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DECISION

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

FILE: B-202813 DATE: March 22, 1982

MATTER OF: Sperry Univac

DIGEST:

1. The contracting officer properly rejected the protester's best and final offer which proposed a step-pricing plan for maintenance services to take effect after the 24th month of the contract because that offer did not conform to the maintenance pricing structure mandated by the solicitation.

2. The contracting agency is not required to reopen discussions with an offeror that submits a best and final offer which the agency determines does not conform with solicitation requirements where the deviation did not appear in the offeror's initial offer which was the subject of discussions, but resulted from a restructuring of that offer after the agency's request for best and final offers.

Sperry Univac Division of Sperry Corporation protests the award of a contract to Paradyne Corporation under request for proposals No. SSA-RFP-80-0253 issued by the Social Security Administration (SSA). Univac contends that it was entitled to the award because its proposal was low under the amended evaluation criteria contained in the RFP. The protester maintains that the award was improperly made to Paradyne after SSA abandoned the stated criteria and employed different criteria to evaluate Univac's proposal. Although it is true, as Univac argues, that its evaluated cost was low, since we have no basis to disturb the agency's determination that Univac's revised best and final offer was not consistent with the terms of the RFP, we deny the protest.

month. If all items were not ordered by that time, Univac proposed a step-pricing plan, effective for the remainder of the contract, offering substantially higher prices for each item, including monthly maintenance, varying with the number of items ordered.

The record shows that SSA had difficulty evaluating Univac's step-pricing plan. The SSA Cost Evaluation Committee concluded that Univac's step-pricing plan was ambiguous in a number of areas and that it violated the solicitation provisions requiring fixed prices and prohibiting separate charges for failure to exercise the options. Based upon this evaluation, the contracting officer rejected Univac's proposal, which was evaluated as low, and made award to Paradyne on the basis of its second low offer.

<u>Agency Position</u>

SSA argues that Univac's step-pricing plan constituted a contingency which qualified that firm's proposal, in that the agency's failure to exercise all options within the first two years would result in it paying a substantial price penalty. This penalty, in SSA's view, would cause Univac's proposal, which appeared to be low, to result in actual higher system life cost than Paradyne's proposal and, in effect, would have curtailed SSA's option rights. Moreover, SSA contends, this step-pricing plan constituted a "separate charge" or penalty for failing to exercise the option rights, which violated the solicitation's provision prohibiting such separate charges.

The agency also states that Univac's proposal did not conform with the pricing structure for maintenance mandated by the solicitation. The solicitation format and instructions provided for fixed maintenance charges, with escalation limited to the Consumer Price Index (CPI). In SSA's view, the step-pricing of maintenance charges for varying quantities of equipment ordered violated this term of the solicitation.

Finally, SSA contends that the step-pricing plan Univac presented with its best and final offer deviated materially from the pricing terms previously discussed during negotiations. SSA points out that its letter soliciting best and

Background

This procurement was conducted by SSA to upgrade and replace telecommunications terminals used by its field offices to tie in with its central computer facility in Baltimore and to transmit administrative messages. The RFP called for the equipment needed to perform these functions at each site, including controllers, printers, card readers and key stations. In addition to the basic quantities, the solicitation reserved to SSA the right to order substantial option quantities of these same items, as well as additional optional items, such as memory enhancements. The solicitation also called for necessary maintenance and other services for all items ordered during the contract period. Offerors were to propose on the basis of purchase, rental, lease with purchase option, and lease to ownership arrangements. Award was to be made on the basis of lowest system life cost as determined by adding the total prices for all optional periods and option quantities to the total price for the initial contract period.

Throughout the initial period of written and oral discussions, Univac proposed fixed prices for each of the various items it offered. That is, at all times during negotiations and in its original best and final offer, Univac proposed one unit price for each item of equipment offered under a particular purchase or lease plan and a single fixed monthly maintenance charge per item no matter when during the life of the contract the item was ordered.

After initial best and final offers were submitted on February 5, 1981, SSA reopened negotiations by issuing amendment No. 14, which advised offerors that for purposes of evaluation, all options would be considered to be exercised in "Month 24" and that "price will be based on Year 2 prices."

Discussions were again held with all offerors within the competitive range and a new date was set for receipt of best and final offers. Univac's revised best and final offer proposed, for the first time, a completely restructured pricing plan. This plan offered fixed-unit prices for all items, effective for the entire life of the contract, if every base and option item were ordered by the end of the 24th final offers required full details supporting any revisions to the offeror's final proposal. The abbreviated explanation of the step-pricing plan contained in Univac's best and final offer did not, in SSA's opinion, satisfy this requirement.

Protester's Position

Univac contends that its step-pricing plan fully complied with the solicitation requirements as revised by amendment No. 14. In Univac's view, that amendment substantially modified the ground rules for evaluating system life cost and Univac's revised pricing plan simply reflected the Government's change in its stated requirements. Univac points out that its lease-to-purchase offer, incorporating its step-pricing plan, was lower than Paradyne's when evaluated according to the formula set forth in the solicitation. In light of Univac's low evaluated cost, the protester argues award to Paradyne could only have been made as the result of using undisclosed evaluation criteria or criteria different from those applied to Univac.

Univac contends that its step-pricing plan did in fact result in a fixed-price offer, the fixed price being determined, after the second year, by the quantity ordered. Consequently, Univac argues that its proposal did not include any contingency or separate charge.

Univac also argues that its step-pricing plan for maintenance complied with the solicitation provisions. It states its maintenance prices were determinable in the same manner as its equipment prices, recognizing that the solicitation also allowed escalation in accordance with the CPI. Finally, Univac argues that if its proposed step-pricing plan was not acceptable or if clarification of its proposal was required, SSA should have initiated further discussions with Univac to resolve any areas of uncertainty.

Maintenance Pricing

Although Univac's step-pricing plan was not the kind of proposal that SSA anticipated in response to its amended evaluation criteria, we do not agree with SSA that Univac's proposal was inconsistent with the solicitation requirements regarding the pricing or ordering of equipment. We do agree with the agency, however, that Univac's proposed pricing for its monthly maintenance service was not in accordance with the solicitation provisions.

Univac's second best and final offer preserved the company's original price structure, with a fixed monthly charge for lease to ownership of each equipment item, and with fixed monthly maintenance charges escalating over the life of the contract, provided that all option quantities were ordered by the 24th month. However, the offer stated that:

> "if the total quantity of each item is not ordered by the end of month 24, then commencing at month 25 the enclosed step volume pricing cost table * * * will apply for the remaining life of the contract."

The cost proposal also advised that monthly maintenance charges "will be adjusted annually in accordance with the terms and conditions of the RFP."

This method of pricing reflected a three to four-fold price increase for each item of equipment and a lesser increase for maintenance in the event the entire quantity of each item was not ordered within the first 24 months. For example, Univac proposed the following general schedule of monthly lease and maintenance charges for one particular item in the event the entire quantity was not ordered within 24 months:

Quantity	Monthly Maintenance (per item ordered)	Monthly Lease Payment (per item ordered)
1 - 666	$59	$300
1 - 1332	56	270
1 - 1998	53	240
1 - 2663	50	210

In comparision, Univac proposed a monthly maintenance charge of $41 and a monthly lease charge of $69 for this same item in the event that SSA ordered all quantities within the first 24 months.

Section G.4.1 of the RFP stated that:

> "The Contractor shall provide maintenance (travel, labor and parts) at the prices shown in Section I, Table I-3 * * *."

Section III of the solicitation package titled "Format and Instruction for Proposals" stated at Subsection 2.2 that, to have an acceptable proposal, an offeror was required to agree to all of the support requirements of Section G of the RFP. Section G is styled, "Mandatory Support Requirements."

Table I-3 summarized maintenance prices which each offeror was to propose in Table I-1. The instructions for Table I-1 (dealing with various equipment cost factors) provide that monthly maintenance cost:

> " * * * shall be the firm fixed cost for the first contract year. This cost will be adjusted by the Contracting Officer based on the Consumer Price Index - U.S. City Average, 'All Items.' The annual percentage change of increase or decrease shall not exceed 15 percent. For the purpose of evaluation, a 10 percent compound increase over the remaining years of the systems life will be used."

Further, the instructions for Table I-3 stated that each offeror was to price maintenance for each item of equipment installed on a per month basis only for the first year because maintenance cost for subsequent years would be evaluated from first year pricing by increasing the cost of each preceding year by 10 percent. Amendment 14 provided that these instructions constituted "the only acceptable method of proposing maintenance."

It seems clear from these provisions that SSA meant to require offerors to bind themselves to a single pricing schedule for maintenance. The only prices which were supposed to be offered for maintenance in Table I-3 were the prices for the first year. It was to those prices, adjusted by applying the Consumer Price Index, that Section G.4.i referred, and it was only on this basis, as spelled out in Table I-1 (in the language added by amendment 14), that an acceptable maintenance pricing proposal could be offered.

We also see no merit in Univac's position that its proposed step pricing for maintenance amounts to a discount for increased quantities which was not precluded by the solicitation. The most obvious result of this purported discount is a marked increase in prices in the event all quantities are not ordered within 24 months, not a decrease for increased quantities. Regardless of the label one may choose for Univac's proposed maintenance pricing, its offer simply did not conform to the stipulated maintenance pricing structure set forth in the solicitation.

Univac argues that SSA's stipulated method for proposing maintenance was not a material requirement so that, regardless of its form, Univac's failure to conform to it should not render its proposal unacceptable. Univac characterizes SSA's use of indexed first year maintenance prices as designed simply to protect the contractor from the effect of inflation upon wages, rather than as intended to impose a material requirement upon offerors. We view Univac's interpretation as wholly inconsistent with SSA's obvious intent in amendment 14 to make indexed maintenance pricing mandatory. Further, SSA's restriction on maintenance pricing clearly has a substantial impact on pricing, and is material in that respect.

Finally, we consider Univac's contention that, even if its maintenance pricing schedule was unacceptable or unclear, SSA should have reopened best and final offers and discussed maintenance pricing with it.

Ordinarily, as Univac points out, agencies are required to discuss deficiencies found in offerors' proposals. Federal Procurement Regulations (FPR) § 1-3.805-1(a). The regulation does not, however, require discussions to be reopened where such discussions have been conducted prior to requesting best and final offers and the deficiency arises initially in a best and final offer. In fact, discussions should not be reopened after best and final offers are received unless it is clearly in the Government's best interest to do so. ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301. While an offeror may modify its earlier proposals in its best and final offer, Control Data Corporation and KET, Incorporated, B-196722, June 26, 1981, 60 Comp. Gen. ____, 81-1 CPD 531, in doing so it assumes the risk that its changes might result in the rejection of its proposal, rather than in further discussions, if the agency finds the revised proposal unacceptable. See Electronic Communications, Inc., 55 Comp. Gen. 636 (1976), 76-1 CPD 15. In this instance, the agency found Univac's revised best and final offer unacceptable and simply did not consider that it was in the Government's best interest to reopen discussions. We have no basis to disagree with the agency.

It is our view that Univac's step-pricing maintenance proposal rendered its best and final offer unacceptable because it did not conform with the specific terms of the RFP. Univac's step-pricing proposal provided for more flexibility in pricing maintenance than granted by the solicitation thus giving Univac an unfair competitive advantage over offerors which proposed the single fixed unit price required by the solicitation.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States