



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Bank Note Company
File: B-222589
Date: September 18, 1986

DIGEST

1. General Accounting Office will not object to multiple awards to two offerors responding to a request for proposals for the production of various denominations of food stamp coupons where the awards result in the lowest aggregate cost to the government consistent with more than a single award; where solicitation permitted the multiple awards which were made; and where separate awards--based upon a finding that no one contractor can perform the entire contract--are necessary to meet the government's requirement for an uninterrupted supply of food stamps.
2. A contracting officer's nonresponsibility determination generally will not be disturbed absent a showing of bad faith, abuse of discretion, or a lack of any reasonable basis for the determination.
3. While instances of unsatisfactory performance on a previous contract do not in themselves establish an offeror's nonresponsibility, the circumstances and the fact of the prior deficiencies are appropriate for consideration and a contracting officer can reasonably determine that they constitute the grounds for a nonresponsibility determination.
4. Protester has not established that meaningful discussions were not held with it or that oral advice from unnamed agency officials--which advice the agency denies giving--misled the protester into not submitting alternate price proposals which may have been to its advantage.
5. Protest that awardee's price proposal is materially unbalanced is deemed abandoned where protester fails to respond to the agency's rebuttal of the issue when protester comments on the agency's report.

036779-131073

DECISION

American Bank Note Company (ABN) protests the award of a contract^{1/} to United States Bank Note Corporation (USBN) under request for proposals (RFP) No. 86-2LK issued by the United States Department of Agriculture (USDA), Food and Nutrition Service.

For reasons discussed herein, the protest is denied.

BACKGROUND

The RFP was issued on October 31, 1985, for the printing of six different denominations of food stamp coupon books, and solicited offers for a stated quantity of \$2, \$7, \$10, \$40, \$50 and \$65 coupon books for a base period commencing September 1, 1986, through August 31, 1987, with a 1-year option ending August 31, 1988. The government reserved the right to increase and/or decrease the quantity of food stamp coupon books by 30 percent during the life of the contract. The solicitation invited offers for any or all denominations provided the option price for that particular denomination was included. Offerors were permitted, at their discretion, to submit alternate proposals for the various coupon books, if the alternate proposals were clearly identified as such and if the offeror also submitted a proposal for the performance of the work as specified in the statement of work.

USDA is procuring these supplies because it has responsibility for the administration of the National Food Stamp Program which is the major federal program to provide adequate nutrition to needy Americans. Approximately 19.8 million people receive food stamps each month. At the time the RFP was issued, only three private domestic companies--ABN, USBN and Jeffries Banknote Company (JBN)--had the intaglio-printing^{2/} capability suitable for printing of food stamp coupons.

^{1/} At time of filing, ABN's protest was against the proposed multiple award to USBN and itself. However, during the pendency of this protest we were notified that based on a finding of urgent and compelling reasons, USDA awarded a contract to USBN for three of the six denominations of food stamp coupon books on June 25, 1986, and the other three denominations were awarded to the protester on June 30, 1986.

^{2/} The process whereby an engraving is done from a plate in which the image is sunk below the surface. The quality of printing required here is similar to that for paper currency, travelers' checks and stock certificates.

Because of the limited market, USDA determined that its needs for an uninterrupted supply of food stamps were of such an urgent and compelling nature that it included in the RFP a provision which would permit multiple awards. The agency reports that multiple awards have been "commonplace" since 1979, the year it assumed direct responsibility for the food stamp program.

The agency received four proposals from ABN, USBN, JBN and British American Bank Note, Inc. (BABN) by the solicitation closing date. These proposals were then referred to a technical evaluation panel (TEP) for evaluation. The TEP determined that all four initial proposals were technically acceptable and the Agency Board of Contract Awards (Board)^{3/} recommended that all four firms be included in the competitive range. The agency then commenced discussions with the firms by first submitting written questions to them concerning their proposals and then conducting oral discussions. Best and final offers [BAFOs] were requested and received from all four offerors.

Upon evaluation of the BAFOs and the responses to various technical and business questions, the TEP found only three of the four proposals acceptable, both technically and from the standpoint of cost. BABN's proposal was found technically unacceptable because of its failure to comply with certain security requirements of the RFP.

The TEP considered ABN's and USBN's offers to perform the entire contract but found neither company capable of total performance. The panel noted that various technical questions remained and therefore recommended to the contracting officer and the Board that further clarification questions be posed to the three remaining offerors.

The Board considered the TEP's recommendation to reopen discussions with the three firms but rejected that recommendation on the basis that further negotiations would not be in the best interests of the government given the length of time that had already elapsed and the belief that further delay in the procurement process could jeopardize the agency's mission to provide for the needy. The Board also considered the TEP's findings that none of the offerors could fulfill the

^{3/} USDA's internal procedures require that the technical evaluation report--which includes a certification of findings with technical recommendations--be presented to the Board and, after review, the Board submits its recommendation to the contracting officer.

total production capacity for the entire contract and ultimately recommended to the contracting officer multiple awards to the protester and USBN based upon the total low aggregate cost to the government. The contracting officer determined that neither ABN nor USBN was a responsible prospective contractor for purposes of performing the entire requirement and therefore proposed to split the award between the two firms. USDA orally informed the protester on May 16, 1986, of its decision to make a split award and a debriefing was held on May 19 at the protester's request. ABN thereupon filed this protest with our Office.

ABN's Protest

The lowest-priced offeror for the entire contract quantity was not the protester but USBN which, in addition to offering a price for each of the six line items, submitted alternate proposals for the award of all six items on an "all-or-none" basis as well as for varying combinations of line items. The protester's proposal, in which it offered prices on each of the six line items, was second low. Neither firm received an award for the entire contract quantity following the contracting officer's determination that neither had the capacity to perform the entire contract. The multiple awards, in which the requirement was split between the two firms, represented the lowest price to the government that could be achieved with multiple awards, but totaled more than the price offered by either offeror for the entire contract. ABN's protest arises out of the fact that it was awarded only the \$2, \$7 and \$10 coupon books, which represent about 35 percent of the dollar value of the contract. ABN argues that it should have received a larger, and different, portion of the award if not the award of the entire contract. The protester attributes the USDA's failure to make such an award to a variety of deficiencies throughout the procurement process ranging from the terms of the solicitation itself to the contracting officer's nonresponsibility determination which preceded the partial award to ABN. The protester maintains that the circumstances permitting multiple awards were not present here; that the awards made were inconsistent with the terms of the RFP; that the conduct of the procurement was flawed in that the agency failed to apprise ABN during negotiations of concerns about its technical proposal and not only discouraged it from submitting alternate proposals (something which its competitor did do) but in fact orally suggested to ABN that it was under consideration for award of the entire contract; that its competitor's proposal for the \$40, \$50 and \$65 books should have been rejected as an "unbalanced offer" and the award made to ABN for those items; and that the contracting officer unreasonably determined that ABN lacked the capacity to perform the entire contract.

DISCUSSION

1. Multiple Awards

ABN first questions the agency's authority to proceed with multiple awards under the circumstances of this procurement. Describing solicitation provisions which permit multiple awards as a "feature of sealed bid procedures . . . [and] not contracting by negotiation," the protester argues that there are only two circumstances relevant to this protest where multiple awards are authorized: (1) if there is an economic advantage to the government and the proposed contract is severable or (2) where no single offeror can perform the entire contract.

With regard to the first circumstance, ABN does not suggest that the contract work is not severable. It does maintain, however, that the awards made cannot be defended as economically advantageous to the government since their total cost exceeds that of a single award to ABN for the entire contract.^{4/} Even the partial award to USBN, the protester points out, was at a higher price than the total of ABN's prices for those denominations. The actual basis for the multiple awards, ABN argues, is not because they were economically advantageous to the government, or because there was no single source capable of performing the contract--it contends that it could--but because the agency wanted two sources of supply for programmatic reasons.

Our first inquiry is whether multiple awards were permissible under the RFP and, if so, whether they appropriately were made. We have consistently stated that if the method of award clause in an RFP does not specifically require an aggregate award, multiple awards are permissible. See Talbott Development Corp., B-220641, Feb. 11, 1986, 86-1 C.P.D. ¶ 152 at 2. Not only is there nothing in this RFP that requires an aggregate award but, we would agree with USDA, there are three solicitation provisions which indicate its intent to retain the flexibility to make multiple awards.

Paragraph I.1 of the solicitation incorporates by reference the Federal Acquisition Regulation (FAR) provision at 48 C.F.R. § 52.215-16 (1985) which states in relevant part:

^{4/} ABN does not mention that it would be even more economically advantageous to award the entire contract to USBN, whose offer ABN argues should be rejected as "unbalanced" and whose ability to perform the whole contract it questions.

"(d) The Government may accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations. . . ."

More specifically, that section of the solicitation concerning the evaluation of offers for award advised offerors in clauses M.4 and M.6:

"M.4 EVALUATION FACTORS FOR AWARD

Proposals to be acceptable and eligible for evaluation must be prepared in accordance with the instructions given in this solicitation . . . and must meet all the mandatory requirements set forth in [the solicitation instructions for preparing technical and price proposals.] Proposals meeting the mandatory requirements and complying with the provisions of the Standard Form of Contract will be evaluated and award made to that responsible offeror whose proposal is determined to be the lowest overall cost to the Government, price and other factors considered, for each coupon book. Cost to the Government includes but is not limited to the offeror's prices for the coupon books, cost of making multiple awards, [and other factors affecting transportation costs]. . . .

Offerors have the opportunity to submit an offer or offers on any or all book denominations as long as the option price for that particular book denomination is included."

"M.6 MULTIPLE AWARDS

Food Stamp Coupons are necessary for the Food Stamp Program. In order to assure a constant and sufficient supply of food stamp coupon books, the Government reserves the right to make multiple awards which may be to other than the lowest offeror."

These clauses, most particularly M.6, clearly express the agency's intent to reserve to itself the option of making more than one award. We do not see how any offeror could have concluded that multiple awards were not a possibility in the face of these explicit statements in the solicitation. In this regard, we cannot attach much weight to the protester's suggestion that it may have been led to believe otherwise, in view of the generality and lack of support for its allegation that unnamed USDA "officials" or "personnel" orally indicated to it that it was being considered for the award of the entire contract, when that allegation is denied

by the agency and not substantiated by the record of negotiations.

The protester's principal position is that multiple awards were not authorized under the circumstances of this procurement and that it should have received a single award of the entire contract quantity as the lowest responsible offeror. Alternatively, however, it argues that assuming multiple awards were permissible, the awards which were made were not in accordance with the criteria in clause M.4, which states that "award [shall] be made to that responsible offeror whose proposal [represents] the lowest overall cost to the Government, price and other factors considered, for each coupon book." ABN argues that since its prices for the \$40, \$50 and \$65 coupon books were lower than USBN's, it should have received the award of this portion of the contract, rather than of the \$2, \$7 and \$10 books. ABN recognizes that clause M.4 states that "cost to the Government" includes the "cost of making multiple awards," but the protester argues that must:

"be interpreted to mean that the Government would consider additional costs relative to a particular coupon book imposed by an offeror in the event that such offeror were to receive an award for less than all coupon books (i.e., incremental pricing based on volume)."

We do not agree that the multiple awards which were made were prohibited by the solicitation provisions. The agency points out that once the contracting officer concluded that neither USBN nor ABN could perform the total contract, that combination of items which would result in the lowest aggregate cost to the government, achievable consistent with more than one award, was the combination in fact awarded. The agency states that were it to follow the multiple award scheme advocated by the protester, the \$2 coupon books would be awarded to BABN; the \$40, \$50 and \$65 books to the protester; and the \$7 and \$10 books to USBN, for a total price including the option year of \$30,761,059, almost \$2 million higher than the awards which were actually made.

Since the RFP provided for multiple awards and those awards which were made represented the lowest aggregate cost to the government consistent with more than one award, we have no legal objection to them provided they were adequately justified. For the reasons discussed below, we think the contracting officer's nonresponsibility determinations concerning ABN and USBN provided that justification.

2. ABN's Capacity to Perform the Entire Contract

As indicated above, ABN recognizes that multiple awards may be appropriate where no single offeror can perform the entire contract. ABN challenges the contracting officer's determination that it is not capable of performing the entire contract. The protester takes the position that it has "demonstrated" its capacity to perform the entire contract and asserts that it can substantiate its claim with "statistical data known to USDA."

USDA responds that the multiple award to ABN and USBN is proper because the agency made a specific determination that neither of the successful suppliers of the coupon books--ABN, and USBN--had the proven capacity to perform the contract. While USDA concedes that there are several programmatic reasons which, in its judgment, support its decision to make a split award, the agency maintains that the decision to proceed with multiple awards was premised on the responsibility determination that neither contractor had sufficient capacity to satisfy the entire contract requirements and was not driven, as the protester alleges, by a desire to maintain two sources of supply. We note that in its report, the agency discusses the benefits to be derived from two sources of supply, but we also note it has voiced no absolute objection to a single award.

As a general matter, our Office will not question a contracting officer's nonresponsibility determination unless the protester can show bad faith by the agency officials or a lack of any reasonable basis for the determination. Martin Electronics, Inc., B-221298, Mar. 13, 1986, 86-1 C.P.D. ¶ 252 at 3. The determination of a prospective contractor's responsibility is the duty of the contracting officer in whom a wide degree of discretion and business judgment is vested. Id. We usually defer to such judgment and discretion unless the protester, who bears the burden of proof, shows that it was abused. Pauline James & Assocs., B-220152 et al., Nov. 20, 1985, 85-2 C.P.D. ¶ 573 at 3. In this instance, ABN has not alleged bad faith by USDA, and we find ABN has not demonstrated that the nonresponsibility determination lacked a reasonable basis.

In support of its nonresponsibility determination, the agency has provided us with detailed information of unsatisfactory contract performance by ABN under its current (1985-1986) contract to produce the \$2, \$7, \$10, \$40, and \$50 coupon books. In particular, the information shows that ABN had failed to meet a number of critical deadlines; that there was a delay in the production of the 1986 coupon books due to the quality of the \$10 first article sheets provided by ABN; and that ABN failed to deliver full orders in the quantities

requested for some book denominations because ABN was overproducing some book denominations while underproducing other denominations.

USDA reports that the contracting officer was familiar with ABN's unsatisfactory performance under the existing contract; consequently, this information was considered when an affirmative determination of the protester's ability was made for the subject solicitation.

In its comments on the agency report, ABN asks that we not consider the detailed information of its unsatisfactory prior performance on the basis that the information "are contemporary statements [which] are inconsistent with the documents that constitute the historical agency record." We decline to do so.

We believe it is appropriate that the contracting officer considered ABN's poor performance on one contract and the circumstances therefor in making a responsibility determination for the current requirements. Under the circumstances present herein, this information which was readily available to the contracting officer provides, in our view, a reasonable basis for the nonresponsibility determination to perform the total contract. See C.W. Girard, C.M., 64 Comp. Gen. 176 (1984), 84-2 C.P.D. ¶ 704.

3. Conduct of Negotiations

ABN next alleges that the competitive procedures used by the agency were deficient in that the agency did not adequately apprise ABN of deficiencies it perceived in the firm's technical proposal nor did it request ABN to provide alternate price proposals for various combinations of books in the event the agency contemplated multiple awards. With respect to the latter, as we indicated above, ABN has alleged in general terms that it was orally advised by USDA officials, prior to submission of BAFOs, that it was being considered for award of the entire contract. We understand ABN to suggest that not only was it not put on notice by the agency that the submission of alternate proposals might be to its advantage, but was--erroneously--led to believe that it was being considered for award of all items. ABN speculates as to whether USBN may have been given different advice which resulted in that firm's submission of a number of alternate proposals.

USDA denies that it told ABN that the firm was being considered for the entire award and states that all offerors were told that although alternate proposals were not encouraged, they were not prohibited by the RFP provisions. The agency's negotiation memoranda support this. In addition,

the agency states that extensive oral and written discussions, which pertained to various technical and business matters, were held with all four firms.

Our review substantiates the agency's position that full and meaningful discussions, as required by the procurement regulations, were held. The record shows that USDA provided ABN with numerous written technical questions on at least two occasions, February 3 and March 17, 1986. Furthermore, there is evidence that discussions were held with each offeror during March 23 and 30, and various technical matters were also discussed. We thus do not understand how ABN can reasonably claim that the agency failed to conduct adequate discussions prior to submission of its BAFO.

We also do not understand how the protester could have relied on any oral advice that it was being considered for the full award or that alternate price proposals would not be considered. In any event, it has long been our view that offerors rely on oral advice at their own risk, especially when the oral representation conflicts with the written provisions of the RFP. See American Bank Note Co., B-212505.2, Oct. 25, 1983, 83-2 C.P.D. ¶ 495; Weinschel Engineering Co., Inc., 64 Comp. Gen. 524 (1985), 85-1 C.P.D. ¶ 574 at 4.

We think the record supports the conclusion that meaningful discussions were held with the protester and that the protester was not precluded from submitting alternate price proposals.

4. Unbalanced Offer

In its initial protest, ABN also alleged that USBN's price proposal for three coupon denominations--\$40, \$50 and \$65--is "materially unbalanced" and therefore nonresponsive to the solicitation. The protester surmises that USBN's alternate price proposal for these three book denominations in combination (on which award was made) was so much lower than its price for each item individually that its individual item price was, in relative terms, "very high," and therefore was an "unbalanced offer" as defined in the solicitation, i.e., one "based on prices significantly overstated for other work."

The agency in its report, and USBN in its comments on the protest, both refute the protester's claims. The parties point out, as we have noted previously, that the solicitation contemplated the award of a 1-year firm fixed-price contract with a 1-year option and the option to increase or decrease the quantity of food coupons by 30 percent. The RFP also provides for rejection of an offer if the offer is materially unbalanced as to prices for the basic requirement and the option quantities.

The record indicates that an independent preaward audit, conducted by the Defense Contract Audit Agency, as well as an in-house cost analysis found no attempt on the part of any offeror to submit unbalanced price proposals. Accordingly, the contracting officer found that USBN's offer was neither mathematically nor materially unbalanced.

We need not consider the merits of ABN's "unbalanced offer" argument, however, because the protester has not rebutted that portion of the agency's report. We therefore consider ABN to have abandoned this protest ground. The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 C.P.D. ¶ 218.

The protest is denied.

for Seymour E. Fros
Harry R. Van Cleve
General Counsel