract requirements are met is a matter of contract administration, which is the function of the contracting agency. Commercial Movers, Inc., B-216698, Oct. 22, 1984, 84-2 CPD ¶ 441.

⁸The RFP required that offerors comply with the SCA, and York's proposal stated that it took no exceptions to the terms of the RFP.

⁹The cases cited by the protester in support of its argument that York's price should be adjusted are not on point. The first, Unified Indus. Inc., B-237868, Apr. 2, 1990, 90-1 CPD ¶ 346, aff'd, RGI, Inc.--Recon., B-237868.2, Aug. 13, 1990, 90-2 CPD ¶ 120, deals with a time and materials, rather than a fixed-price contract, while the second, CBIS Federal Inc., 71 Comp. Gen. 319 (1992), 92-2 CPD ¶ 308, does not even discuss the issue of adjusting offerors' prices to reflect accurate SCA wage rates.

Since the record does not demonstrate either that York engaged in "bait and switch" tactics with regard to its proposed personnel, or that York's price should have been adjusted upward to reflect the additional expense that it will incur in compensating its proofreaders at the required SCA rate, the protest is denied.

/s/ Michael R. Golden
for Robert P. Murphy
General Counsel