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DECISION



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

FILE: B-216846 **DATE:** March 25, 1985
MATTER OF: Barber-Nichols Engineering Co.

DIGEST:

1. Where a solicitation for a negotiated procurement advises offerors that technical factors are more important than cost, award may be made to an offeror with a superior technical proposal even though its price is higher than other technically acceptable proposals if the lower prices are offset by the advantages of the technically superior proposal.
2. Protest contending that agency should have been more specific during discussions in asking for information is denied because it is the offeror that has the burden of establishing in its proposal that what it offers will meet the government's needs and the agency's only burden when conducting discussions is to furnish those offerors whose proposals are within the competitive range information concerning the areas of perceived deficiencies in their proposals and to give those offerors the opportunity to revise their proposals.
3. No matter how capable or reputable an offeror may be, the technical evaluation of the agency must be based on information in, or submitted with, the proposal and an offeror cannot be considered for award if it does not submit an adequately written proposal.

Barber-Nichols Engineering Co. protests the award of a cost-plus-fixed-fee contract by the U.S. Army to Western Gear Corporation under solicitation No. DAAK7084-Q-0081. Barber-Nichols contends that its proposal to design, fabricate and deliver a new gearbox for an experimental personnel carrier was improperly disqualified and that

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because Barber-Nichols' price was so much below that of Western Gear's, the agency should have been more specific in requesting the information necessary to make Barber-Nichols' proposal eligible for award.

We deny the protest.

The solicitation, issued on July 3, 1984, indicated that for evaluation purposes the adequacy of the technical approach was weighted as 50 percent and that the two remaining criteria--cost and cost realism, organization, personnel and facilities--were weighted at 25 percent each. The solicitation further advised offerors to make their initial proposals clear and complete and to provide sufficient information to clearly demonstrate the engineering merit of the proposed design and its compliance with the specifications. The solicitation explicitly reserved the right to make award to other than the lowest offeror because "factors other than estimated cost are collectively of greater importance." In addition, the solicitation stated that in no case would use of such words as "We will comply with the requirements of paragraph___," or equivalent wording, be acceptable.

Three proposals were received and written questions with respect to each proposal were sent to the offerors. After receipt of best and final offers, the evaluation resulted in point scores for technical approach of 350 for Barber-Nichols and 450 for Western Gear--a difference of 100 points, or 29 percent. The combined point scores for technical approach and organization, personnel and facilities were 541.59 for Barber-Nichols and 666.58 for Western Gear--a difference of 124.99 points, or 23 percent. Barber-Nichols' total price was \$120,079 and Western Gear's price was \$197,037--a difference of \$76,958, or 64 percent. The total points for all three evaluation criteria were 729.09 for Barber-Nichols and 841.58 for Western Gear--a difference of 112.49 points, or 15 percent. The contracting officer determined that the higher cost proposal of Western Gear was justified by its superior technical proposal as reflected by the evaluation scores and made an award to Western Gear. Barber-Nichols then protested to our Office.

Barber-Nichols' contentions that its proposal was unfairly "disqualified" and that the agency's negotiations

were not specific enough to obtain the information desired to make the proposal acceptable reflect a possible misunderstanding of the purpose of negotiations and the respective responsibilities of the offeror and the agency.

The record indicates that Barber-Nichols' proposal was never disqualified, but remained in the competitive range until after best and final offers, when the proposal of Western Gear was determined to be more advantageous to the government than Barber-Nichols' proposal. The determination that the proposal was within the competitive range clearly indicated the agency's judgment that the proposal was acceptable or reasonably capable of being made acceptable without major revisions. Essex Electro Engineers, Inc., et al., B-211053.2; B-211053.3, Jan. 17, 1984, 84-1 CPD ¶ 74. A proposal within the competitive range, however, is not automatically entitled to award even if its price is low, unless the solicitation so provides. Thus, in negotiated procurements such as this one, where offerors are on notice that technical considerations are more important than cost, award can be made to the offeror with a superior technical proposal even though its price may be higher than those of other technically acceptable proposals if the lower prices are offset by the advantages of the technically superior proposal. In this respect, the cost technical tradeoffs made by the procuring agency necessarily require the exercise of reasoned judgment as to the significance of the differences in technical merit among the proposals. Our office will not question that judgment if it is reasonable and consistent with the evaluation factors set out in the solicitation. Systems Development Corp., B-213726, June 6, 1984, 84-1 CPD ¶ 605.

Also, the offeror has the burden of establishing in its proposal that what it offers will meet the government's needs. Texas Medical Instruments, B-206405, Aug. 10, 1982, 82-2 CPD ¶ 122. This burden on the offeror remains through the best and final offer phase of the procurement. See Decision Sciences Corp., B-184438, Aug. 3, 1976, 76-2 CPD ¶ 114. When an agency decides to conduct discussions, its burden is to furnish those offerors whose proposals are within the competitive range information concerning the areas of perceived deficiencies in their proposals and give those offerors the opportunity to revise their proposals. The extent and content of such discussions, however, are matters primarily for the judgment of the contracting

agency and that judgment will not be disturbed by our Office unless it is without a reasonable basis. Photonics Technology, Inc., B-200482, Apr. 15, 1981, 81-1 CPD ¶ 288. On the other hand, the agency must take care in the conduct of discussions not to prejudice the other competitors by pointing out weaknesses in one proposal that have resulted from a lack of diligence or competence. Information Network Systems, B-208009, Mar. 17, 1983, 83-1 CPD ¶ 272.

In our view, the questions sent to Barber-Nichols fulfilled the agency's obligations with regard to the discussions by fairly identifying those areas of the proposal where the agency had concerns and need for more information. Barber-Nichols' responses, however, did not meet its burden of establishing that its design and the gearbox would meet the government's needs. In some instances, Barber-Nichols' responses were brief and apparently based on the assumption that its unverifiable assurances should be sufficient for the agency. For example, when the agency asked if the gearbox's weight could be kept under 200 pounds, Barber-Nichols' answered that it "expects to meet the maximum weight goal of 200 pounds." In a second instance, when the agency asked if the 11-inch width of the gearbox could be reduced to meet the required 10-inch maximum width, the response stated that the 11 inches was incorrect and should be 10 inches. It then referred to an attached figure which was not drawn to scale and, therefore, could not be used to confirm the statement. In a third instance, the agency asked if the proposal had considered the obstructions relative to the flywheel housing and, if so, could the required maximum dimensions be met. The response stated that the maximum dimensions could be met and that the gearbox would not interfere with the flywheel housing obstructions.


While it is true, as Barber-Nichols insists, that the solicitation did not specifically require that drawings be to scale or that a preliminary estimate of the weight of each component of the gearbox be provided, it is also clear that the solicitation did require clear and complete information to show the merits of the design and its compliance with the specifications.

In our view, the agency clearly was reasonable in considering these answers and others like them to be

unsatisfactory, especially as the solicitation cautioned against we-will-comply-like statements and the contract was to be awarded on a cost-plus-fixed-fee basis. Under a cost-based contract, it is the agency, not the contractor, that pays for the unexpected costs if the contractor cannot perform as promised. We therefore find no merit to this portion of the protest.

Barber-Nichols also contends that its qualifications and reputation were so well known to the procuring agency that Barber-Nichols should have been asked specifically for the information desired. In this regard, we point out that no matter how reputable or capable an offeror might be, its technical evaluation by the agency must be based on information in, or submitted with, the proposal and the offeror cannot be considered for award if it does not submit an adequately written proposal. Frequency Engineering Laboratories, B-212516, Feb. 7, 1984, 84-1 CPD ¶ 151.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel