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

FILE: B-205266 DATE: May 12, 1982
MATTER OF: Griggs and Associates, Inc.

DIGEST:

1. Where specifications are primarily performance oriented so that offerors can propose their own technical approaches, an agency properly may develop different cost objectives for discussions with each offeror based on what the agency determined were reasonable costs to accomplish the firm's proposed approach. The agency also may not discuss the variations in technical approaches that give rise to different cost objectives so as to avoid disclosing another offeror's approach.
2. When agency reveals its cost objectives for technical effort proposed by offers, the offeror cannot assume that its agreement to those objectives will result in an award since the agency is attempting to only negotiate reasonable costs for the effort involved prior to a final evaluation of competing proposals.
3. Protest that the agency failed to disclose certain technical deficiencies during negotiations is dismissed as untimely where filed more than ten days after a debriefing by the agency, when the protester learned the basis of protest.

Griggs and Associates, Inc. protests the Department of Education's (DOEd) award of a contract to the United States Conference of Mayors (USCM) under request for proposals (RFP) No. 81-14. The contract, a cost-reimbursement type, requires the USCM to provide certain technical assistance

to mayors and the staffs of municipal governments regarding their responsibilities in implementing section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. III 1979). Section 504 basically prohibits discrimination against handicapped individuals under any program or activity receiving Federal financial assistance.

The thrust of Griggs' protest is that for the purpose of cost negotiations, DOEd developed different cost objectives for each offeror based on what DOEd determined were reasonable costs to accomplish the approach proposed by the offeror in its technical proposal. The protester also complains that, during the technical evaluation, DOEd failed to apprise Griggs of deficiencies in its technical proposal. We deny the protest regarding cost negotiations and we dismiss the remainder of the protest as untimely.

The RFP's description of work basically defined several performance requirements without mandating any particular methodology. For instance, the RFP required that the contractor conduct workshops, geographically distributed across the country, to demonstrate methods of implementing section 504. The RFP also required that the contractor establish a "clearinghouse" to provide mayors and other key officials with published information on the most effective means of implementing section 504, and that the contractor prepare a monthly newsletter for the mayors. It did not specify, however, how these tasks must be achieved, but left the offerors to propose their own approaches.

The RFP required the separate submission of a technical proposal, detailing the offeror's approach to meeting DOEd's needs, and a business proposal, which had to include detailed cost data. The RFP provided that technical and business proposals would be evaluated independently, and that technical considerations would be of paramount importance in selecting the awardee.

Initially, technical proposals were evaluated without regard to cost. Based on this initial evaluation, DOEd determined that both Griggs' and USCM's proposals were technically acceptable. USCM received an average score of 72 points out of a possible 100, and Griggs received an average score of 66.75. DOEd then performed a cost analysis of the business proposals to determine

the reasonableness of proposed costs, USCM's proposed cost was \$343,122; Griggs' was \$468,901. Based on the technical evaluation and the cost analysis, the agency included both offers in the competitive range.

DOEd conducted discussions by first requesting certain clarifications of each offeror's technical proposal, and then orally negotiating the cost elements of the business proposals. The agency developed different negotiation objectives for each offeror based on the particular offeror's methodology, labor rates, overhead, and proposed fees (Griggs' offer included a set fee of \$30,676, whereas USCM had no such fee). The cost objective for USCM's proposal (originally evaluated at \$343,122) was \$306,632, whereas DOEd's objective for Griggs' proposal, (originally evaluated at \$468,901) was \$330,389. The solicited reductions in proposed costs included adjustments for certain tasks that were deleted after the submission of initial proposals, and estimates of reasonable costs (e.g., labor costs and overhead rates) recommended by the cost analyst. During discussions DOEd basically disclosed its cost objectives, item for item, to the offerors.

Subsequently, both offerors had the opportunity to submit best and final offers. Griggs accepted DOEd's cost objectives, and even reduced its offer further, to \$327,630, while USCM reduced its offer to \$304,195. Although technical merit was more important than the estimated contract cost for evaluation purposes, cost apparently was the deciding factor in DOEd's selection of USCM because of the close range of the technical scores.

Griggs argues that DOEd's system of suggesting different cost objectives to offerors is unfair because the different cost objectives, if accepted by the offerors, will place the offeror with the higher objective at a competitive disadvantage. The reason is that if the other technically acceptable firm meets its cost objective, presumably it will receive the award. Griggs also complains that it assumed that by accepting the revisions, it would receive the award.

We find nothing improper about the agency's conduct of cost discussions. Where, as here, detailed cost or pricing data is required, the contracting officer must perform a cost analysis to form an opinion of the degree to which a contractor's proposed costs represent what

performance of the contract should cost, assuming reasonable economy and efficiency. Federal Procurement Regulations (FPR) § 1-3.807-2(c) (1964 ed.). If at any time before an agreement on price the contracting officer believes that the cost data is inaccurate, he must call it to the attention of the potential contractor, and negotiate appropriate costs. FPR § 1-3.807-5(b). We have recognized that a Government estimate or analysis of estimated costs provides a valid basis for negotiation and may be disclosed to the offeror. See Hager, Sharp & Abramson, Inc., B-201368, May 8, 1981, 81-1 CPD 365.

Thus, contrary to the protester's impression, the purpose of cost discussions is not to disclose to the offeror what it must do to win the competition. The purpose is to resolve uncertainties relating to the offeror's price, see FPR § 1-3.804 and to negotiate a fair and reasonable price for contracting with that firm. FPR § 1-3.806. In fact, the regulations caution contracting officers against giving any offeror a price that must be met to obtain further consideration, and against advising an offeror of its relative standing with regard to other offerors. FPR § 1-3.805-1(b). The purpose is to prevent an auction between offerors. See Carol L. Bender, M.D., National Health Services, Inc., B-196912, B-196287, April 1, 1980, 80-1 CPD 243. Therefore, we believe DOEd acted properly in conducting its cost discussions and in establishing individual cost objectives on the basis of separate appraisals of each offerors' costs.

We also believe Griggs acted unreasonably in assuming that the cost objectives disclosed by DOEd during negotiations comprised a figure which, if met, would result in an award. Griggs does not allege that the agency represented that to be the case or otherwise acted in a manner to enforce that assumption. Griggs should have known that the agency was attempting to reach agreement on reasonable costs based on Griggs' technical proposal, rather than improperly disclosing what would be necessary for Griggs to be selected.

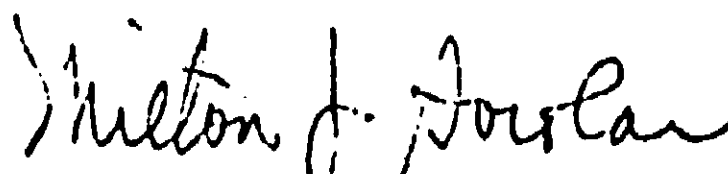
To the extent that Griggs suggests that it should have been informed of technical "deficiencies" that resulted in DOEd's forming a higher cost objective for Griggs than for USCM, as stated above the approach to meeting the agency's needs was left to each offeror.

If the only "deficiencies" in Griggs' technically acceptable proposal stemmed from the fact that Griggs' approach inherently was more costly than USCM's, then what Griggs would have us view as "deficiencies" simply were elements of its acceptable approach to the problem that were different, and more costly, than the elements of USCM's.

Where, as here, specifications are primarily performance oriented so that the Government can obtain independent and innovative approaches to the performance desired, an agency must take care during discussions not to disclose a particular offeror's innovative approach. Raytheon Company, 54 Comp. Gen. 169, 178 (1974), 74-2 CPD 137. While discussions should be meaningful and inform all offerors within the competitive range as to areas in which their proposals are believed deficient, 50 Comp. Gen. 177 (1970), it is fundamental that technical discussions must be curtailed to the extent necessary to avoid such transfusion of technical approach and methodology. Bellmore Johnson Tool Company, B-179030, January 24, 1974, 74-1 CPD 26. Under the circumstances, we agree with DOEd that the discussion of the differences in issue basically would have necessitated the improper disclosure of the technical approach of USCM's proposal.

In its February 18, 1982 comments on DOEd's report on the protest, Griggs protests that the DOEd found certain real deficiencies in its technical proposal but informed Griggs of them in a debriefing held November 5, 1981, instead of during discussions. This basis of protest clearly is untimely since it was filed more than 10 working days after Griggs learned the basis for its protest, that is, the debriefing. See Pennsylvania Blue Shield, B-203338, March 23, 1982, 82-1 CPD 272; 4 C.F.R. § 21.2(b)(2) (1981). Also, because we do not view this protest ground as being of interest to the procurement community, and because we have had many occasions to decide the proper scope of discussions, it is not a significant issue for purposes of invoking an exception to our timeliness rules under 4 C.F.R. § 21.2(c). See John Mondrick Plumbing & Heating, Inc., B-201675.3, July 31, 1981, 81-2 CPD 73. Therefore, we will not consider this matter on the merits.

The protest is denied in part and dismissed in part.


Milton J. Fowler
Comptroller General
of the United States