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DECISION

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

FILE: B-207311 **DATE:** March 16, 1983

MATTER OF: Electronic Data Systems Federal Corporation

DIGEST:

1. In evaluating cost proposals in connection with the award of a cost-plus-fixed-fee contract, the informed judgment of procuring agencies regarding the extent to which proposed costs are realistic is entitled to great weight and will not be disturbed unless shown to be arbitrary.

2. The procuring agency's decision to adjust the protester's proposal after best and final offers to reflect the cost of subcontracting the maintenance work for a particular computer system over the entire duration of the contract was not arbitrary or unreasonable where the protesting offeror had proposed less subcontracting on the incorrect assumption that the Government would obtain for it the necessary diagnostic license, where the protester was on notice of its mistake and of the agency's dissatisfaction with its approach, and where no prejudice resulted.

3. Where the protester's contention--that the agency used material costs for cost evaluation purposes, in contravention of an RFP amendment and verbal agreement--is not supported by the record and the protester submits no direct evidence to counter the procuring agency's claim that material costs were not so used, the protester has not met its affirmative burden of proof.

4. Discussions held with the protester after its submission of a best and final offer (BAFO) were clarifying in nature where the modifications which resulted were not essential to a determination of the acceptability of the

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protester's proposal. Where both offerors were asked to clarify their BAFO's and where neither the protester nor the other offeror was prejudiced by such post-BAFO dialog, the discussions were permissible and provide no ground to sustain a protest.

5. In a negotiated procurement, a procuring agency may select a highly rated technical proposal over a lower cost proposal where doing so is in the best interest of the Government and consistent with the evaluation scheme set forth in the RFP. Where the RFP provided that cost would be considered secondary to technical excellence, our Office will defer to the agency's judgment as long as there is a rational and specific basis for the agency's determination regarding technical superiority.

6. Even though the protester's proposal was initially found to be technically acceptable, the procuring agency's decision to select the other offeror's proposal, because of its technical superiority and in spite of its higher cost, was reasonable where subsequent discussions with both offerors enhanced and supported the acceptability of the awardee's proposal, while revealing greater deficiencies in the protester's technical approach, and where the evaluation of past performance clearly favored the awardee.

Electronic Data Systems Federal Corporation (EDSFC) protests the award of a cost-plus-fixed-fee contract for computer maintenance services to the incumbent contractor, Systems Research Laboratories (SRL), under request for proposals (RFP) No. F33615-81-R-1452, issued by the Aeronautical Systems Division of the Air Force Systems Command at Wright-Patterson Air Force Base. EDSFC claims that, as the lowest cost, technically qualified offeror, it was entitled to the contract, but was arbitrarily denied the award due to a number of irregularities in the conduct of the negotiation and evaluation process by the Air Force.

Specifically, EDSFC alleges that the Air Force unreasonably added material costs to EDSFC's proposal and used such cost information for cost evaluation purposes in contravention of an RFP amendment and an agency agreement to exclude such costs from evaluation. Additionally, EDSFC maintains that the Air Force held discussions after the receipt of best and final offers (BAFO) in violation of the Defense Acquisition Regulation (DAR). EDSFC further asserts that the Air Force lacked a reasonable basis for finding that SRL's technical superiority outweighed its added cost to the Government and the Air Force was unreasonably dilatory in its reponse to the protest.

We deny the protest.

ARBITRARY ADDITION OF MATERIAL COSTS

EDSFC's first contention--that the Air Force arbitrarily added material costs to its proposal--centers around two technical aspects of the EDSFC proposal about which the Air Force had sought clarification throughout negotiations. During a fact-finding meeting after the submission of proposals, the Air Force expressed to EDSFC its need for further information regarding the maintenance of several specialized computer systems--in particular, the VAX 11/750 system, produced by Digital Equipment Corporation (DEC) and the Evans & Sutherland picture systems (E & S), described in individual appendices to the RFP. The Air Force sought clarification of, among other things, precisely how EDSFC proposed to provide maintenance of the VAX and E & S systems.

The problem associated with the VAX system was that DEC had not released the VAX software diagnostics which are necessary for the performance of proper maintenance of the system. After discussions with EDSFC, the Air Force discovered that EDSFC had assumed in its proposal that the Government, through the General Services Administration (GSA), had contracted to obtain a license for the VAX diagnostics within the year, thereby enabling EDSFC itself to perform the maintenance on that system throughout most of the duration of the contract. Thus, EDSFC had proposed only 5 months of subcontracting with DEC, rather than 36 months--the full contract period. However, because a diagnostic software license for the VAX would, in fact, remain unavailable to the Government in the foreseeable future--a fact

EDSFC was apprised of in a meeting which included representatives of GSA and which occurred before submission of EDSFC's BAFO--the Air Force corrected EDSFC's proposal by adding on the Government's cost for the additional 31 months of VAX maintenance. The Air Force corrected the mistake, rather than declaring EDSFC's proposal unacceptable, because EDSFC had based its assumptions regarding the VAX diagnostic license on prior information from GSA.

The Air Force argues that its action in adding on the remainder of the contract period of subcontracting to the EDSFC proposal was reasonable and in keeping with the RFP and the intent of the DAR which provide that any competitive advantage arising from the use of Government production and research property should be eliminated. See DAR §§ 13-502 and 503 (1976 ed.). The Air Force reasons that, had the Government been able to furnish the diagnostic license, the cost of the license would have been included. See, e.g., System Development Corporation and International Business Machines, B-204672, March 9, 1982, 82-1 CPD 218. Therefore, the Air Force maintains that, since the license availability was unclear, the addition of the remaining months of necessary subcontracting for maintenance on the VAX system was reasonable and appropriate.

Our Office has noted in the past that the award of a cost-reimbursement contract requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic regarding the proposed costs and technical approach involved. Administrative judgment in these matters is entitled to great weight and will not be disturbed unless shown to be arbitrary. See Scott Services, Incorporated, B-181075, October 30, 1974, 74-2 CPD 232.

The cost adjustment in this case was reasonable. EDSFC was on notice of its mistaken assumption; yet, it failed to propose an alternative solution to the VAX problem in its BAFO. The RFP provided that cost realism would be a significant consideration in the final selection. Thus, given that clarifications of EDSFC's BAFO revealed the need for a subcontract with DES for the entire duration of the contract, the Air Force's adjustment of the subcontracting costs to reflect the actual situation regarding the Government's ownership of the diagnostics license was within its

discretion and reasonable. Moreover, no prejudice to EDSFC resulted from the adjustment of the subcontracting costs, since it remained the low offeror and since technical considerations formed the basis of the Air Force's selection decision.

The second major area in which EDSFC alleges that its costs were improperly increased involved the E & S picture system II. The Air Force was concerned about the fact that no spares were available for maintenance of that system and sought more detailed information regarding EDSFC's proposed maintenance approach to that particular system. After discussion with EDSFC, the Air Force learned that EDSFC could provide a spare and parts warranty on the E & S system for $400, but that EDSFC did not believe that the warranty would be cost effective and, thus, had not included it in its proposal. Our in camera review of the record reveals that, contrary to EDSFC's assertion, the Air Force did not add on the cost of the warranty to EDSFC's proposal to compensate for what it perceived to be a deficiency, but merely considered EDSFC's response to be a variance in technical approach. Thus, EDSFC's first contention--that the Air Force arbitrarily added costs onto its proposal--is unsupported by the record, since the subcontracting adjustment for the VAX system was reasonable and since no costs were added in conjunction with the E & S system.

MATERIAL COSTS AS EVALUATION FACTOR

EDSFC alleges that the Air Force improperly changed the evaluation criteria by taking material costs into consideration after having assured EDSFC that material costs would not be an evaluation factor for award. The controversy centers in part upon the differing interpretations which the protester and the agency have attached to a particular RFP amendment.

Amendment 0001 to the RFP eliminated the original RFP requirement that offerors should include in their proposals any contractor-recommended spare parts inventory, broken down by each RFP appendix, describing individual systems. The requirement was eliminated because it was found to give

an advantage to the incumbent. EDSFC asserts, and the Air Force agrees, that, after the amendment and in response to its request for clarification, EDSFC was verbally assured by the Air Force that material costs, in general, would not be treated as part of evaluated costs. However, after a technical and contractual fact-finding conference, the Air Force requested that EDSFC break down man-hours and material costs by appendices to facilitate postaward distribution of funding, cost and price analysis prior to award, and analysis of man-hour loading as part of the technical evaluation. The Air Force continued to assure EDSFC that the material costs would not be used for cost evaluation purposes, but clarified its position that the RFP amendment eliminating the spare parts recommendation requirement did not affect the need for a breakdown of manloading and costs by appendices.

EDSFC contends that the Air Force's insistence upon the material costs and labor breakdown was in violation of the RFP amendment and of the Air Force's agreement not to consider material costs in making its evaluation, and that the conduct of the fact-finding conference was highly irregular in that material and labor cost questions were posed by Air Force technical personnel. The Air Force claims that the labor and materials cost breakdowns were necessary for reasons other than cost evaluation--for assessment of technical approach, for example, that material costs information was, in fact, not used for evaluation purposes and that all cost figures were purged from the technical evaluation team's copies.

In general, the protester has the burden of affirmatively proving its case; where conflicting statements by the protester and contracting agency constitute the only available evidence, that burden has not been met. Line Fast Corporation, B-205483, April 26, 1982, 82-1 CPD 382. EDSFC has offered no direct evidence that material costs were used for evaluation purposes, but merely asserts that the solicitation should have informed offerors that material costs and labor data would be required or, alternatively, that requiring the data for management purposes was somehow improper or irregular.

Our Office's in camera inspection of the Air Force report and accompanying documentation reveals that material costs were not used as a cost evaluation factor for award and that the breakdown of each appendix was in fact used by the Air Force as an indication of the offeror's understanding of the individual problems posed by each system. EDSFC was on notice of the need for the cost/labor breakdown and of its significance to the Air Force for evaluation purposes. Therefore, the protester has not met its burden of proof in this case and the record itself fails to support EDSFC's contention regarding the use of material cost information.

DISCUSSIONS AFTER BEST AND FINAL OFFERS

EDSFC protests that discussions which the Air Force initiated with EDSFC after its receipt of BAFO's violated the applicable DAR provisions and unfairly favored the incumbent, resulting in an increase in EDSFC's evaluated cost. The Air Force maintains that the requested cost and technical data was needed for purposes of clarifying EDSFC's BAFO.

DAR § 3-805 (1976 ed.) and our decisions require that, if discussions are reopened with one offeror after the receipt of BAFO's, they must be reopened with all offerors in the competitive range and an opportunity given to submit revised proposals. Harris Corporation, B-204827, March 23, 1982, 82-1 CPD 274. However, an agency may contact offerors to clarify minor uncertainties and irregularities so long as no offeror is given an opportunity to make modifications or revisions of its proposal which would be essential to a determination of its acceptability. C3, Inc., M/A-COM Sigma Data, Inc., B-206881, B-206881.2, May 14, 1982, 82-1 CPD 461.

The rule is designed to ensure that all offerors are treated fairly and equally. EDSFC's allegation is unusual in that it protests its own post-BAFO discussions with the Air Force rather than another offeror's. Its claim of prejudice is based on its assumption that data requested by the Air Force may have been used to increase EDSFC's evaluated cost and thereby impair its competitive position. Since EDSFC's argument is basically one of claimed unfairness or inequity, the general rule would apply; the issue

is whether the agency was conducting discussions designed to elicit new information affecting the protester's proposal or whether it was merely attempting to clarify information already contained in the BAFO.

The post-BAFO dialog with EDSFC was for purposes of administrative clarification. EDSFC submitted its BAFO on March 19, 1982, and the Air Force requested information from both offerors regarding their BAFO's on March 31, 1982. The questions raised about EDSFC's BAFO concerned the necessary subcontracting of the DEC VAX system maintenance, discussed above, and the correction of several typographical and mathematical errors. The record reveals no reason to suspect that any information received in response to post-BAFO inquiries was other than clarifying in nature. As noted above, the change in the number of months of subcontracting with DEC was necessitated by EDSFC's mistaken assumption regarding the Government's access to the diagnostics. Clarification of the Air Force position resulted in the addition of 31 months of subcontracting to EDSFC's proposal as a corrective measure.

Moreover, EDSFC has failed to demonstrate that any prejudice to it resulted from the inquiries and changes in question. Both EDSFC and SRL were asked to clarify points in their BAFO's and, as indicated above, the costs added to the EDSFC proposal to account for the added months of DEC subcontracting were not used in any comparative evaluation of material costs. Thus, since the post-BAFO dialog was clarifying in nature and resulted in no proposal changes which directly affected the acceptability of EDSFC's proposal, it was permissible under the DAR and provides no ground for sustaining the protest.

TECHNICAL EVALUATION

EDSFC questions the technical evaluation performed by the Air Force in this case, maintaining that the technical merit of SRL's proposal did not outweigh the added cost to the Government which that proposal represented. As the lowest cost offeror with a technically acceptable proposal, EDSFC claims entitlement to the contract award.

In a negotiated procurement, there is no requirement that the award be made on the basis of the lowest cost. Bell Aerospace Company, 55 Comp. Gen. 244, 256 (1975), 75-2 CPD 168. Rather, the procuring agency has the discretion to select a highly rated technical proposal if doing so is in the best interest of the Government and consistent with the evaluation scheme set forth in the RFP. Development Associates, Inc., B-205380, July 12, 1982, 82-2 CPD 37. The RFP in this case explicitly advised offerors that "[c]ost/price will be considered secondary to technical excellence" and that "the Government specifically reserves the right to award a contract at other than the lowest cost/price or the highest in technical excellence." Therefore, as long as the record demonstrates that there was a rational and specific basis for a procuring agency's decision that technical superiority outweighs additional cost, our Office will defer to the agency's judgment. See Baird Corporation, B-206268, July 6, 1982, 82-2 CPD 17.

In this case, there is ample support in the record for the Air Force's determination that SRC's technical superiority outweighed the additional cost to the Government which that proposal represented. Although EDSFC's proposal was rated "technically acceptable" in the initial technical evaluation, subsequent discussions resulted in responses by EDSFC which the Air Force deemed unacceptable and further clarification was required. EDSFC's rating for "soundness of approach" suffered as a result of its failure to adequately research and resolve the problems associated with the VAX and E & S systems in particular. During the course of negotiations, the Air Force discovered, among other things, that EDSFC had proposed maintenance service on the VAX system over only part of the life of the contract, assuming incorrectly as it had that the Government would furnish the diagnostic license within 1 year. EDSFC's response to the E & S picture system II problem was also found to be unacceptable in that EDSFC had failed to consider all available options for its resolution. In general, the Air Force found that EDSFC had shown an unacceptable level of understanding of certain kinds of subcontracting. Thus, despite the fact that the Air Force had originally rated EDSFC's proposal as "acceptable," the discussions and submissions which occurred during the subsequent negotiations provided a reasonable basis for finding EDSFC's proposal less acceptable than it was originally considered. See GMS Gesellschaft Feur Metallverarbertung mbH. & Co., B-197855, January 6, 1981, 81-1 CPD 4.

By contrast, the acceptability of the SRL proposal was further enhanced and supported throughout the negotiation process. Documentation reveals that SRL's reponses to inquiries during the factfinding were perceived to be fully satisfactory by the Air Force evaluators. The SRL breakdown by appendix of the necessary material cost and labor indicated to the Air Force a superior understanding and technical approach to the problem areas.

In addition to the findings of unacceptability which resulted from discussions and inquiries after the initial technical evaluation, the Air Force assessment of each offeror's past performance strongly favored the SRL proposal. The RFP had notified offerors that past performance, as it pertained to prior relevant contracts, would be considered in the evaluation of each criterion. Based on its prior performance under a DEC system maintenance contract for the Air Force, EDSFC was rated poor in each of the four evaluation areas, with major problems noted in the areas which were also the subject of concern regarding the contract in question--understanding the problem and soundness of technical approach.

Therefore, based on the technical evaluations of the offerors' proposals, the record reveals a rational basis for the Air Force decision to prefer the more technically sound proposal submitted by SRL, despite its higher cost to the Government.

AGENCY DELAY

Finally, EDSFC claims that the Air Force's delay in submitting its report to the GAO was excessive and in violation of our Bid Protest Procedures, which require the procuring agency to submit a complete report "as expeditiously as possible (generally within 25 working days)." 4 C.F.R. § 21.3(c) (1982). In this case, EDSFC emphasizes the 5-month gap between the date GAO requested the report, May 18, 1982, and the October 18, 1982, submission date. EDSFC notes that the delay seems especially unreasonable in that the contracting officer's Statement of Facts and Findings was dated April 31, 1982.

The late receipt of an agency report does not provide a basis for disregarding the substantive information contained in the record or for sustaining the protest on an inadequate record. Armidir, Ltd., B-205890, July 27, 1982, 82-2 CPD 83 (involving a period of more than 4 months between request and delivery). Moreover, in this case, at least some of the delay was understandable. The record shows that, as early as July 1982, the Air Force had been operating under the mistaken belief that there was to be a conditional withdrawal of the protest. It was not until September 1982 that the Air Force was fully aware of its error and its reaffirmed obligation to prepare a formal report.

The protest is denied.

Milton J. Socolar

for Comptroller General
of the United States