



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: B-222562

File: Price Waterhouse

Date: August 18, 1986

DIGEST

1. Contracting agencies generally must hold discussions with all responsible offerors for a negotiated procurement whose proposals are within the competitive range, and in order for these discussions to be meaningful, agencies must point out weaknesses, deficiencies, or excesses in proposals unless doing so would result in technical transfusion or technical leveling.
2. Protest is sustained where the agency conducted a limited form of discussions--identical technical and cost questions asked of all competitive range offerors--which were not justified by the agency's concerns as to technical transfusion or technical leveling and which effectively precluded the protester from any reasonable opportunity to improve its offer because the questions were unrelated to perceived areas of weakness or deficiency existing in the firm's initial proposal.

DECISION

Price Waterhouse protests the award of a contract to Coopers & Lybrand under request for proposals (RFP) No. DE-RP65-86WP16126, issued by the Western Area Power Administration, Department of Energy (DOE). The procurement is for the acquisition of support services to provide productivity improvement analysis and the review and evaluation of existing and proposed administrative/management systems. Price Waterhouse principally complains that the award was improper because DOE failed to conduct meaningful competitive range discussions with the result that the firm was deprived of an opportunity to submit an improved proposal.

We sustain the protest.

BACKGROUND

The RFP contemplated the award of a cost-plus-award-fee contract for a 1-year base period with the right of the government to extend the contract for up to 3 additional 1-year periods. Offerors were asked to submit technical, cost, and business management proposals. The RFP advised that the technical proposal was of greater importance than the cost proposal and that the business management proposal was of least importance.

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As provided in the RFP, technical proposals were to be evaluated under three major criteria. Criterion I, Technical Approach, comprised of four subcriteria which may be summarized as: (1) a demonstrated understanding of the RFP's statement of work and demonstrated corporate experience and past performance of related work; (2) technical approach to performing productivity reviews with respect to the activity's significant Operations and Maintenance (O&M) function; (3) steps taken to assure timely and thorough completion of tasks, including consideration of potential difficulties; and (4) technical approach to be employed for review, evaluation, and analysis work. Criterion II, Personnel Qualifications, comprised: (1) the experience and capabilities (background, education, and work experience) of proposed personnel, most importantly those of the proposed project managers, to be evidenced from submitted resumes; and (2) the commitment of proposed personnel required to meet the requirements of the contemplated contract. Criterion III, Program Management, required a description of the offeror's corporate structure and the lines of authority to the proposed key personnel, and the lines of communication between the offeror's organization and the contracting activity.

Nine firms responded to the RFP but DOE determined that only Coopers & Lybrand (the incumbent contractor), Arthur Young, and Price Waterhouse had submitted proposals within the competitive range.^{1/} In this regard, the firms' technical proposals had received respective initial evaluation scores of 489, 426, and 345.5 under the criteria discussed above, which were worth a total maximum of 500 weighted points. In terms of initial proposed costs (which were evaluated on the basis of the base period and the 3 option years), Coopers & Lybrand's cost was substantially higher than Arthur Young's and Price Waterhouse's. From the record, it appears that Price Waterhouse was included within the competitive range because its initial proposed cost was the second lowest among the nine original offerors. This is borne out by the fact that the offeror whose proposal was fourth-ranked technically (with a score only two points below Price Waterhouse's), but whose proposed cost was the highest, was not included.

In adjectival terms, Coopers & Lybrand's proposal was rated as "excellent" in virtually all areas, with no noted weaknesses or deficiencies. Arthur Young's proposal was basically evaluated as "very good" to "excellent," except in one area. Overall, Price Waterhouse's proposal was rated as "good," with ratings of "very good" in only two areas. DOE perceived the underlying weakness of the proposal to be

^{1/}The competitive range in a negotiated procurement shall include all proposals that have a reasonable chance of being selected for award. Federal Acquisition Regulation, § 15.609(a) (FAC 84-5, Apr. 1, 1985). Therefore, as a general rule, offers that are technically unacceptable as submitted and are not susceptible to being made acceptable without major revisions are not for inclusion in the competitive range. Ameriko Maintenance Co., Inc., B-216406, Mar. 1, 1985, 85-1 CPD ¶ 255.

Price Waterhouse's overly general approach to meeting the agency's needs. For example, DOE noted, among other things, that Price Waterhouse had failed to address adequately under Criterion I(2) the agency's important O&M productivity review requirement, thus indicating "a lack of understanding of what is being requested."

After determination of the competitive range, DOE submitted a set of six identical questions to the three firms and requested responses. These questions concerned both cost and technical elements. With respect to the latter, DOE requested expanded responses as to the responsibility and authority of the project manager, site office support, and the functions of the proposed oversight group. Although replies were received from all of the firms, the technical proposals were not rescored in light of the submitted responses.

DOE then submitted to the firms a second set of three cost-related questions (which also were identical in nature except in relation to each firm's specific proposed labor rates and hours) and simultaneously requested best and final technical and cost offers. Responses to the three questions were incorporated into the firms' best and final offers and were evaluated, but DOE again did not rescore the technical proposals. With regard to best and final proposed costs, Arthur Young reduced its proposed cost, making its offer the lowest among the three firms. Price Waterhouse also reduced its proposed cost, but Coopers & Lybrand offered no reduction. DOE requested preaward audits, and all best and final offers were adjusted as a result of these audits to reflect the most probable cost to the government. According to DOE, Coopers & Lybrand submitted an unsolicited revised cost proposal after the best and final closing date, based upon its knowledge of its own Defense Contract Audit Agency audit, but this revised cost was not used in the probable cost evaluation and was not considered during the source selection process. After evaluating the probable costs for each offeror and the best and final technical proposals, DOE selected Coopers & Lybrand for the award based upon the superiority of its technical proposal and "the relative equality of probable costs for the competitive range offerors." Upon its debriefing as an unsuccessful offeror, Price Waterhouse then protested the award to this Office.

PROTEST POSITION

Price Waterhouse principally complains that the agency failed to conduct meaningful competitive range discussions so as to afford the firm the opportunity to submit an improved technical proposal. In this regard, the firm states that it did not learn of the specific deficiencies noted by DOE in its initial proposal until it was so advised during its debriefing. The firm urges that the identical questions asked of all offerors during the evaluation process did not constitute meaningful discussions because they were wholly unrelated to the perceived weaknesses existing in the proposals. In this regard, Price Waterhouse notes that the question asked with regard to the oversight group was not

germane to its own offer because it had never proposed such an organizational function. Accordingly, the firm asserts that, had it been apprised of its proposal deficiencies, it could have submitted a significantly improved best and final offer.

ANALYSIS

The governing provision of the Competition in Contracting Act of 1984, 41 U.S.C. § 253b(d)(2) (Supp. II 1984), as reflected in the Federal Acquisition Regulation (FAR), § 15.610(b) (FAC 84-5, Apr. 1, 1985), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Price Waterhouse, B-220049, Jan. 16, 1986, 65 Comp. Gen. _____, 86-1 CPD ¶ 54, aff'd on reconsideration, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. This fundamental requirement includes advising offerors of deficiencies in their proposals and affording them the opportunity to satisfy the government's requirements through the submission of a revised proposal. FAR, § 15.610(c)(2) and (5); see also Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. Thus, it is well settled that for competitive range discussions to be meaningful, agencies must point out weaknesses, deficiencies, or excesses in proposals unless doing so would result in disclosure of one offeror's approach to another--technical transfusion^{2/}--or would result in technical leveling when the weakness or deficiency was inherent in the proposed approach or caused by a lack of diligence or competence.^{3/} Advanced Technology Systems, B-221068, Mar. 17, 1986, 86-1 CPD ¶ 260; Ford Aerospace & Communications Corp., B-200672, Dec. 19, 1980, 80-2 CPD ¶ 439.

Although agencies are not obligated to afford offerors all-encompassing discussions, Training and Management Resources, Inc., B-220965, Mar. 12, 1986, 86-1 CPD ¶ 244, or to discuss every element of a technically acceptable competitive range proposal that has received less than the maximum possible score, Bauer of America Corp. & Raymond International Builders, Inc., A Joint Venture, B-219343.3, Oct. 4, 1985, 85-2 CPD ¶ 380, they still generally must lead offerors into the areas of their

^{2/} "Technical transfusion" is the government disclosure of technical information pertaining to a proposal that results in the improvement of a competitive proposal. Federal Acquisition Regulation, § 15.610(d)(2) (FAC 84-5, Apr. 1, 1985).

^{3/} "Technical leveling" involves helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussions, such as by pointing out inherent weaknesses in the proposal stemming from the offeror's own lack of diligence, competence, or inventiveness in preparing its proposal. Federal Acquisition Regulation, § 15.610(d)(1); see also Austin Electronics, 54 Comp. Gen. 60 (1974), 74-2 CPD ¶ 61; E-Systems, Inc., B-191346, Mar. 20, 1979, 79-1 CPD ¶ 192.

proposals which require amplification. Furuno U.S.A., Inc., B-221814, supra; Technical Services Corp., B-216408.2, June 5, 1985, 85-1 CPD ¶ 640. In short, discussions should be as specific as practical considerations will permit in advising offerors of the deficiencies in their proposals. Tracor Marine Inc., B-207285, June 6, 1983, 83-1 CPD ¶ 604.

In the present matter, we agree with Price Waterhouse that DOE failed to conduct meaningful discussions. We have closely compared the two sets of identical questions that were asked of the competitive range offerors with the specific deficiencies that were noted as existing in Price Waterhouse's proposal, and we conclude that those questions did not meet the general requirement of leading the firm "into the areas of [its] proposal which require[d] amplifications." Furuno U.S.A., Inc., B-221814, supra. For example, as already noted, Price Waterhouse's proposal was perceived to be weak in the important O&M productivity review area, but none of the technical questions asked by DOE (concerning the project manager, site office support, and oversight group) bore any reasonable relation to this aspect of the proposal. We think this is particularly troublesome given the fact that the RFP itself was, in our view, not as specific as it could have been with regard to this and other functions of the activity. Although Price Waterhouse was given the opportunity to revise its initial proposal through the submission of a best and final offer, a fact which, ordinarily, would satisfy the requirement for discussions, see The Aerial Image Corp., Comcorps, B-219174, Sept. 23, 1985, 85-2 CPD ¶ 319, DOE's mere request for best and final offers was legally insufficient in that regard since the proposal continued to contain technical uncertainties and deficiencies which had never been brought to the firm's attention. See Sperry Corp., B-220521, Jan. 13, 1986, 65 Comp. Gen. _____, 86-1 CPD ¶ 28. As we believe Price Waterhouse correctly argues, the fact that the responses to these questions generated no rescoring of the proposals indicates that they did not serve to warn of perceived proposal weaknesses.

DOE asserts that it was not required to discuss the specific deficient aspects of the proposal with Price Waterhouse because they reflected the firm's lack of diligence and inventiveness in preparing its proposal, and, therefore, discussions would only have led to prohibited technical transfusion or technical leveling. FAR, § 15.610(d)(1) and (2), notes 2 and 3, supra.

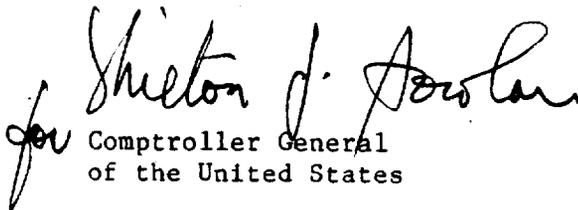
Although it is clear that Coopers & Lybrand enjoyed a natural advantage as the incumbent in terms of a full understanding of the activity's mission and, accordingly, submitted an excellent proposal, we see nothing in the record to establish that there was a clear risk that the firm's technical approach would have been improperly transfused to the other competitive range offerors through discussions. Similarly, we note that technical leveling arises only where, as the result of successive rounds of discussions, the agency has helped to bring one proposal up to the level of other proposals by pointing out inherent weaknesses that remain in the proposal because of the offeror's own lack

of diligence, competence, or inventiveness after having been given an opportunity to correct them. E-Systems, Inc., B-191346, note 3, supra. Here, no successive rounds of discussions were conducted, and although DOE may have believed that Price Waterhouse's relatively low evaluation scores reflected a proposal inherently weak to the extent that it could not be improved without repeated discussions, we do not believe that this allowed the agency to conduct a form of negotiations which precluded Price Waterhouse from even a single reasonable opportunity to address the perceived deficiencies in its proposal. In our view, the agency's effective limitation on discussions was not justified by its concerns about the risk of technical transfusion or technical leveling. See Harbridge House, Inc., B-195320, Feb. 8, 1980, 80-1 CPD ¶ 112; cf. Gould Inc., B-192930, May 7, 1979, 79-1 CPD ¶ 311 (limited discussions justified where proposal inadequacies arguably were related to matters which would lead to transfusion or leveling in technically complex procurement).

We emphasize that, unlike the situation where a proposal as submitted is so deficient that it is initially excluded from the competitive range, see Marvin Engineering Co., Inc., B-214889, July 3, 1984, 84-2 CPD ¶ 15, Price Waterhouse's proposal, in fact, was included within the competitive range, thus mandating that the perceived areas of weakness be brought to its attention so as to allow for proposal revision. Furuno U.S.A., Inc., B-221814, supra. By definition, any proposal included within the competitive range has a reasonable chance of being selected for award, FAR, § 15.609(a), note 1, supra, and we believe that DOE's failure to advise Price Waterhouse of the proposal areas needing improvement unreasonably deprived the firm of any further opportunity to obtain the contract.

Therefore, by separate letter of today, we are recommending to the Secretary of Energy that discussions be reopened with the three competitive range offerors. If Coopers & Lybrand is not in line for award as a result of these discussions, we further recommend that the present contract with Coopers & Lybrand be terminated for the convenience of the government. See Sperry Corp., B-220521, supra, 65 Comp. Gen. at _____, 86-1 CPD ¶ 28 at 8.

The protest is sustained.

for 
Comptroller General
of the United States