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

[Protest of Method Used by Agency for Proposal Evaluation]

FILE: B-197749 DATE: November 20, 1980

MATTER OF: Anchorage Telephone Utility

DIGEST:

1. Agency's determination to evaluate communications common carriers' price proposals which are subject to possible regulatory rate revisions as offering "firm" prices is reasonable where agency's historical experience with procurements of "special assembly" services indicates that carriers maintain prices quoted for entire contract term.

2. Contracting officer's telephone conversation with offeror, after receipt of best and final offers, was merely request for clarification without affording opportunity for changes in offeror's proposal and did not constitute improper post-selection discussions.

Anchorage Telephone Utility (ATU) protests the award of a contract for telephone services to Alascom, Inc. (Alascom), under request for proposals (RFP) No. DCA 200-78-R-0024 issued by the Defense Commercial Communications Office, Defense Communications Agency (DCA). The protest involves the propriety of DCA's method of evaluating proposals from common carriers offering prices subject to the jurisdiction of regulatory bodies (tariffed rates), as well as ATU's allegation that DCA engaged in improper post-selection discussions with Alascom. For the reasons stated below, we are denying the protest.

The RFP requested offers for the lease of two "AUTOVON" switches in the Anchorage and Fairbanks areas of Alaska. Offerors were required to submit technical and price proposals and to indicate whether services would be provided under existing filed tariffs. Under the RFP's evaluation and award criteria, after

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completion of the technical review, all "responsive proposals" were to be evaluated and ranked according to price. The solicitation advised offerors that "price evaluation [would] be based on the total discounted life cycle cost over a ten (10) year period."

The four firms other than ATU which submitted proposals for the Anchorage area switch quoted tariffed rates for the full ten year period. ATU offered a two level system of pricing. One level (tier A), which represented capital investment costs, was to be fixed for the ten year period while the second level (tier B), which pertained to costs associated with recurring maintenance and operational costs, was to be subject to annual economic price adjustment to be governed by changes in the Consumer Price Index (CPI) as determined by the Bureau of Labor Statistics. In a letter accompanying its price proposal, ATU stated:

> "Since the Alaska Public Utilities Commission (APUC) indicated in an informal hearing * * * that they had no jurisdiction over this service offering, ATU proposes to enter into a special contract with the Government for these services as no requirement exists for APUC approval or tariffing of the associated charges, other than APUC review to assure that no cross-subsidization exists between these service charges and those provided by ATU that fall under APUC regulatory jurisdiction."

DCA subsequently informed ATU by letter of October 29, 1979, that:

> "In order for DECCO to do this [evaluate the proposal based on a ten year life cycle cost] with your proposal and be able to compare it with other bidders' proposals, it is necessary to adjust your tier 'B' rate to reflect the estimated effects of the CPI, for years 2 thru 10. We propose to use an average annual CPI escalator of 8% [subsequently reduced to 7%] on all proposals received which do not include ten year costs. This adjustment is necessary since your proposed tier 'B' rate is effective for one year."

DCA did not, during its evaluation of proposals, similarly escalate any of the other offerors' prices, all of which were subject to regulatory jurisdiction.

ATU argues that DCA improperly evaluated its competitors' proposals as offering "firm, fixed-price proposals" for the ten year contract term. ATU explains that prices of communications common carriers set forth in contractual arrangements, such as DCA's agreement with Alascom, may be increased by the filing of revised tariffs. Tariff increases can occur following the filing of a revised tariff by the communications carrier, a complaint by a member of the public, an investigation by the regulatory body, or the filing of a tariff by the carrier unrelated to the services in question.

While ATU does not contest DCA's decision to escalate its price, it protests the decision of DCA to treat possible increases due to tariff changes differently from the possible increases due to changes in the CPI. It is ATU's view that all prices either directly or indirectly reflect changes in the CPI. Had the RFP advised offerors that price proposals subject to regulatory jurisdiction were to be construed as offering firm-fixed prices, ATU maintains it would have submitted a price proposal subject to regulation that was substantially lower than Alascom's price. Further, ATU argues that DCA was well aware of the fact that ATU could have "bid" subject to regulatory jurisdiction but did not do so because "it believed such a bid would not only not be in the Government's best interests, but would be apt to be rejected because it did not offer a firm-fixed price." ATU concludes that DCA "concealed" the fact that it intended to treat prices subject to regulatory jurisdiction as firm-fixed prices.

DCA disagrees with ATU's contention that the rates proposed by Alascom were not "firm" and maintains that it acted properly in evaluating the proposals of the other offerors by not escalating prices simply because they were subject to regulatory jurisdiction. DCA maintains that it had no intention of concealing this evaluation procedure and did not know that ATU would offer unregulated prices.

DCA states that AUTOVON is a "special assembly" service which is provided to meet the unique and complex needs of a specific customer. Rates for this type of service are generally developed to reflect the actual cost of providing services without consideration of "non-cost sensitive" factors such as "value of service" which are reflected in general exchange and non-special assembly services. DCA maintains that ATU's arguments concerning increased tariffs are premised on general exchange services which, unlike special assembly services, are rated to reflect an entire spectrum of political and economic pricing considerations. DCA has also submitted examples of its historical experience with leasing AUTOVON switches showing instances where charges have actually decreased during the ten year service life of the system. DCA also points to the Communication Service Authorization (CSA) issued to Alascom which states:

> "Alascom agrees that it will not, on its own motion, initiate any rate/price increases for the services and facilities authorized by this CSA for a period of ten years from the effective start of service date."

DCA argues that by offering ten year prices in its proposal and by the "confirmatory" provision in the CSA, Alascom contractually obligated itself to maintain its rates and therefore any increase in rates due to regulatory jurisdiction is remote. DCA therefore concludes that it acted reasonably in evaluating the proposals by not escalating the prices of proposals submitted subject to regulatory jurisdiction. We agree.

We believe that, under the evaluation criteria, DCA was obligated to determine which of the offerors proposed the lowest cost, that is, to make a good faith determination of the probable lowest ultimate cost to the Government. See, generally, Computer Machinery Corporation, 55 Comp. Gen. 1151 (1976), 76-1 CPD 358, affirmed C3, Inc. and Department of the Army Requests for Reconsideration, B-185592, August 5, 1976, 76-2 CPD 128. Since DCA's specific historical experience in leasing AUTOVON special assembly services indicated that tariffed rates were generally maintained by the telephone companies over the contract term, we

fail to see how DCA could be obligated to escalate the prices of such carriers subject to regulation in determining the lowest ultimate cost to the Government. Thus, we believe that DCA's actions were consistent with the evaluation criteria.

ATU also argues that the contract between DCA and Alascom is invalid because the agency allegedly engaged in improper post-selection discussions with Alascom. The record contains a statement by the contracting officer indicating that, after receipt of best and final offers, he phoned an Alascom representative merely to "confirm" his understanding that Alascom was offering a "firm-fixed [price] for ten years [that] included cost escalation." Subsequently, a CSA was issued which, as stated above, contained a provision precluding Alascom from petitioning for rate increases for a ten year period from the "effective start of service date."

ATU argues that this provision was improperly inserted in the CSA as a result of the telephone discussions between the contracting officer and Alascom's representatives. ATU notes that the specific provision was not included in Alascom's proposal which was submitted subject to regulatory approval and jurisdiction and thereby reserved Alascom's right as a regulated carrier to initiate and receive rate increases. ATU further states that by the terms of the CSA, Alascom was, in any event, free to initiate tariff increases prior to the "start of service date" of June 1, 1982. ATU concludes that the telephone conversation resulted in substantive changes and therefore constituted improper discussions.

The contracting officer states that the addition of the provision in the CSA was purely administrative in nature and had not been discussed during the telephone conversation. The purpose of the telephone conversation, according to the contracting officer, was simply "to preclude even the most remote possibility of error in the Government's understanding that the contract prices were for a 10 year period of time [and] Alascom was not given an opportunity to add, subtract, or in any way

change their proposal." The CSA, according to the contracting officer, was merely a "written verification of the Government's pre-existing understanding." He further indicated that as Alascom submitted a proposal for a ten year service period, any attempt by that firm to increase the charges during the installation period prior to start of service would be considered by DCA to be a "breach of contract."

In negotiated procurements, meaningful discussions must be held, except in certain circumstances not applicable here, with all offerors whose initial proposals are acceptable or are capable of being made acceptable. Defense Acquisition Regulation (DAR) § § 3-805.1 and 2 (DPC 76-7, April 29, 1977). Discussions should be concluded with a common cutoff date for the submission of best and final offers. DAR § 3-805.3(d). If discussions are reopened with one offeror after the receipt of best and final offers, they must be reopened with all offerors in the competitive range and those offerors must be given an opportunity to submit revised proposals. University of New Orleans, B-184194, September 19, 1977, 77-2 CPD 201. However, inquiries to an offeror for the sole purpose of eliminating minor uncertainties or irregularities in a proposal constitute clarifications rather than discussions and do not require reopening discussions with all offerors.

Whether discussions have been held is a matter to be determined on the basis of the actions of the parties. New Hampshire-Vermont Health Service, 57 Comp. Gen. 347 (1978), 78-1 CPD 202. We have held that discussions occur if an offeror is afforded an opportunity to revise or modify its proposal. 51 Comp. Gen. 479 (1972). Discussions also occur when the information requested and provided is essential for determining the acceptability of a proposal. The Human Resources Company, B-187153, November 30, 1976, 76-2 CPD 459.

The record shows that the information solicited by the contracting officer merely consisted of confirmation of Alascom's "firm-fixed price" at the request of an accountant in DCA's Rates Analysis Branch who had already completed his final evaluation and analysis of the proposals received in response to the RFP. Further, the record is clear that the specific provision in the CSA was never mentioned during the telephone conversation. Under the circumstances, it is our view that the contracting officer's telephone conversation merely clarified the agency's previously held view of Alascom's prices without affording that firm an opportunity to change its proposal and therefore is not subject to objection by our Office.

The protest is denied.

Milton J. Socolar

For the Comptroller General
of the United States