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DECISION

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

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FILE: B-202257 DATE: May 3, 1982

MATTER OF: Craft Machine Works, Inc.

DIGEST:

1. Protester's allegation that awardee's proposed fabrication subcontractor had been "released" by awardee during the discussion of proposals stage of the negotiated procurement is erroneous. Record shows that, rather than having disassociated itself from the subcontractor, awardee had, in accordance with suggestion by contracting agency, merely changed the type of subcontract from fixed-fee to cost-reimbursement.

2. Protester's contention that contracting agency's technical analysis of awardee's subcontracting experience was based on inaccurate information from the awardee has no basis in record. Record contains no statement from awardee, as alleged by protester, to effect that awardee had substantial subcontracting experience.

3. Protester's assertion that contracting agency applied in an arbitrary manner solicitation's evaluation criteria regarding subcontracting has no merit. Record shows that agency's objections to protester's proposal concerned protester's engineering capabilities and the effect that increasing such capabilities would have on contract cost rather than on use of outside engineering consultants per se.

4. Solicitation has no ambiguity regarding the use of subcontractors to accomplish the contract work. While the solicitation did notify offerors that a background in design and fabrication of the equipment being procured was necessary in order to successfully

compete for award, the solicitation did not define or limit how such a background could be obtained. Moreover, the solicitation's evaluation criteria specifically show that subcontracting was allowed.

5. Protester has failed to cite all the situations where cost-plus-a-fixed-fee contract is permitted. Contracting agency's procurement regulations allow that type of contract when uncertainties involved in contract performance cannot be estimated with sufficient reasonableness. Record shows that agency made factual determination that it was not possible to determine in advance the precise nature of the work to be performed under the solicitation.

6. Protester's claim for proposal preparation costs is denied because there is no evidence in record supporting a finding of arbitrary action by the contracting agency with respect to the protester's proposal.

Craft Machine Works, Inc. (Craft), protests the award of a contract to Engineering, Inc. (EI), under request for proposal (RFP) No. 1-16-5626.0636 issued by the National Aeronautics and Space Administration (NASA), Langley Research Center, Hampton, Virginia. The RFP was for the design and fabrication of collateral research equipment.

Subsequent to filing this protest, Craft brought suit in the United States District Court for the Eastern District of Virginia, Newport News Division (Civil Action No. 81-29-NN). The court issued an order expressing an interest in receiving our views on the protest and stayed proceedings on the suit pending our resolution of Craft's protest.

Craft raises the following grounds of protest:

(1) The release of EI's fabrication subcontractor after EI's proposal had been submitted amounted to a substantial change in EI's technical capabilities which should have been reflected in NASA's evaluation of the proposal;

(2) The technical analysis of NASA's evaluation board was based on inaccurate information supplied by EI with regard to that company's subcontracting experience;

(3) NASA's board applied the RFP's evaluation criteria in an arbitrary and capricious manner, thereby denying equal treatment of all offerors;

(4) The RFP was ambiguous in stating the requirement for an offeror's demonstrated experience and background in research equipment design and fabrication; and

(5) The use of a cost-plus-a-fixed-fee contract for the RFP was prohibited under NASA's procurement regulations.

Craft also asserts a claim for bid preparation costs in the event we find its protest to be meritorious but are unable to recommend termination for convenience of EI's contract.

For the reasons set forth below, we deny Craft's protest.

The RFP was provided to 124 firms, 14 of which attended a proposal conference and six of which submitted proposals. Of the six firms, four, including Craft and EI, were determined to be within the competitive range. After oral and written discussions and question and answer exchanges were conducted with the four firms in the competitive range, EI was selected for price negotiation and award.

Release of EI's Subcontractor

Craft alleges that following discussions with the offerors in the competitive range, it was notified that EI had substantially changed its arrangement with Accurtron, Inc. (Accurtron), the subcontractor that EI had proposed to do the fabrication of the research equipment. Craft further alleges that it was provided a memorandum prepared by NASA's pricing officer which stated that EI had disassociated itself from Accurtron for the fabrication. Consequently, Craft contends that the release of Accurtron by EI was a major change that should have required a rescoring of EI's technical proposal by NASA's evaluation board. Craft points out that the RFP's mission suitability criteria required a description of the offeror's fabrication facilities and that several other mission suitability factors require specific information regarding the fabrication subcontractor. Craft argues that the release of Accurtron as fabrication subcontractor left EI with no subcontractor, so that EI could not have earned any technical evaluation points for fabrication had NASA's board properly rescored EI's proposal.

The record shows that Craft's conclusion from the NASA memorandum that Accurtron had been released as fabrication subcontractor by EI was erroneous. The portion of the NASA memorandum which Craft cites as evidence that EI disassociated itself from Accurtron stated:

> "EI proposed an unacceptable fabrication subcontract arrangement whereby it would be obligated to negotiate a firm fixed price for each mechanical fabrication task on a sole source basis with Accurtron. EI has now been released from that obligation, and will probably obtain competitive fixed prices for each task; but the estimate for performance of all work by Accurtron is still considered a reasonable basis for the cost * * *."

The record shows that the above-quoted portion of the NASA memorandum refers to the fact that NASA found EI's subcontract arrangement to be unacceptable,

not the subcontractor itself. The agency's assessment of Accurtron's fabrication capability and the type of subcontract arrangement are two different matters. With regard to the adequacy of Accurtron's fabrication facilities, the quality of its experience, and the skills of its employees, the record reveals that NASA's board determined that Accurtron had available the requisite fabrication and manufacturing capabilities needed to accomplish the contract work. However, the board was concerned at one time during the course of its discussions with EI that the use of a proposed fixed-price type of subcontract between EI and Accurtron would result in higher fabrication costs than would the use of a cost-plus-a-fixed-fee type of subcontract. Subsequently, EI renegotiated its subcontract with Accurtron on a cost-plus-a-fixed-fee basis and NASA informs us that Accurtron, in fact, is performing its subcontract in that manner.

Furthermore, taken in its entire context, the memorandum clearly indicates that NASA's pricing officer was recommending to the contracting officer that EI should change the type of subcontract it was using and not that EI abandon Accurtron and rid itself of fabrication capability. The memorandum indicates that the reason for this recommendation was that under a fixed-price subcontracting arrangement, it would have been difficult for NASA to assess the price for each task and to monitor the status of the fabrication labor hours for comparison with the prime contract's level of effort requirement.

EI's Subcontracting Experience

Craft notes that one of the RFP's technical evaluation factors was the technical capabilities of proposed subcontractors and the offeror's plan for managing the proposed subcontractors. Craft alleges that EI stated in its proposal that it had substantial subcontracting experience when according to Craft, EI had virtually no subcontract management experience. As evidence of EI's alleged lack of such experience, Craft offers the statements of one of its employees whom Craft claims was familiar with EI's operations as the result of Craft's having been associated with EI for 3 years. This employee states that Accurtron never had a subcontract with EI and that EI's involvement with

other fabricators of research equipment had been de minimus. Despite these indications that EI lacked subcontract management experience, Craft complains that NASA made no attempts whatever to investigate EI's representation concerning subcontracting.

NASA replies that it reviewed EI's proposal and found no statement, either verbatim or substantially similar, to the effect that EI had substantial subcontracting experience. NASA states that it did find a statement that EI had worked with Accurtron on a number of projects over a 6-year period of time. From its point of view, NASA believes that EI's experience with Accurtron was sufficient to establish that EI had the administrative ability to award and administer a subcontract. In addition, NASA states that its evaluation board chairman, in his role as user and monitor of EI's previous design and fabrication contract for collateral research equipment, was personally aware of EI's subcontracting experience and capabilities. In this regard, NASA points out that, in the previous contract, Craft, composed basically and predominantly of fabrication and manufacturing skills, entered into a joint venture with EI, composed basically and predominantly of engineering design skills. NASA emphasizes that the administrative relationship between EI and Craft required that many of the functions normally performed under a subcontract arrangement (preparation of specifications, estimating, and monitoring performance) were performed by EI as part of its responsibilities under the joint venture.

More importantly, NASA calls our attention to the fact the RFP's evaluation criteria were designed to measure the offeror's subcontracting plan and that no specific degree of subcontracting experience was required by the RFP. We agree. The RFP's Mission Suitability criteria provided for two separate areas of evaluation of subcontracting. Subparagraph 3.1.1B(3) of the RFP's Technical/Management Proposal Evaluation Factors and Content stated that the offeror's plans to use subcontractors to provide flexibility would be assessed with respect to the technical capabilities of proposed subcontractors and the offeror's plan for managing subcontractors. Under subparagraph 3.1.1D(3), the offeror's ability to manage and control the work would be assessed based, among other things, on the

offeror's ability to review subcontractor activity. In view of the RFP's evaluation scheme, while past experience in handling and monitoring subcontracts would be one consideration in measuring an offeror's plan for administering subcontracts, the lack of such past experience would not automatically mean that an otherwise good subcontract management plan was deficient.

Equal Treatment of the Offerors

Craft alleges that NASA's board did not take issue with EI's use of subcontractors to perform approximately 50 percent of the contract work; yet, it criticized other offerors in the competitive range for their use of subcontractors. Craft calls our attention to the agency's selection statement which indicated that a major weakness in Craft's proposal was the reliance on consultants and new hires to accommodate variations in workload. According to Craft, the board considered the use of consultants as subcontracting. From the foregoing, Craft concludes that subcontracts for fabrication were acceptable in EI's proposal, but subcontracts for design were not acceptable in Craft's proposal. Craft argues that it was inequitable for NASA to downscore one offeror for subcontracting, but not to downscore another offeror for the same arrangement. Craft emphasizes that the board had a duty to apply the RFP's evaluation criteria equally to all offerors.

From our review of the record, we find nothing to support Craft's contention that NASA treated the offerors unequally with regard to subcontracting. The evaluation report prepared by NASA's board shows that Craft received the lowest final Mission Suitability score of the four offerors in the competitive range. The report noted that Craft's engineering skills were marginal because the company did not have any electrical engineers on its staff. While Craft proposed to add to its engineering staff as the demand for engineering increased and to supplement its staff with consultants, the board determined that the long term implications on probable contract costs meant that as Craft's capabilities increased so would the cost of performance.

Thus, the board's report does not reveal an objection to Craft's use of consultants, but rather a concern with Craft's technical capabilities and the effect that Craft's proposed increase in such capabilities would have on cost. In this regard, the report indicates that the major uncertainty about Craft's probable engineering costs was that Craft intended to staff at conservative levels and meet upward workload fluctuations through the use of consultants and the judicious use of overtime. The report goes on to indicate that, if Craft's workload were frequently higher than Craft's direct employee capacity so that consultants would have to be used to a greater extent than contemplated in Craft's cost proposal, contract costs would be greater because the fees of the outside consultants identified in Craft's technical proposal were higher than the salary and overhead costs of Craft's employees.

Ambiguity in the RFP

Craft asserts that the RFP and its supporting documents repeatedly stated that an offeror had to show "a demonstrated background in the design and fabrication of research equipment." Craft alleges that it interpreted this RFP requirement as indicating a desire on the part of NASA that subcontracting was to be held to a minimum and that an in-house capability for both design and fabrication was necessary. As a consequence, Craft alleges that on this interpretation, it declined association with other more experienced design firms.

Craft points out, however, that subcontractors were mentioned in the RFP in regard to their use for providing "flexibility" for quick response time to an uneven workload and in regard to an offeror's ability to manage subcontractors. Craft further points out that the offer of EI showed no demonstrated background in fabrication by the company itself, but was evaluated by NASA on the basis of the fabrication ability of its subcontractor. Craft argues that under the fundamental principles of Federal contract law, NASA had a responsibility to draft its RFP in a manner that made its requirements clear and unambiguous to all offerors. Consequently, Craft contends that the RFP should have

been redrafted by NASA to clearly state the potential role of subcontractors.

NASA responds that Craft's protest on this issue is untimely because it relates to alleged RFP improprieties which under our Office's Bid Protest Procedures should have been protested prior to the date set for the receipt of proposals. See 4 C.F.R. § 21.2(b)(1) (1981). In any event, NASA contends that nowhere in the RFP was any statement or inference made that subcontracting be held to a minimum and that the design and fabrication work be done in-house. In NASA's opinion, the RFP made it clear that subcontracting was permissible and that Craft submitted its proposal with what it believed would be the best approach toward performance. Therefore, NASA concludes that Craft was not harmed or otherwise prejudiced by the RFP.

We think Craft's protest concerning the above-mentioned issue has been timely raised since it involves an interpretation of the RFP. In any event, because the court expressed interest in a decision by our Office, we will, in accordance with our policy when a court expresses interest, consider the issue on the merits. See New York University, B-195792, August 18, 1980, 80-2 CPD 126.

The RFP provided as follows:

> "To qualify for consideration under this procurement, the offeror shall be a small business concern possessing a demonstrated background in the design and fabrication of research equipment as required by the Scope of Work, and shall establish a local facility within an approximate one (1) hour driving distance from LaRC."

In our opinion, the above-quoted RFP provision merely gave prospective offerors notice that a design and fabrication background would be necessary if they wanted to successfully compete for award. The provision did not define or limit how this background could be obtained. In this regard, NASA points out that a background in a specific expertise can be obtained in several acceptable ways by a company: (1) hiring personnel possessing the expertise; (2) contracting with

consultants having the expertise; (3) subcontracting or forming a joint venture with a company possessing the expertise; or (4) already possessing the expertise in-house. With respect to the use of subcontractors, the RFP's instructions on proposal preparation and evaluation criteria, as noted by Craft, specifically allowed the use of subcontractors. Further, the record shows that both Craft and EI, as well as the other two companies in the competitive range, proposed either the use of subcontractors or consultants to perform the contract work.

Award of a Cost-Plus-a-Fixed-Fee Contract

Craft contends that NASA's use of a cost-plus-a-fixed-fee (CPFF) contract was not appropriate under the circumstances of this procurement. Craft alleges that NASA's procurement regulations permit the use of a CPFF contract only in certain limited circumstances. Craft refers to two of these circumstances: (1) where the contract is for the performance of research, preliminary exploration or study where the level of effort is unknown and (2) where the contract is for development and testing where the use of a cost-plus-incentive fee is not practical. Craft argues that the development and testing circumstance was not applicable because the RFP was for design and fabrication of research equipment and that the unknown level of effort circumstance was not applicable because the RFP's level of effort was very specifically defined. Also, Craft alleges that NASA regulations expressly prohibit the use of a CPFF contract in the development of space systems and equipment once preliminary exploration and studies have indicated a high degree of probability that the development is feasible and the Government generally has determined its desired performance objectives.

NASA states that the proposed contract schedule portion of the IFB clearly indicated that a CPFF contract was contemplated. Thus, NASA contends that any objection that Craft had to that type of contract should have been registered prior to the receipt of proposals. However, in view of our policy, as stated above, we will consider the merits of this issue because the court expressed interest in a decision by this Office. New York University, supra.

NASA's procurement regulations do not limit the use of the CPFF contract to only those circumstances cited by the protester. NASA's procurement regulations also provide that the CPFF contract is suitable for use whenever a cost-reimbursement-type contract is found necessary. See 41 C.F.R. § 18-3.405-6(b)(i) (1981). Under NASA's procurement regulations, the cost-reimbursement-type contract is suitable for use when the uncertainties involved in contract performance are of such magnitude that cost of performance cannot be estimated with sufficient reasonableness. 41 C.F.R. § 18-3.405-1(b) (1981). The record shows that NASA decided that it was not possible to determine in advance the precise nature of the work to be performed. As an example, NASA cites the fact that the designs of the structures and devices will be based on rudimentary information furnished by the Government; observations of the contractor relating to interfacing equipment; the contractor's awareness of the product's end use; and knowledge of material property characteristics, machineability, fabricability and availability.

Proposal Preparation Costs

Proposal preparation costs can be recovered only if the Government acts in an arbitrary and capricious manner with respect to a proposal. Spacesaver Systems, Inc., B-197174, August 25, 1980, 80-2 CPD 146. Since we find no evidence supporting a finding of arbitrary action on NASA's part, we deny Craft's claim for proposal preparation costs.

Milton J. Socolar

Acting Comptroller General
of the United States