Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ACS Systems & Engineering, Inc.

File: B-275439.3

Date: March 31, 1997

L. Allan Parrott, Jr., Esq., Patrick H. O'Donnell, Esq., and Terence Murphy, Esq., Kaufman & Canoles, for the protester.
John W. Fowler, Jr., Esq., Blank, Rome, Comisky & McCauley, for Peirce-Phelps, Inc., an intervenor.
Kathryn E. Simmons, Department of Defense, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where contracting agency evaluated best and final offers (BAFO) based upon changed requirements which were not communicated to offerors until after award, contracting agency properly proposed to correct this error by issuing an amendment to clarify its revised requirements; allowing the submission of revised BAFOs based upon those requirements; and evaluating the revised BAFOs for purposes of award.

DECISION

ACS Systems & Engineering, Inc. protests the corrective action proposed by the Department of Defense's Television-Audio Support Activity (T-ASA) in connection with the firm's prior protest of the award of a contract to Peirce-Phelps, Inc. under request for proposals (RFP) No. TASA12-95-R-0025, issued to obtain shipboard audio entertainment systems (SAES) on behalf of the Naval Media Center (NMC). ACS contends that the proposed corrective action is unreasonable and unlawful.

We deny the protest.

The solicitation, issued July 20, 1995, anticipated the award of a fixed-price requirements contract for SAES units consisting of state-of-the-art, commercial-off-the-shelf components. Each SAES unit will broadcast through a ship's intercom system from such sources as compact discs, audio cassettes, commercial FM signals, and the Armed Forces Satellite Transmitted Radio Service audio signal. The contract will run for 1 base year, with up to 4 option years.

To satisfy the base year requirements, offerors were to supply up to 13 SAES units under the third line item. This line item also included two sub-line items, one for a

1-year SAES warranty and the other for a 2-year SAES warranty. In this regard, section C.3.10 of the RFP required that a manufacturer's standard warranty cover the equipment and services to be provided. If this warranty did not extend for a total of 1 year, offerors were to provide the price of doing so; offerors were also to provide the price associated with extending this warranty for a total of 2 years. In addition, the solicitation contained two separate line items for SAES spare parts kits--one for onboard use and one for depot-level use. Offerors were advised that these line items were to be priced as options. The remaining line items concerned such things as data, engineering services and support, technical manuals, and training.[1]

Award would be made to the offeror submitting the "best overall proposal," considering merit and price. The solicitation included the standard clause, "Evaluation of Options," set forth at Federal Acquisition Regulation (FAR) § 52.217-5, which informed offerors that offers would be evaluated by adding the total price for all options to the total price for the basic requirement unless, in accordance with FAR § 17.206(b), it was determined not to be in the government's best interests to do so.[2]

T-ASA's technical evaluation team (TET) evaluated the eight proposals it received and conducted discussions with all offerors. The evaluation of discussion responses resulted in a competitive range of three: ACS's proposal; Peirce-Phelps's proposal for a basic system; and Peirce-Phelps's proposal for an enhanced system. Best and final offers (BAFO) were requested and submitted by March 11, 1996. However, on March 21, a firm whose proposal was excluded from the competitive range filed a protest in this Office, and the final evaluation of BAFOs was suspended until after our July decision denying the protest was issued. Techniarts Eng'g, B-271509, July 1, 1996, 96-2 CPD ¶ 1.

Given the passage of time since the solicitation's issuance, the TET postponed its final evaluation until after the NMC had reviewed each line item in light of the agency's current situation and requirements. NMC listed the line items in terms of their priority, placing primary emphasis on the production units and associated

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[1]The contents of the option year requirements were essentially identical to those of the base year requirements.

[2]FAR § 17.206(b) states, in part, that:

> "The contracting officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the [g]overnment and this determination is approved at a level above the contracting officer. . . . "

nonrecurring items. The three items lowest on the priority list were the 2-year warranty and the two types of spare parts kits.

In view of the NMC's priorities, the TET's final evaluation did not consider the proposed prices of the 2-year warranty or spare parts kits. The TET concluded that Peirce-Phelps's proposal for an enhanced system represented the best value to the government and the contracting officer, acting as the source selection official, agreed. After its September 27 briefing, T-ASA's Board of Awards discussed the fact that the prices of the 2-year warranty and spare parts kits were not evaluated and concluded that such action was proper in view of the language in FAR § 17.206(b). Award was made to Peirce-Phelps on September 30.

After its debriefing, ACS filed a protest in this Office challenging T-ASA's conduct of the evaluation. The agency subsequently conceded that it had improperly failed to evaluate all line item prices. The agency proposed to take corrective action by amending the solicitation to delete the unevaluated line items and allowing the submission of second BAFOs from the offerors in the competitive range. We dismissed the protest as academic on December 23, and the present protest followed.

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Computing Devices Int'l, B-258554.3, Oct. 25, 1994, 94-2 CPD ¶ 162. It is fundamental that offerors must be advised of a procuring agency's actual minimum requirements and the basis upon which their proposals will be evaluated. Unisys Corp., 67 Comp. Gen. 512 (1988), 88-2 CPD ¶ 35; Occu-Health, Inc., B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196; Lobar Inc., B-247843.3, Aug. 31, 1992, 92-2 CPD ¶ 139. When an agency changes its requirements, either before or after receipt of proposals, it must issue a written amendment to notify all offerors of the changed requirements and allow competing firms an opportunity to respond to them. FAR § 15.606(a) (FAC 90-31); Ogden Gov't Servs.--Protest and Request for Modification of Remedy; Tate Facilities Servs., Inc.--Protest, B-253350.3 et al., Apr. 4, 1994, 94-1 CPD ¶ 226; Budney Indus., B-252361, June 10, 1993, 93-1 CPD ¶ 450; Universal Technologies, Inc., B-241157, Jan. 18, 1991, 91-1 CPD ¶ 63.

ACS contends that the Navy does require the items proposed for deletion and should simply reevaluate the BAFOs which have already been submitted in accordance with the evaluation scheme. Our review of the record affords us no basis to find the agency's proposed corrective action unreasonable.

NMC states that the spare parts kits were included in the solicitation to provide a potentially more convenient method of procuring items since, at the time the acquisition was planned, the agency was faced with drastically diminishing manning

levels and increased workloads, but steady funding levels. Thus, for example, if the agency's storekeepers were swamped with ordering parts for other systems, the inclusion of these line items would allow them to buy kits of spare parts instead of many parts individually. However, NMC reports that the drastic manning reductions have not continued, the workload has eased, and funding has been reduced.[3] As a result, NMC no longer needs the convenient option of these line items--the agency employs a staff of 10 at its supply depot and one of their primary functions is to procure parts for shipboard broadcasting systems. Similarly, while the 2-year extended warranty was a potential convenience for Navy repair personnel given the once-current manning, workload, and funding considerations, these considerations no longer exist. NMC has six fleet maintenance facilities located around the world staffed with technicians qualified to work on all NMC shipboard systems, as well as repair personnel at its supply depot, and these repair personnel successfully maintain numerous pieces of equipment without any warranty protection.

ACS asserts that the NMC must still buy spare parts and has no other contract vehicle for purchasing them. However, NMC states that it has no intention of fielding units without having spare parts available, but prefers the flexibility of purchasing the components for these commercial-off-the-shelf items individually, rather than in kits, through its supply depot. As for ACS's assertion that the 2-year warranty is in the Navy's best interest, the question here is not whether the solicitation reflects the Navy's ultimate "wish list," but whether it reflects the Navy's minimum needs. Finally, ACS's point that the Navy has not "ruled out" the need for these items overlooks the NMC's statements that these items are "clearly not required" and "will not be procured." Under the circumstances, we have no basis to question NMC's determination that its requirements no longer include the items at issue here. As a result, the agency properly determined to amend the RFP to reflect its actual requirements and to allow the submission of second BAFOs based upon those requirements. Lobar Inc., supra.

ACS also complains that the proposed corrective action amounts to an improper auction because Peirce-Phelps's prices have been exposed, or "technical leveling and/or technical transfusion."[4] Where the reopening of negotiations is properly

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[3]ACS's argument that manning reductions will continue are not particularized to the personnel functions at issue here and provide us no basis to discount NMC's statements in this regard.

[4]The basis for this position is the protester's apparent contention that reopening negotiations will give Peirce-Phelps an opportunity to correct what ACS calls its "flawed technical approach," i.e., allotting a major portion of its proposed price to the warranty and spare parts kits. Although ACS supports its argument by citing to (continued...)

required, as here, the prior disclosure of an offeror's pricing does not preclude reopening negotiations because the possibility that a contract may not be awarded based on true competition on an equal basis has a more harmful effect on the integrity of the competitive system than the otherwise improper disclosure of proprietary information. The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425; Lobar Inc., supra. Accordingly, the agency's proposed corrective action here is entirely proper.

ACS finally asserts that the proposed corrective action is designed to "steer" the award to Peirce-Phelps. When a protester contends that contracting officials are motivated by bias or bad faith, it must provide convincing proof, since contracting officials are presumed to act in good faith. Protective Group, Inc./Protective Materials Co. Div., B-236975, Jan. 11, 1990, 90-1 CPD ¶ 45. ACS merely notes the error that led to this proposed corrective action, reiterates its complaint concerning improper technical transfusion or an auction, and concludes, with no further proof, that the agency's proposed corrective action is an attempt to "steer" the award to Peirce-Phelps. In light of the rationale for the agency's actions, which we have found reasonable, we find that ACS's unsupported allegations do not constitute the proof required. Id.

The protest is denied.

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[4](...continued)
the regulation relating to technical transfusion (FAR § 15.610(e)(1)), that provision clearly has no application to ACS's contention; at best, ACS's argument can be interpreted as an allegation of technical leveling, a charge unsupported by the record.