Corrected Copy

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: H.J. Osterfeld Company

File: B-234992

Date: August 1, 1989

DIGEST

1. An offeror is not entitled to a debrifing until after award is made.

2. Cost realism analysis of an offeror's labor rates is to determine if they are realistic and reasonable and we will not disturb agency's informed judgment absent a showing it was unreasonable. Where total standard wage rate using solicitation's wage determinations is $47.28, proposed awardee's offered rate is $52 and protester's is $53.81, agency determination that proposed awardee's costs were realistic is not unreasonable.

3. Protest that agency failed to evaluate offered discount is denied since discount would still not make protester low where award is to be made to technically acceptable lowest priced offeror.

4. Protest not filed within 10 days of knowledge of protest basis made known in agency report is untimely.

DECISION

The H.J. Osterfeld Company protests the award of a contract to the apparent successful offeror, the Fred DeBra Company, under request for proposals (RFP) No. F33657-88-R-0094, issued by Wright-Patterson Air Force Base, Ohio, for maintenance and minor construction. The solicitation was set-aside for small businesses.

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

The solicitation provided that proposals would be evaluated on the basis of contractor performance, maintenance experience, construction experience, work control system,

subcontracting, computer records, reporting system, manual records, reporting, material control and accounting procedures, and labor availability and recruitment plan. Award was to be made to the responsible offeror whose technical proposal was found to be technically acceptable and offered the lowest weighted composite hourly labor rate.

Initially, Osterfeld protests that the Air Force failed to provide it with a debriefing. Osterfeld states that upon receiving a notice from the Air Force that DeBra was the apparent successful offeror, Osterfeld requested a debriefing. The Air Force declined to give Osterfeld a debriefing on the grounds that although the apparent successful offeror had been identified pursuant to Federal Acquisition Regulation (FAR) § 15.1001(b)(2) (FAC 84-13), no award had been made. Under FAR § 15.1003 (FAC 84-38), when a contract is awarded on a basis other than price alone unsuccessful offerors, upon their written request, shall be debriefed and furnished the basis for the selection decision and contract award. Since the FAR clearly does not provide an entitlement to a debriefing prior to award Osterfeld was not entitled to the debriefing here.

Osterfeld claims that DeBra's weighted composite hourly labor rate could not have included the refrigeration technician or skilled electrician wage rates and DeBra improperly used tradesman wage rates which are approximately half of the skilled rates. Osterfeld states it was specifically told tradesmen were not to be used as a substitute for skilled trades. The Air Force contends that Osterfeld was merely informed to use the proper rates in accordance with the RFP and the wage determinations.

The RFP was designed so that offerors were required to price each labor category, including overhead, general and administrative (G&A) and profit, in the solicitation. An offeror who avoided pricing any of the labor categories would have been found unacceptable since, for the purposes of evaluation, the weighted composite hourly labor rate was derived by multiplying the straight time rates of each labor category by a fixed percentage of estimated hours of use stated in the RFP. DeBra did, in fact, price the refrigeration technician and skilled electrician wage rates and our review of DeBra's proposal shows that its pricing of these labor categories was closely in line with Osterfeld's. This basis of protest is accordingly denied.

Osterfeld next protests that DeBra's low composite hourly rate of $52 is unreasonably low, because it is the same rate proposed by DeBra 3 years ago for these services, it does not include overhead, G&A and profit, and is not in line with Osterfeld's experience as incumbent contractor. Osterfeld contends that no cost realism analysis of DeBra's proposal was performed as was required by section M of the RFP.

The Air Force responds that it did perform a cost realism analysis, that DeBra's composite hourly rate includes overhead, G&A and profit and that in any event, DeBra's composite rate was barely 3 percent below the composite rate offered by Osterfeld. The Air Force maintains that DeBra's pricing on all wage categories is in line with all other offerors.

In its comments on the Air Force's report Osterfeld contends that the total standard rate using the RFP's wage determinations is $47.28. Subtracting this standard rate from DeBra's $52 offer and Osterfeld's $53.81 offer leaves an allowance for overhead, G&A, and profit of $4.72 for DeBra and $6.53 for Osterfeld. Osterfeld thus contends that the true difference between it and DeBra is 38.35 percent, not 3 percent as stated by the Air Force.

The purpose of a cost realism evaluation by an agency under a time and materials type contract is to determine the extent to which the offeror's proposed labor rates and other costs are realistic and reasonable. Since an evaluation of this nature necessarily involves the exercise of informed judgment, the agency clearly is in the best position to make this cost realism determination and, consequently, we will not disturb such a determination absent a showing that it was unreasonable. Carrier Joint Venture, B-233702, Mar. 13, 1989, 89-1 CPD ¶ 268. Moreover, with respect to the extent of the cost realism analysis, we have held that an agency is not required to conduct an in-depth analysis or to verify each and every item in conducting its cost realism analysis. Id.

The Air Force compared the four offerors' cost proposals and found them to be all reasonable. DeBra quoted a composite labor rate which clearly included a markup for overhead, G&A and profit. We do not agree with Osterfeld, therefore, that the fact there was a 38.35 percent difference between the overhead, G&A and profit portion of its

composite wage rate and DeBra's signifies an unrealistically low offer on the part of DeBra. As Osterfeld itself now notes, DeBra did quote labor rates above the mandatory rates in the RFP's wage determination. The fact that DeBra's rates were not as high as Osterfeld does not signify unreasonableness.

Although in its comments on the agency report, Osterfeld argues that the Air Force erroneously concluded that Osterfeld had not included a markup for overhead, G&A and profit, it is evident from the Air Force's evaluation that this applied not to item 0001, maintenance labor rates and item 0002, construction labor rates, but to item 0003, materials/subcontracting. Item 0003 was estimated at $10,000 in the RFP, and all offerors but Osterfeld included a markup for overhead, G&A and profit. The net effect of item 0003's markup was in any event so small as to be inconsequential to the evaluation of the weighted composite hourly labor rates.

Osterfeld raises two further contentions in its comments on the agency report and conference relating to the argument that the Air Force failed to perform a cost realism analysis. The first is that the Air Force failed to evaluate Osterfeld's offered discount, i.e., that Osterfeld would reduce its billable labor rate by $1.44/hour for maintenance and $1.36/hour for construction for those hours in excess of 150,000 for each category per year. A simple examination of the composite average labor rates offered, however, shows a difference between DeBra's $52 and Osterfeld's $53.80 of $1.80. DeBra therefore would still be low by 36 cents an hour for maintenance and 44 cents an hour for construction for all hours over 150,000 a year. For the first 150,000 hours in each category, DeBra would enjoy a much wider price advantage. Osterfeld's discount, therefore, would not have changed the result of DeBra having the lowest weighted composite hourly labor rate offered.

Secondly, Osterfeld states that the RFP required offerors to submit prices for each labor category for straight time, second shift, third shift and overtime. Osterfeld states that the only document produced relating to its cost evaluation was a memorandum for the record relisting all of the labor rates supplied by Osterfeld as well as the calculation for the weighted hourly labor rate. Osterfeld says the Air Force's analysis is flawed in that the weighted composite hourly labor rate for items 0001 and 0002 was

based solely on the direct hourly labor rate, straight time, and no consideration was given to second and third shift rates or the overtime rate. Osterfeld contends that the Air Force's cost analysis of the proposals was necessarily flawed by this omission.

The solicitation stated that the weighted hourly labor rate would be calculated using the straight time rates only for evaluation purposes. Osterfeld apparently concludes that since the Air Force only evaluated straight time rates for award it did not examine the shift and overtime rates for cost realism. Osterfeld has not articulated a reason why it feels shift and overtime rates were not examined for cost realism. We note that the documentation provided by the Air Force shows Air Force corrections in the weighted rates because offerors may have improperly computed the weighted rate by incorrectly multiplying the average rate times estimated percentage of hours. The same documentation contains no annotation or corrections as to the shift and overtime labor rates. We do not conclude from this, however, that the Air Force failed to examine the cost realism of shift and overtime labor rates. The weighted hourly labor rate had to be corrected for evaluation purposes. The quoted shift and overtime rates needed no such correction but only an examination of their reasonableness. The fact they were not annotated by written comment does not mean the Air Force failed to conduct an adequate cost realism analysis.

Finally, Osterfeld alleges that DeBra proposed using the current computer system and was rated technically acceptable under the computer records/reporting system category even though no government-furnished computer equipment was described in the RFP. Osterfeld alleges it was orally informed that the current Air Force system would not be permitted to be used on this contract.

The contracting officer states that no offeror was told that the current computer system, which was developed and modified by DeBra, was unacceptable. Rather, the contracting officer states that offerors were informed that there was no available government system as the computer and software used under the current contract was not government property. The RFP itself does not set any limits as to what system can or cannot be used other than performance requirements relating to the capability of the system to effectively accomplish the solicitation's purposes. Accordingly, we see no reason why DeBra would be prohibited from offering a computer system which consists of its own hardware and software which it developed and modified.

Osterfeld also contends that DeBra should have been found technically unacceptable for the contractor performance evaluation factor due to its poor performance on the contract from 1982 through 1985. Since the Air Force effectively rebutted this basis of protest in its agency report and Osterfeld did not respond in its comments, we view this as an abandonment by Osterfeld of this basis of protest.

Finally, Osterfeld in its comments on the agency report and conference raises the issue that technical discussions were held with all other offerors, but not itself. Our Bid Protest Regulations require that protests be filed not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1988). The information upon which this allegation is based was provided in the Air Force's agency report of May 4. Since Osterfeld did not protest this matter until May 31, it is untimely. 4 C.F.R. § 21.2(a)(2). In any event, the record shows that although technical discussions were held with two offerors, the Air Force did not hold technical discussions with either DeBra or Osterfeld as their proposals contained no technical deficiencies. Since the solicitation provided that award would be made to the technically acceptable offeror offering the lowest price the Air Force need not have conducted detailed discussions with those offerors whose proposals were technically acceptable. Weinschel Engineers, Co., Inc., 64 Comp. Gen. 524 (1985), 85-1 CPD 574.

The protest is dismissed in part and denied in part.

for James F. Hinchman
General Counsel