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**DECISION**



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

**FILE:** B-218567.2 **DATE:** November 5, 1985

**MATTER OF:** Research Analysis and Management Corporation

**DIGEST:**

1. Protest that request for best and final offers, after the contracting agency disclosed the percentage cost differential between offers, constituted an auction is untimely where filed after the closing date for the receipt of best and final offers.
2. Contracting agency reasonably declined to find proposal technically unacceptable where the proposal offered personnel already committed to performing other contracts who could be made available with the agency's approval under the other contracts.
3. There is nothing wrong with requesting more than one round of best and final offers where a valid reason exists to do so. Where an otherwise strong proposal needs some revision, reopening discussions to permit such revisions does not constitute technical leveling.

Research Analysis and Management Corporation (RAM) protests the award of a contract to Resource Consultants, Inc. (RC) under request for proposals (RFP) No. N00024-85-R-2051(Q). The RFP was issued by the Department of the Navy to acquire engineering and administrative support services, on a cost plus fixed fee basis, for the Naval Sea Systems Command Combatant Craft and Service Craft Acquisition Program Office.

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The protester basically argues that the Navy unreasonably retained RC's first best and final proposal in the competitive range for award since RC proposed personnel already committed to performing other Navy contracts, and improperly requested successive rounds of best and final offers permitting RC to correct this deficiency. The protester also contends that the Navy improperly conducted an auction by requesting best and final offers after the percentage cost differential between offers had been disclosed.

We dismiss the protest in part and deny it in part.

### I. Background

The solicitation stipulated a level of effort of 75,000 manhours for the basic year and each of three 1-year options, and permitted offerors to propose the labor mix and the hourly rates for its employees. The labor costs apparently will comprise the preponderance of the government's contract costs.

As originally issued, the RFP required that offerors identify and submit resumes for all proposed key personnel, and indicate the percentage of dedicated time for these key personnel. If any of the proposed individuals were not currently employed by the offeror, the offeror was required to submit a copy of a hiring agreement with the individual. An offeror agreed, under the RFP's terms, to assign the key personnel to any resultant contract in the capacities proposed.

The RFP's "Evaluation Factors for Award" listed the following factors in descending order of importance:

1. Personnel
2. Proposed Approach
3. Facilities
4. Proposal Presentation
5. Experience (corporate experience in relation to the statement of work, as opposed to individual experience and qualifications)
6. Cost (of the basic year and the three options, adjusted for realism and reasonableness).

This section also advised offerors that the first two factors combined were significantly more important than the other factors combined, and that the government could award a contract to an offeror whose proposal was not the least costly.

The Navy determined that only RC's and RAM's proposals were in the competitive range. After conducting discussions and receiving best and final offers from both firms, the Navy decided to make award to RC based principally on RC's superior ranking for the technical evaluation factors (excluding cost). RC's technical score was 45 percent higher than RAM's score. While RC's proposed estimated costs plus fixed fee were almost 17 percent higher than RAM's, the Navy did not consider RAM's proposed labor rates reasonable since they were significantly lower than RAM, the incumbent contractor, incurred under its prior contract. Therefore, the Navy scored RC's costs superior to RAM's on the basis of realism and reasonableness.

RAM, after receiving notice of the proposed award, filed a protest with this Office objecting to any award to RC. In responding to the protest, the Navy disclosed the evaluation results, including the percentage difference in proposed costs. Subsequently, for reasons not associated with RAM's protest, the Navy decided to reopen discussions and request a second round of best and final offers. RAM therefore withdrew its protest.

The Navy reopened discussions because it discovered that RC had proposed several key personnel that already were committed to the performance of other Navy contracts, and that RC intended to transfer them from those contracts. Although the contracts apparently had provisions authorizing the substitution of key personnel with the Navy's approval, the Navy program managers under the other contracts advised the contracting officer that they were opposed to losing the personnel in RC's proposal. The contracting officer therefore entered into discussions with RC to give it an opportunity to revise its personnel, and requested new best and final offers from both RC and RAM. At the same time, the Navy issued an amendment to the RFP to include a "Substitution of Key Personnel" clause that reiterated the contractor's obligation to utilize the personnel proposed in its proposal, and permitted only the substitution of at least equally qualified personnel upon prior notification to the Navy.

RC revised its proposal to include personnel that were not committed to other work. After receiving the offerors' revised proposals, the Navy deemed it necessary to obtain more information from both firms, particularly from RC whose proposal was unclear regarding the experience and commitment of one individual, and also regarding how RC proposed to

utilize other personnel. The Navy therefore reopened discussions and called for a third, and last, round of best and final offers.

RAM's best and final offer upwardly revised its costs, which the Navy determined to be realistic, reasonable, and practically equal to RC's. Regarding technical merit, the Navy again evaluated RC's proposal to be technically superior to RAM's. The principal strength of RC's proposal was the proposed significantly greater percentage of effort from senior level personnel and engineers than RAM proposed. Based on this evaluation, the Navy awarded RC the contract, occasioning the current protest.

## II. Timeliness

The Navy argues that all the protest issues are untimely, but does concede that as regards the reasonableness of whether RC's initial best and final offer should have been rejected without successive rounds of discussions, it is unclear when the protester knew or should have known the basis for protest. This aspect of the protest is based on RC's having originally proposed personnel already committed to performing other Navy contracts, of which RAM should not have had knowledge until after the contract was awarded. RAM filed its protest on the second working day after the award.

Our Bid Protest Regulations require a protest, based on other than apparent solicitation improprieties, to be filed within 10 working days after the basis for protest was known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1985). Where it is not clear when a protester learned as a basis for protest, of the specifics of its competitor's proposal or of the contracting agency's discussions with the competitor, we generally resolve doubt as to timeliness in the protester's favor. See Professional Review of Florida, Inc., et al., B-215303.3, et al., Apr. 5, 1985, 85-1 CPD ¶ 394. Since doubt exists as to when the basis for protest was known and RAM's protest apparently was filed within 2 working days after the basis should have been known, we will consider the merits of the protest as regards continuing discussions with RC after its first best and final offer.

RAM's contention that the Navy conducted an auction by requesting best and final offers after it had disclosed the percentage cost differential between offerors is untimely. Our regulations require that alleged apparent improprieties which did not exist in the original solicitation but subsequently are incorporated into the solicitation must be

protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1). After the cost data had been disclosed and the contracting officer issued a request for a second round of best and final offers, RAM did not protest that the request constituted an auction before the closing date, but waited until after the contract was awarded to RC. We therefore dismiss this protest ground as being untimely.

### III. Discussion

RAM contends that RC's proposed use of personnel already committed to performing other contracts was such a major technical deficiency as to render RC's proposal technically unacceptable and to require its rejection.

The evaluation of the technical acceptability of proposals is a matter primarily within the contracting agency's discretion that our Office will not question unless it is shown to be unreasonable or in violation of procurement laws or regulations. Waukesha Engine Division of Dresser Industries, Inc., B-215265, June 24, 1985, 85-1 CPD ¶ 711. Our decisions have recognized that an agency may exclude a proposal from the competitive range as being technically unacceptable if the proposal require revisions so major as to be tantamount to the submission of a new proposal. Metric Systems Corp., B-218275, June 13, 1985, 85-1 CPD ¶ 682, there is no law or regulation, however, that limits the agency's discretion to include a proposal that is susceptible of being made acceptable through discussions, except for a prohibition against "technical leveling." Technical leveling is helping an offeror improve its proposal to the level of other proposals through successive rounds of discussion, by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing its proposal. Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d)(1) (1984).

After discussions, if an agency reasonably determines that a proposal is materially deficient, the agency has discretion to reject the proposal as technically unacceptable, Lanier Business Products of Western Maryland, Inc., B-214468, July 23, 1984, 84-2 CPD ¶ 85, but there generally is no requirement that the agency do so. Thus, short of a showing that the contracting agency acted unreasonably or engaged in technical leveling, we have no basis to question an agency's decision not to find a proposal technically unacceptable.

We do not believe that the Navy acted improperly by declining to find RC's proposal technically unacceptable and giving RC an opportunity to propose other personnel for this contract, even though the availability of proposed personnel

was an important evaluation factor and RC proposed personnel who were committed to other contracts. The record shows that the Navy considered RC's initial best and final offer to be technically superior under the other technical factors (Proposed Approach, Facilities and Experience), and it was simply the Navy's preference to retain RC's personnel at their current positions, a position that the Navy did not have to adopt, that led to the need for a revision to the RC proposal. We find nothing unreasonable in what the Navy did here, especially since the Navy viewed RAM's proposal as technically inferior and based on unreasonably low labor rates.

In this regard, applicable regulations provide that while after the receipt of best and final offers, the contracting officer generally should not reopen discussions, he may do so when it is clearly in the government's interest, such as where it is clear that information available at the time is inadequate to reasonably justify contractor selection and award. FAR, 48 C.F.R. § 15.611(c) (1984). Consequently, our decisions recognize that there is nothing wrong with requesting more than one round of best and final offers where a valid reason exists to do so. Kisco Co., Inc., B-216646, Jan. 18, 1985, 85-1 CPD ¶ 56. Since we believe that the Navy clearly had the discretion not to reject RC's first best and final offer, we think the Navy had a valid basis for reopening discussions and requesting a second round of best and final offers. Further, since the record shows that RC's second best and final offer was unclear regarding a few proposed personnel, and that RAM's second best and final was again viewed as inferior to RC's, we think the Navy had a valid reason for requesting a third round of best and final offers.

The protester complains that the three rounds of best and final offers constitute technical leveling. RC's first and second best and final proposals were not inferior to RAM's; therefore, it cannot be said that the agency was merely using the negotiation process to unfairly allow RC to bring its proposal up to the level of RAM's. We think this is simply a case where an otherwise strong proposal had aspects to it that required revision and clarification and where the agency properly used the flexibility inherent in the negotiation process to permit that revision and clarification in the government's best interest.

IV. Conclusion

We dismiss as untimely the protest that the Navy improperly conducted an auction. We find no merit in the protest that the Navy should have rejected RC's first best and final offer and not requested successive rounds of best and final offers.

The protest is dismissed in part and denied in part.

*for Seymour Gross*  
Harry R. Van Cleave  
General Counsel