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DECISION



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

FILE: B-196254

DATE: June 24, 1980

MATTER OF: Logistic Systems Incorporated

DIGEST:

1. Where proposal in competitive range was found informationally inadequate, so that contracting agency could not determine extent of offeror's compliance with requirements, contracting agency should have discussed inadequacies with offeror, especially since solicitation did not specifically call for missing information but merely contained general request for information.
2. Contracting agency may not avoid duty to conduct meaningful discussions by labelling informational inadequacies in offeror's proposal as weaknesses and thus not for discussion under its regulation.
3. Contracting agency may not avoid duty to conduct meaningful discussions, by pointing out informational inadequacies in offeror's proposal, on basis that to do so would constitute technical leveling. Technical leveling is not involved where sole purpose of discussion is to ascertain what offeror proposes to furnish.
4. Contracting agency does not fulfill duty to point out informational inadequacies in offeror's personnel and facilities areas merely by requesting offeror to furnish cost information pertaining to these areas. Offeror could not reasonably relate agency's request for cost detail to the specific informational inadequacies.
5. Grounds of protest concerning failure of all initial proposal evaluators to evaluate final proposals, procuring agency's refusal to release documents bearing on evaluation of proposals, and procuring agency's alleged bias against small concerns are without merit since: (1) final proposal evaluation did not contradict solicitation;

[Protest Against Contract Award]

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- (2) procuring agency, not GAO, determines releasability of documents; and (3) procuring agency's position that bias in evaluation did not exist is supported by record.
6. Given closeness of scoring and inadequate negotiating approach, offeror having "best buy" for three phases of decontamination and cleanup contract is in doubt.

Logistic Systems Incorporated (LSI) protests the award of a contract to Rockwell International Corporation (Rockwell) under request for quotations (RFQ) DAAK11-79-Q-0095 issued by the Chemical/Ballistics Procurement Division, United States Army Armament Research and Development Command, Aberdeen Proving Ground, Maryland. The solicitation was for the decontamination and cleanup of Frankford Arsenal, Philadelphia, Pennsylvania, so that the area could be turned over to the public for recreational or industrial use.

LSI primarily challenges the adequacy of discussions leading to the contract which was awarded under a "best buy" analysis at an estimated cost (\$6,302,187) nearly 50 percent higher than LSI's proposed cost for the work. We conclude the discussions in question should have been more extensive.

BACKGROUND

In 1976 Frankford Arsenal, a 110-acre facility located within the city limits of Philadelphia, was determined to be excess of the Army's needs. During the 160-year period that the facility had been in existence, a wide range of explosive, pyrotechnic, radiological and industrial chemicals were utilized in carrying out the facility's research, design and

manufacturing mission. A sampling and analysis program was then undertaken to determine the extent of radiological contamination and explosive residues present at the arsenal.

The RFQ, which was issued on May 8, 1979, divided the cleanup and decontamination of Frankford Arsenal into three phases. The first phase would consist of verifying detailed decontamination and cleanup methods and procedures for the contaminants present at the arsenal. Based on the information generated in phase I, detailed plans and standard operating procedures to conduct the cleanup would then be prepared under phase II. Under the terms of the solicitation, these plans and procedures would have to be submitted to the Government for approval prior to starting operations. Upon approval by the Government, the contractor would conduct the actual decontamination and cleanup operations under phase III.

The RFQ also informed offerors that proposals would be evaluated on the basis of the following criteria listed in descending order of importance:

- (1) Technical approach
- (2) Management, Personnel and Facilities
- (3) Cost Realism
- (4) Proposal quality and Responsiveness

Moreover, listed in the RFQ were the mathematical formulas which were to be used to determine the "best buy" for the work. Under these formulas, "technical merit," which included all four evaluation factors, carried three times the weight of cost quantum.

On the closing date for receipt of proposals, June 14, 1979, the Army received five proposals. These proposals were then submitted to the Army's Toxic and Hazardous Materials Agency for technical evaluation.

Teledyne Isotopes, Inc., Rockwell, and LSI were found to be qualified and thus placed within the zone of consideration. On July 30, 1979, the contracting officer sent letters to the three qualified firms requesting certain price data and the submission of best and final offers. Best and final offers were received on August 6, 1979.

The Toxic and Hazardous Materials Agency was then requested on August 7, 1979, to review the best and final offers to determine whether any changes in technical scoring were necessary. The Agency stated on August 8, 1979, that there should be no change in the previously assigned technical ratings. Between August 9 and September 20, 1979, the Army conducted a "best buy" analysis in accordance with the terms of the solicitation and the analysis was reviewed by its Board of Award. Because of this analysis, a cost-plus-fixed-fee contract was awarded to Rockwell on September 21, 1979. By letter dated September 25, 1979, LSI submitted its protest against the award to Rockwell.

There is no dispute as to the essential facts pertinent to the "discussions" issue. Both LSI and the Army agree that the questions posed in the contracting officer's July 30 letter constitute the only discussions that were held concerning the LSI proposal. Issue is taken, however, as to whether these discussions constituted "meaningful" discussions as contemplated by 10 U.S.C. § 2304(g) (1976) and the decisions of our Office. See, for example, B-173677, March 31, 1972, as summarized in 51 Comp. Gen. 621 (1972).

The contracting officer's July 30, 1979, letter to LSI asked that the company give consideration to the following:

"a. In order to adequately judge analytical costs for each phase of the contract, you should provide the Government with the number of

samples taken and the analyses performed in each of the areas addressed, i.e., cleanup of 400 area, cleanup of radiological material, cleanup of heavy metals and cleanup of explosives. In addition, the associated manhours and costs for both prime contractor and subcontractors should also be provided.

"b. Your total Phase I manhours would appear excessive. What is your rationale for these projected manhours?

"c. Your estimated 4,500 manhours to prepare detailed SOP's would appear inadequate. What is your rationale for these projected manhours?

"d. You present analytical manhours during Phase II which deals with preparation of operational SOPs. Do the analytical manhours represent actual analytical effort or time spent by analytical personnel preparing SOP's?

"e. Your estimate (3.9 million square feet) of the area to be painted is considerably less than that contemplated by the Government. How was your estimate computed?

"f. Backup data relating to your estimate of \$20,600 disposal cost for radiological material during Phase III should be provided. Your allocation for disposal in this area is considered inadequate. What is the rationale for your estimate?

"g. What is the rationale for the analytical costs required during Phase III for cleanup of the 400 area.

"h. What is the rationale for the analytical manhours required during Phase III for painting and cleanup of heavy metals? The total manhours would appear excessive."

The contracting officer argues that a detailed review of these questions would have necessarily led LSI to a discovery of proposal areas judged "weak," rather than "deficient," by the Army. These areas and the paragraphs of the July 30 letter which purportedly relate to the weaknesses, in the contracting officer's view, are as follows:

1. Sampling and analyses for heavy metals and explosives treated too lightly (paragraphs a, g and h).

2. Insufficient information on laboratory facilities and capabilities (paragraphs a, g and h).

3. Underestimated laboratory requirements (paragraphs a, g and h).

4. Underestimated analytical and painting requirements (paragraphs a, g and h).

5. Details on proposed procedures for heavy metals and explosives cleanup lacking (paragraph b).

6. Treatment of waste water contaminated with heavy metal waste not addressed (paragraph b).

7. Little original ideas or specific details provided for Phase I so that proposal repeated what was in the RFQ (paragraph b).

8. Subcontracting not fully defined (paragraph e).

9. Allocation for radiological waste disposal low (paragraph f).

Under the "best buy" formula, these weak areas sufficiently offset, in part, LSI's \$2 million cost advantage, therefore dictating award to Rockwell. Apart from this list of weaknesses, the record also shows that the Army considered LSI's proposal to contain an additional weakness regarding alleged inadequate information about proposed personnel.

As to the weaknesses concerning laboratory facilities and personnel, the contracting officer has emphasized the importance of the areas and why he thought explicit discussion of the weaknesses would have been inappropriate, as follows:

"With respect to the factor management, personnel and facilities, there was some significant difference between the score assigned LSI and that assigned the other two firms. However, each of the competing firms had equal opportunity to establish a proposed management plan, to engage qualified personnel, to arrange for facilities, and to communicate their background and experience. In this particular case, the difference sprang not merely from any weakness of the LSI proposal, but the superiority of the resources available, in terms of personnel and facilities, to the other two competing offerors. To negotiate these factors with LSI toward upgrading its proposal and to giving LSI further opportunity to seek other personnel and facilities would have constituted leveling rather than any meaningful negotiation."

Additionally, the contracting officer's legal counsel has offered a defense of the negotiating approach which he believes is expressly consistent with Defense Acquisition Regulation § 3-805.3 (DAC #76-7, April 29, 1977). The argument, is as follows:

"DAR 3-805.3(a) requires that when discussions are held that the offeror be advised of deficiencies * * *. Deficiencies are defined as parts of a proposal which do not satisfy the Government's requirements. The contracting officer has indicated * * * that LSI had numerous weaknesses and overall its proposal was inferior to that of [the other offerors] * * *. [But there] were no areas where LSI failed * * * to address the RFQ requirements."

* * * * *

"* * * the contracting officer does not have to advise an offeror of its weaknesses * * *. [But as] a practical matter, the contracting officer will normally inform an offeror of its weakness * * *. This is exactly what the contracting officer did in this case."

In reply, LSI challenges the Army's position that by questioning man-hours and costs, an implied notification is being made concerning specific weaknesses in technical approach. LSI alleges that it was not alerted to any weaknesses in technical approach by the contracting officer's July 30, 1979, letter which merely required LSI to "adequately judge analytical costs for each phase of the contract." The remaining paragraphs of the letter indicated only that either man-hours or costs in various areas appeared excessive or inadequate and requested a rationale from LSI. In addition, LSI points out that prior to the July 30, 1979, letter the contracting officer on July 10, 1979, issued a communication to all competing offerors asking that man-hours and costs be resupplied on a predetermined evaluation format by July 11, 1979. LSI asserts that it assumed the request for additional information on July 30, 1979, regarding the same cost and man-hours categories meant only that further comparisons were being made between the competing offerors and that the contracting officer was attempting to insure that he was evaluating all offerors on the same basis.

Most importantly, LSI alleges that the contracting officer's July 30, 1979, letter did not specifically apprise the company of any "weaknesses" at all in its proposal. Finally, LSI contends that the contracting officer abused his discretion in failing to conduct more comprehensive discussions in view of the approximately \$2.1 million difference between the proposals.

GAO ANALYSIS

When an agency conducts competitive range discussions, it must make those discussions meaningful. Raytheon Company, 54 Comp. Gen. 169 (1974), 74-2 CPD 137. At the same time, we have also recognized that the requirement for meaningful discussions should not be interpreted in a manner which discriminates against or gives preferential treatment to any competitor. Union Carbide Corporation, 55 Comp. Gen. 802 (1976), 76-1 CPD 134. Since disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is clearly unfair, such "transfusion" should be avoided. 51 Comp. Gen. 621, supra. It is also unfair to point out deficiencies or weaknesses when to do so would result in technical leveling by helping one proposer to bring his original inadequate proposal up to the level of other adequate proposals where these deficiencies or weaknesses were the result of the proposer's own lack of diligence, competence, or inventiveness in preparing his proposal. 52 Comp. Gen. 870 (1973).

The record shows that LSI scored lower than the other firms in the zone of consideration under each of the above-described evaluation criteria with the widest disparity existing in technical approach, the most heavily weighted of the evaluation criteria. Even if we were to conclude that LSI could directly infer the evaluation inadequacies conveyed by some of the questions, this conclusion would not apply to the informational inadequacies in proposed personnel and "laboratory facilities and related capabilities." In our view, LSI could not have reasonably related the Army's request for cost details to the specific inadequacies found in these areas. While LSI might have inferred from paragraphs (a), (g) and (h) of the Army's July 30 letter that the company had generally underestimated work requirements, we do not think that it would have also inferred the presence of specific informational inadequacies in these areas.

Where, as here, a proposal in the competitive range is informationally inadequate so that the agency evaluators cannot determine the extent of the offeror's compliance with its requirements, the agency should use the discussion process to attempt to ascertain exactly what the offeror is proposing. In this connection, we have recognized that where a solicitation specifically calls for certain information, the agency should not be required to remind the offeror to furnish the necessary information with its final proposal. Value Engineering Company, B-182421, July 3, 1975, 75-2 CPD 10. But here the solicitation was not so specific in calling for information on the offeror's personnel and laboratory facilities.

As to personnel, the RFQ required offerors to provide:

"Management Flow Chart
Project organization chart showing personnel
by name in each job category
Resumes for Program Manager, key engineering,
and support personnel
Experience, educational background and record
of past accomplishment of key personnel * * *."

The Army found LSI's project chart to be deficient because it included names of personnel in only 11 of 20 organizational blocks found on the chart. Specifically, the contracting officer states that LSI's proposal was "weak" because it omitted the name and qualifications of LSI's "explosives and heavy metals team leader." In reply LSI argues that it "did identify * * * all the key technical personnel involved in the decision making process who would be directly assigned to this job."

Contrary to the contracting officer's statement, LSI's project chart does not identify a position entitled "explosives and heavy metals team leader;" rather the organizational block is entitled "Explosives and Heavy Metals Team" which is shown as operating directly under LSI's named manager for "Explosives and Heavy Metals Decontamination." Moreover, we infer from the contracting officer's statement that LSI's proposal would not have been considered informationally deficient in this particular organizational

block had the putative "team leader" been identified even if the rest of the team members not been identified. This inference runs counter to a literal interpretation of the phrase "in each job category" if one assumes that the phrase was intended to denote each organizational block shown on an offeror's project chart.

Consequently, we do not consider the RFQ's personnel requirements to have been so specific that the Army can be held to have been excused from discussing LSI's perceived informational deficiencies relating to personnel whom LSI evidently did not consider to be "key." At a minimum, the present record suggests possible misinterpretation of the phrase "in each job category" by both the Army and LSI. This misinterpretation, in itself, would have justified explicit negotiation in order to assure an appropriate informational exchange between the parties on personnel requirements.

As to laboratory facilities, the RFQ merely asked offerors to show how their "laboratory * * * equipment/techniques were adequate for the requirements of the work." In our view, this RFQ requirement can only be read as a general call for information. Since the requirement was stated in general terms, it is our view that the Army was obligated to have explicit discussions with LSI if there were specific informational inadequacies relating to laboratory facilities.

The comments of some of the Army evaluators regarding LSI's proposed laboratory facilities were:

- (1) "Radiation only-instrumentation not provided for heavy metal analytical procedures;"
- (2) "Radiation excellent-others?;"
- (3) "No details in equipment and techniques other than some radiation;"
- (4) "Subcontract-Lab Facilities except PMC suspect."

In reply to the Army's criticism that its proposal in these areas was informationally inadequate, LSI contends that the "alleged weakness could have been clarified very simply if any meaningful negotiations had been conducted."

From our review of the record, it appears that the evaluators were uncertain as to the adequacy of LSI's laboratory facilities in areas other than radiation. In view of the evaluator's uncertainties further exploration would have been worthwhile during the course of the competitive range discussions. This conclusion is particularly appropriate given the closeness of the revised numerical rankings of offerors (the awardee was only .01178 ahead of LSI on a revised "Best Buy Index" evaluation) and the potential cost savings theoretically available under an award to LSI. Moreover, by our calculations, a slight increase in LSI's "technical" score (perhaps as little as one point) might have displaced Rockwell under the "best buy" provision of the RFQ.

Thus, we believe that the informational inadequacies relating to laboratory facilities and personnel should have been pointed out to LSI during the discussion process. We are mindful of the Army's argument that such discussions were not required under DAR § 3-805.3, above. Neither, however, does the regulation sanction the Army's failure to point out informational inadequacies which prevent the contracting agency from ascertaining exactly what the offeror is proposing to furnish and whether it will meet the Government's requirements. In short, a contracting agency may not avoid its duty to conduct meaningful discussions by labelling informational inadequacies in a proposal as "weaknesses" rather than "deficiencies." Indeed the Army states that as a practical matter "the contracting officer will normally inform an offeror of its weakness."

Finally, on this point, we do not accept the contracting officer's position that discussion of LSI's informational inadequacies would have constituted improper leveling. In our opinion leveling is not involved where the sole purpose of the discussions is to ascertain what the offeror is proposing to furnish.

We think this result is consistent with 52 Comp. Gen. 466 (1973) where we held:

"* * * we believe it is incumbent upon Government negotiators to be as specific as practical considerations will permit * * *. In view of the substantial difference between the evaluated amounts of [the protester's] offer and the award price (\$388,073 v. \$635,600), we do not find the record persuasive that savings could not have been effected * * * had those offerors in the competitive range been called in for detailed discussions * * *."

This situation is distinguishable, therefore, from the facts in Systems Engineering Associates Corporation, B-187601, February 24, 1977, 77-1 CPD 137, cited by the Army, where we upheld the procuring agency's decision not to conduct technical discussions. In that case, unlike here, the protester did not show prejudice resulting from the lack of discussions; moreover, the potential savings that might have been obtained through negotiations were not nearly as significant as here.

LSI has also raised other issues about the propriety of the Rockwell award. Specifically, LSI asserts:

- (1) all proposal evaluators did not evaluate final proposals to LSI's prejudice;
- (2) the Army improperly refused to release information about the evaluation of proposals;
- (3) the Army's actions show bias against small business concerns;
- (4) mistakes were made in evaluating LSI's proposal.

Proposal Evaluators

As to LSI's argument that some proposal evaluators did not evaluate final proposals, the Army replies that one member of the evaluation panel "did not feel that

his input [in reviewing final offers], even if he had been contacted [for the review], would have had any significant impact [on the evaluation of final proposals]." In any event, the Army argues that LSI was not prejudiced by this circumstance since:

- (1) "all final offers were treated equally and received full and adequate consideration;"
- (2) the "RFQ did not define the number of individuals on the evaluation team;"
- (3) there is "no requirement that a minimum number [of evaluators] be on the team, nor that number be constant."

In reply, LSI argues that at least "three, not one, evaluation committee members did not consider the final offers" and that this lends evidence to LSI's contention that the award was "predetermined."

Our Office has recognized that all of the original evaluators need not rescore revised proposals. As we stated in Ray F. Weston, Inc., B-197866, B-197949, May 14, 1980:

"Weston challenges the manner in which the revised proposals were evaluated since only two members of the TEP conducted the reevaluation rather than reconvening the entire TEP as required by the RFP.

"However, the RFP stated that 'the revised proposal will be reevaluated and scored in accordance with the solicitation evaluation criteria.' This does not require the entire TEP to reevaluate the revised proposals and our Office has recognized that all of the original evaluators need not rescore the revised proposals. Checchi and Company, B-187982, April 4, 1977, 77-1 CPD 232, and Columbia Research Corporation, B-193154, May 15, 1979, 79-1 CPD 353."

Here, the RFQ stated that initial quotations would be evaluated by a "team of government personnel" and that the "initial evaluation of proposals may be revised in light of * * * [final offers]." We do not consider that these RFQ statements were breached in the final evaluation of proposals. In any event, we find no evidence in the record to support LSI's allegation that the selection of Rockwell was "predetermined."

Improper Refusal to Release Information

LSI takes exception to the Army's decision not to release many procurement documents bearing on the evaluation of proposals. LSI suggests it would be appropriate for GAO to release these documents directly to LSI.

We have consistently held that our Office is without authority to determine what records must be released by other Government agencies; therefore, we cannot honor LSI's request. Security Assistance Forces and Equipment International, Inc., B-196008, March 14, 1980, 80-1 CPD 198.

Bias Against Small Business

LSI argues that the circumstances of this procurement show bias against LSI's status as a small business concern. The Army insists that there is no evidence to support the allegation and that, as the procurement was not set aside for small business, "no mechanism existed wherein LSI could have been given preferential treatment." Based on our review of the record, we cannot question the Army's position.

Mistaken Evaluation

Related to the discussion issue, LSI also argues that the Army erroneously interpreted parts of its proposal (for example, in considering LSI's subcontracting plans not to be "fully defined") and that our Office should therefore independently evaluate the points assigned proposals to determine if the award was proper.

It is not our function, however, to independently evaluate proposals in the manner suggested by LSI. See, for example, Ads Audio Vusual Productions, Inc., B-190760, March 15, 1978, 78-1 CPD 206. However, given the closeness of the scoring situation and the inadequate negotiating approach, the offeror having the "best buy" is in doubt. Consequently, in sustaining, in part, LSI's protest, the most that we could recommend is a reopening of negotiations with LSI and another evaluation of its proposal, rather than an immediate termination of the contract and award to LSI as originally requested by the company. See Union Carbide Corporation, 55 Comp. Gen. 802, 76-1 CPD 134 (1976).

In deciding whether to recommend action which may lead to a possible termination of a contract, we consider the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the procurement, and other appropriate noncost effects to the Government, apart from the procurement deficiency involved and its effect on the integrity of the procurement system. See System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159 and cases cited in text at page 12.

On May 23, 1980, the Army informed us that phases I and II of the contract were 100 percent complete as compared with 80 percent completion rates for these phases reported by the Army to us on April 8; moreover, as of May 23, Rockwell had supplied the Army with 100 percent of the data to be developed under these phases. Phase III, which calls for the conduct of the actual cleanup and decontamination of Frankford Arsenal, was almost 20 percent complete. Further, out of a total projected contract cost of \$6.3 million, approximately \$2 million has been expended. Based on these facts, the Army estimates that termination costs would be in the area of \$500,000.

Given the status of the work, moreover, the Army insists that a recompetition for remaining Phase III work under a revised solicitation would be the only practical remedy now rather than the reopening of negotiations solely with LSI under its proposal for all three phases of the work. On this point, the

Army insists that a "period of 8 months would be required to prepare a revised scope of work, issue, evaluate and award a new contract [for remaining Phase III work]." The Army has also informed us that, should Rockwell's contract be terminated as a result of the recompetition and a new contract awarded, the new contractor would require 3 additional months to "assimilate * * * information from [Phases I and II], assemble a team of personnel and equipment, and let subcontracts to initiate further progress on the resulting contract."

These delays, the Army contended, would also cause adverse side effects to the economy of the city of Philadelphia and the operations of the United States Treasury Department. Further, the Army stated it would incur an additional "caretaker" cost of \$200,000 for each month of the delay.

In reply LSI argues:

(1) It would take 3 months, rather than 8 months, to reprocure under a revised solicitation for phase III involving a "firm, fixed-price effort" under which "LSI would be willing to bid;"

(2) Contrary to the Army's view that it would take 3 months for a new contractor to become operational, LSI could be ready within "two to three weeks;"

(3) Based on information obtained by LSI the reported adverse side effects are either speculative or nonexistent;

(4) Since the Army has already awarded a contract for "caretaker" services at approximately \$47,000 per month, it is not appropriate to consider the cost of that service as a reason for denying a recompetition of phase III.

Analysis

Applying the above criteria for deciding whether to recommend a recompetition of the remaining phase III work, we conclude that, on balance, the recommendation would not be appropriate.

First, there is no indication, in our view, that the discussion shortcoming here was made other than in good faith under the negotiation regulation in question.

Second, there is no question [that substantial performance has been accomplished under the contract and that substantial costs would be involved in any partial termination of the contract. Apart from the \$500,000 in termination costs, there would be several additional months of caretaker costs at approximately \$47,000 per month to be incurred (assuming LSI's monthly cost figure for the service is correct) in the event Rockwell's contract is ended; on this score, LSI apparently assumes that the Army is not intending to terminate the current caretaker contract as soon as possible after phase III is complete--an assumption which does not square with the position implicit in the Army's April 8 and May 23 statements. Moreover, we are unable to assume that LSI's proposed price under a revised solicitation would contain the same pricing advantage over competitors that the company possessed under the original solicitation given the differences in the solicitations.

Thus, even if we accept LSI's argument that the reported adverse side effects to the economy of Philadelphia and the operations of the Treasury are not accurate, we consider the above analysis precludes our recommending the requested recompetition.

However, by letter of today we are advising the Secretary of the Army of our concern with the Army's failure to point out deficiencies in the protester's proposal in view of the closeness of the revised numerical rankings of the offerors and the potential 2.1 million dollar cost saving theoretically available under any award to the protester. We are also requesting that the Secretary advise us of the action taken to prevent a recurrence of the above situation.



Acting Comptroller General
of the United States