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R. Klaman
Proc I

DECISION

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

FILE: B-185781 DATE: March 10, 1977

MATTER OF: Energy Resources Company, Inc.

DIGEST:

1. Protest filed with GAO after submission of best and final offers alleging impropriety of amendments to RFP is untimely under 4 C.F.R. § 20.2(b)(1) (1975), when alleged improprieties were or should have been apparent prior to submission of best and final offers.

2. Refusal to divulge to offeror its position vis-a-vis other offerors is consistent with FPR § 1-3.805-1(b) (1964 ed. amend. 153).

3. Under applicable regulation estimated costs and proposed fees should not be considered as controlling factors in determining to whom award should be made for a cost-reimbursement contract.

4. Source selection determination will be questioned by GAO only upon a clear showing of unreasonableness or violation of procurement statutes or regulations.

Energy Resources Company, Inc. (ERCO), has protested the negotiation procedures used by the Food and Drug Administration (FDA) under request for proposals (RFP) 223-75-2000, amendments to the RFP, and FDA's source selection determination resulting in an award to another firm.

FDA is responsible for premarketing clearance for all food additives. Exempted from such clearance are items defined as generally recognized as safe (GRAS). In order to insure the safety for use of these exempted items, the FDA, as directed by the President, proposed to reevaluate the safety of the GRAS substances. This was to be done by compiling, collating and reviewing data collected from toxicological literature, consumer exposure questionnaires, and animal testing, and then integrating the total information into a scientific literature review for the GRAS substances.

In furtherance of this objective, the RFP established a requirement for a review of scientific literature from 1920 to the present and the preparation of a scientific literature review of 53 GRAS substances.

The RFP invited proposals on all or any part of the 53 GRAS substances. FDA hoped that the provision permitting multiple awards would promote competition. A cost-reimbursement contract was contemplated.

The technical evaluation was to be based upon the completeness and thoroughness of the proposals. The offerors were to show that the objectives stated in the proposals were understood and, further, were to offer a logical program for their achievement. Technical considerations were to be paramount in evaluating proposals.

The technical evaluation criteria were weighted as follows:

| | |
|---|---|
| (1) Understanding of the scope of work and clarity of presentation of technical narrative | 24 points |
| (2) Resources of proposed offeror to include facilities, equipment and personnel | 35 points |
| (3) Experience | 12 points |
| (4) Planned program management, as reflected by proposed monitoring of the program and utilization of resources | 29 points |

Seven proposals were submitted. All seven offerors proposed to perform an evaluation of the 53 GRAS substances. FDA ranked the proposals as follows:

Technically Qualified

| | |
|---|---|
| Informatics, Inc. | 92.8 |
| Tracor Jitco, Inc. | 88.0 |
| The Franklin Institute Research Laboratories | 85.0 |
| Stanford Research Institute | 74.6 |
| ERCO | 72.4 |

Technically Unacceptable

| | |
|---|---|
| Howard Kaye & Associates | 36.4 |
| New Vistas Systems, Inc. | 24.0 |

Tracor Jitco, Inc. (Tracor Jitco), Howard Kaye & Associates, and New Vistas Systems, Inc., were given rejection notices. Tracor Jitco was rejected because of what the FDA felt was an unrealistically high cost estimate. Howard Kaye & Associates and New Vistas Systems, Inc., were rejected because FDA considered their proposals so technically inferior that they could not even be considered for a partial award.

FDA then changed the priority assigned to the GRAS project so that it would be charged to the impending fiscal year's funds. The contracting officer notified each of the offerors in the competitive range of the delay and requested that their proposals be extended. At this point, Tracor Jitco was added to the competitive range because it was felt that the firm could possibly compete for a partial award in the event FDA decided to make multiple awards.

Subsequently, Tracor Jitco submitted an unsolicited proposal which related estimated costs to the number of citations found in the literature search. FDA, believing that this approach would provide a more accurate estimate of cost if applied to all competing proposals, agreed to solicit modified proposals from the offerors on the basis suggested by Tracor Jitco. The 53 GRAS substances were also divided into four groups for purposes of evaluation. The contracting officer requested that each of the offerors submit an estimate of the number of literature citations considered pertinent to each substance, the percentage of the citations which would be included in the literature review, and separate cost estimates for each of the four subdivisions of GRAS substances.

According to the FDA, the responses failed to furnish the anticipated improvement in cost estimates. The number of citations varied from 9,282 to 180,675. Moreover, the evaluation was complicated even more when the total estimate of citations was compared to the direct labor hour estimates as shown below.

| | Total Citations | Direct Labor Hours |
|---|---|---|
| Informatics, Inc. | 21,470 | 17,940 |
| Tracor Jitco | 43,820 | 33,741 |
| The Franklin Institute Research Laboratories | 9,282 | 14,274 |
| Stanford Research Institute | 53,000 | 10,012 |
| ERCO | 180,675 | 9,504 |

After reviewing the responses, FDA concluded that "* * * it was obvious there was no consistent logic in the various estimates."

In an effort to establish a common basis for evaluating the proposals, FDA developed 5,000 man-hours plus or minus 10 percent as its best estimate of direct labor hours which would be required in performing the literature search and report writing for each of the four groups of GRAS substances. This estimate, which was utilized by FDA in negotiating with each of the offerors, was based on prior direct labor hours required by a contractor which performed similar GRAS reviews.

Following the negotiations, each offeror was requested in writing to submit a best and final offer or to confirm the initial proposal as revised. The offerors submitted revised cost estimates including revised direct labor hour estimates. Shown below is a schedule of the final estimated total cost and estimated direct labor hours for each of the offerors.

| | |
|---|---|
| Informatics, Inc. | $208,362 - 16,982 |
| Tracor Jitco | 300,828 - 19,617 |
| The Franklin Institute Research Laboratories | 226,397 - 19,012 |
| Stanford Research Institute | 530,960 - 17,100 |
| ERCO | 364,998 - 19,600 |

After completing a final technical evaluation of the proposals, FDA concluded, among other things, as follows:

"Technical evaluation of the best and final offer submitted by Informatics as a result of the negotiations resulted in the conclusion that their initial technical rating as the highest ranked proposal remains unchanged. The Informatics proposal as revised is superior in all respects to any other proposal received. The differences in the classes of labor and the number of hours contained in their revised proposal are fully in accord with the Goverment's man loading estimate, the cost awareness displayed by the proposed utilization of the senior staff as well as the concept of limiting the workload of literature searching and preparation of reviews to those personnel who have essentially performed the same kind of work before are typical examples of the innovative and superior management approaches reflected in the Informatics proposal. Furthermore, our prior experience with Informatics during the performance of similar contract services had demonstrated that Informatics can deliver superior end products at the proposed cost in a timely fashion. It is, therefore, recommended that award for all groups I through IV be made to Informatics."

The contract was subsequently awarded to Informatics for all four groups of GRAS substances.

ERCO's allegations of protest are as follows:

1. ERCO may have been the low offeror on the original submission.

2. By establishing a direct labor hour requirement, FDA forced ERCO to increase proposed costs above the amount for which it was willing to perform the contract, thus making the firm noncompetitive.

3. No sound basis existed for partitioning the GRAS substances into four groups.

4. The RFP modifications may have had the effect or may have been undertaken with the intent of minimizing or eliminating ERCO's participation in the procurement.

5. ERCO was led to believe that it would receive all or part of the award so that it would participate in contract negotiations without protesting.

6. The withholding of information concerning ERCO's nonselection was in violation of FPR § 1-3.805-1(b) (1964 ed. amend. 153).

7. Source selection may have been on a basis other than cost.

The Department of Health, Education, and Welfare (HEW) has taken the position that all offerors in the competitive range were treated fairly and impartially. This was accomplished by releasing information modifying the RFP to all offerors at the same time; by permitting proposed revisions on an equal basis; and by requiring the same cut-off date for best and final offers.

With regard to the amendments to the RFP, HEW states:

"* * * since there was no clear basis for making partial awards on the original proposals, it was considered necessary to obtain cost data by four logical groupings of the listed GRAS substances.

* * * * *

> "Analysis of the literature citation data provided additional insight but failed to clearly indicate what each offeror intended to perform under the proposed contract.
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> * * * * *
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> "Finding no means for clearly differentiating between proposals by this approach, the contracting officer then approved a negotiating position for each offeror in the competitive range which was based upon the * * * recommended estimate of direct labor hours and skills mix for performing any of the four groups of GRAS substances."

According to HEW, there was never any intent to minimize or eliminate participation by ERCO or any other offeror.

HEW also takes the position that ERCO unilaterally and voluntarily increased its estimated costs. Here, HEW points to the letter which requested best and final offers. The letter provided in pertinent part:

> "As a result of discussions between personnel of your firm and the Food and Drug Administration on December 18, 1975, a revision to your cost proposal, or recognition that your cost proposal, as revised, is in fact your best and final offer, is solicited."

Further, HEW contends that there is nothing in the record which indicates that ERCO was misled or misinformed. Moreover, ERCO was not the low offeror on the original submission or on the two subsequent submissions for any of the four separate groups of GRAS substances or for the total contract work. In addition, "* * * ERCO's initial cost proposal together with its fifth position in technical ranking, extremely high estimate of literature citations and low estimate of direct labor reflected a lack of understanding of the project and ability to organize and perform the contract."

With regard to the contracting officer's refusal to disclose to ERCO its position vis-a-vis other offerors prior to award of the contract, HEW states that the contracting officer's refusal to disclose the requested information was consistent with FPR § 1-3.805-1(b) (1964 ed. amend. 153). HEW states that estimated costs and proposed fees were not to be the controlling factors in source selection. As was stated in the RFP, technical considerations were to be and were the most important factors in selecting an offeror for award.

Finally, HEW contends that ERCO's protest is untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1975), because the protest was not filed with our Office until more than 10 working days after ERCO's best and final offer was received. HEW refers us to Kollmorgen Corporation, Electro-Optical Division, B-183141, March 26, 1975, 75-1 CPD 181.

We do not agree with HEW that ERCO's protest is untimely in its entirety. However, we do find ERCO's allegations concerning the impropriety of the modifications to the RFP (2, 3, and 4 above) to be untimely. 4 C.F.R. § 20.2(b)(1) (1975), provides in pertinent part that:

> "Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation."

Since the alleged improprieties involved in the amendments to the RFP were or should have been apparent to ERCO prior to the submission of its best and final offer, its protest concerning these matters, which was filed with our Office in excess of 10 days thereafter was clearly untimely and is therefore not for consideration on the merits.

ERCO's protest seems to stem from a lack of information. For example, ERCO alleged that it may have been the low offeror on the original submission (1, above). The implication here is that if award had been made on the basis of initial proposals, ERCO would have been the awardee.

The record reflects, however, that ERCO did not submit either the lowest initial proposal or the lowest best and final offer. Moreover, after evaluating the seven initial proposals, FDA considered five offerors to be in the competitive range. Of the five offerors in the competitive range, ERCO received the lowest technical ranking. Based on the above, it appears that if award had been made on the basis of initial proposals, ERCO would not have received the award.

In any event, no award could have been made on the basis of initial proposals since the initial proposals offered no clear basis for making partial awards as the RFP contemplated. FDA considered it necessary to partition the GRAS substances into four logical groupings and to obtain from each offeror an estimate of costs and direct labor hours required for performing the literature search and report writing for any of the four groups of GRAS substances to facilitate partial awards and to establish a common basis for evaluating proposals.

The direct labor hour estimate was reasonable since it was based on a prior contract for the review of GRAS items. Our Office has recognized that an agency may use an independent estimate of costs or required man-hours, and we will not object unless the estimate appears to be faulty. Teledyne Lewisburg and Oklahoma Aerotronics, Inc., B-183704, October 10, 1975, 75-2 CPD 228.

Further, we find no basis for ERCO's allegation of an impropriety in that the contracting officer, after completing the selection process, refused to advise ERCO whether or not it had been selected for award (6, above). Although ERCO requested information concerning its selection or nonselection after receipt of best and final offers, FDA did not complete its final technical evaluation of proposals until 4 months later and the contract was not awarded to Informatics until 4-1/2 months after that. About 1 week after the award FDA did notify the unsuccessful offerors, including ERCO, that the GRAS contract had been awarded to another firm. ERCO's request for information, then, was made prior to selection and award.

In this connection, the contracting officer's refusal to divulge to ERCO its position vis-a-vis other offerors prior to award was consistent with FPR § 1-3.805-1(b) (1964 ed. amend. 153), which provides in pertinent part that:

> "(b) Whenever negotiations are conducted with more than one offeror, no indication shall be given to any offeror of a price which must be met to obtain further consideration since such practice constitutes an auction technique which must be avoided. Likewise, no offeror shall be advised of his relative standing with other offerors as to price or be furnished information as to the prices offered by other offerors. After receipt of proposals, no information regarding the number or identity of the offerors participating in the negotiations shall be made available to the public or to any one whose official duties do not require such knowledge."

Although FPR § 1-3.805-1(b), supra, does permit preaward notice to an offeror that its proposal is unacceptable, there was no reason for such notice because ERCO's technical proposal remained in the competitive range throughout the competition.

With reference to the basis of source selection, ERCO correctly assumed that selection was made on a basis other than cost (7, above); however, we find nothing wrong with selection on this basis. FPR § 1-3.805-2 (1964 ed.), for example, provides that:

> "In selecting the contractor for a cost-reimbursement type contract, estimated costs of contract performance and proposed fees should not be considered as controlling, since in this type of contract advance estimates of cost may not provide valid indicators of final actual costs. There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and agency procedures and appropriate to the work to be performed (see § 1-3.808). Beyond this, however, the primary consideration in determining to whom the award shall be made is: which contractor can perform the contract in a manner most advantageous to the Government."

Further, the RFP specifically apprised offerors that selection would be based primarily upon technical considerations.

Even assuming that ERCO increased its proposed costs above the amount for which it was willing to perform the contract as a result of negotiations concerning the estimated direct labor hours estimates, as ERCO contends, we cannot find that this was prejudicial. It is

clear that the request for best and final offers did not mandate any such result. Moreover, the offerors' technical capabilities, not the offerors' estimated costs, were the prime determinants in evaluating and ranking the proposals.

With regard to the selection of Informatics, we have held that our review of source selection decisions is limited to the test of rationality. Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-2 CPD 253; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 305. More specifically, a source selection determination will be questioned by our Office only upon a clear showing of unreasonableness or a violation of procurement statutes or regulations. Riggins & Williamson Machine Company, Inc., 54 Comp. Gen. 783 (1975), 75-1 CPD 168.

We cannot conclude from the record that the award of the GRAS contract to Informatics was unreasonable or that it violated procurement statutes or regulations. Informatics' initial proposal received the highest technical rating. Informatics' final proposal was also given the highest rating, and Informatics' final estimated total cost and total direct labor hours were the lowest of all of the offerors. Moreover, there is no evidence of record to indicate that the technical or cost evaluations were not reasonable.

In summary, we cannot find that ERCO was in any way misled or misinformed (5, above) or that the procurement was conducted in a manner contrary to competitive principles.

Accordingly, the protest is denied.

R. F. Keller

Acting Comptroller General
of the United States