The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ultrasystems Defense, Inc.

File: B-235351

Date: August 31, 1989

DIGEST

The contracting agency's reversal of its initial decision to exclude a proposal from the competitive range for the award of a fixed-price contract is reasonable where the agency ultimately decided that with one additional round of negotiations the offeror could clear up the remaining small number of proposal deficiencies, mostly informational, without the offeror's writing a new proposal.

2. Improper technical leveling of proposals did not take place where the primary purpose of the contracting agency's discussions was to ascertain what the offeror was proposing to furnish rather than to raise offeror's technical proposal to level found in protester's proposal.

3. Since contracting agency did not consider protester's price to be too high for technical approach proposed, agency properly did not conduct discussions on the aggregate price proposed by the protester.

DECISION

Ultrasystems Defense, Inc. (UDI), has protested the award of a firm-fixed-price contract for the production of 11 "Basic Morse [Code] Mission Trainers,"1/ an Instructor/Operator training program, technical support data, and on-site contractor logistic support. The contract was awarded by the Naval Training Systems Center, Department of the Navy, to Engineering Research Associates (ERA) under request for proposals No. 61339-88-R-0021.

UDI questions the Navy's evaluation of ERA's proposal, in particular the Navy's reversal of its initial decision to exclude ERA's proposal from the competitive range for the

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1/ The trainers will be used to support code training at the Army Intelligence School, Fort Devens, Massachusetts.

RFP. Next, UDI contends that ERA may have been inadvertently, and improperly, "coached," to upgrade its proposal through a series of discussions and proposal revisions. Finally, UDI complains that the Navy never informed the company that its price was considered too high for the contract.

We deny the protest.

The RFP requested technical, integrated logistics support (ILS), management, and price proposals for the work requirements described therein. The RFP stated that the Navy intended to award a firm-fixed-price contract to that responsible offeror, submitting a technically acceptable proposal, and having the lowest total price (including all options).

Five offerors submitted proposals by the initial closing date. The Navy states that, pursuant to its initial evaluation of proposals, ERA's and UDI's proposals, along with the proposals of the other offerors, were found to have a reasonable chance of being selected for award depending on the offerors' responses, during discussions, to questions about the proposal areas deemed to be deficient by the Navy.

Face-to-face discussions were then conducted with all 5 offerors, who then submitted proposal revisions. As a result of the Navy's evaluation of these revisions, one offeror's proposal was permanently excluded from the competitive range. Next, the Navy's evaluators considered that ERA's responses--along with the responses of a third offeror--would also require a finding that proposals of both these latter companies should be excluded from the competitive range. On further reflection and analysis, however, the Navy's evaluators changed their initial position and determined that these two latter proposals should actually be considered to be in the competitive range. Specifically, the Navy decided that ERA's proposal, as revised, contained only a small percentage of deficiencies and that those could be overcome, in the Navy's view, by a second round of negotiations. Further, the Navy noted that several technical areas in both of the latter proposals were rated unacceptable because of the lack of information and not because the offerors' concepts were unacceptable. For example, ERA asserted in its proposal revisions that the use of software and courseware which it previously had developed would "significantly lessen" its effort for this RFP; however, the Navy noted that ERA had not furnished any real explanation to demonstrate the accuracy of this statement. Given these considerations, the Navy's final position was

that both these proposals should be considered to be within the competitive range as reasonably susceptible to being made acceptable.

Thereafter, the Navy held discussions with both ERA and the other concern found to have an informationally deficient proposal. Further discussions were not held with UDI and the other remaining offeror since those companies' proposals had already been found to be acceptable and did not contain deficiencies. At the end of these discussions, the Navy determined that ERA's proposal should be considered to be minimally acceptable and the other offeror's proposal to be acceptable. The Navy then issued a request for best and final offers (BAFOs) to all four offerors in the competitive range.

Pursuant to the Navy's request, all four offerors submitted BAFOs. ERA's final price, including all required options, was $4,172,934, substantially lower than any other offeror's price. Since ERA's low proposal had been determined to be technically acceptable, its price was the lowest received, and the company was otherwise considered to be responsible, award was made to ERA.

Evaluation of ERA's Proposal

The evaluation of proposals and the resulting determination as to whether an offeror is in the competitive range are matters within the discretion of the contracting activity, since it is responsible for defining its needs and for deciding on the best methods of accommodating them. Harbert Int'l, Inc., B-222472, July 15, 1986, 86-2 CPD ¶ 67. Generally, offers that are unacceptable as submitted and would require major revisions to become acceptable are not for inclusion in the competitive range. Essex Electro Eng'rs., Inc., et al., B-211053.2 et al., Jan. 17, 1984, 84-1 CPD ¶ 74. Further, in reviewing an agency's evaluation, we will not reevaluate the technical proposals, but instead will examine the agency's evaluation to ensure that the evaluation was reasonable. Syscon Corp., B-208882, Mar. 31, 1983, 83-1 CPD ¶ 335. Based on our review of the record, we find reasonable the Navy's evaluation of ERA's proposal.

There is no indication in the record that ERA's proposal was so deficient that the company necessarily had, or was allowed, to write a new proposal through major revisions so as to clear up the remaining small number of deficiencies, mostly informational, that remained in ERA's proposal after initial discussions. Further, we find reasonable the Navy's ultimate decision, given ERA's proposal revisions, to

determine the proposal to be acceptable. For example, we note that by the end of negotiations, ERA had supplied the Navy with enough information concerning its proposed trainer system software and its instructional software development to convince the Navy that the company would comply with the technical requirements.

Moreover, we cannot fault the Navy's decision to assume some risk in awarding to ERA, given the improvement in ERA's proposal as finally modified and given the fixed-price contract award which places on the contractor the risk and responsibility for all contract costs and resulting profit or loss. Corporate Health Examiners, Inc., B-220399.2, June 16, 1986, 86-1 CPD ¶ 550.

Since we find the Navy's final evaluation of ERA's proposal to be reasonable, we do not find objectionable the Navy's reversal of its earlier decision to exclude the company's proposal from the competitive range. See Hill's Capital Security, Inc., B-233411, Mar. 15, 1989, 89-1 CPD ¶ 274, where we recognized that a contracting agency has the discretion to reevaluate proposals upon becoming aware that a proposal has been misevaluated.

Alleged Improper "Coaching" of ERA

Technical leveling (or "coaching") in discussions is prohibited by Federal Acquisition Regulation (FAR) § 15.610(d)(1) (FAC 84-16) and is defined as helping an offeror bring its proposal up to the level of a higher-rated proposal through successive rounds of discussions. Raytheon Ocean Sys. Co., B-218620.2, Feb. 6, 1986, 86-1 CPD ¶ 134. In our view, the Navy had no real intent of bringing ERA's proposal up to the level of merit in UDI's technical proposal, which was priced considerably higher than ERA's final proposal. Instead, it appears that the Navy primarily was trying to ensure that it understood exactly what ERA was actually proposing to do in response to the RFP requirements rather than evaluating ERA's proposal as being out of the competitive range for being informationally deficient. Indeed, we have held that technical leveling is not involved where the purpose of discussions is to ascertain what the offeror is proposing to furnish. Logistics Sys., Inc., 59 Comp. Gen. 548 (1980), 80-1 CPD ¶ 442. Thus, the Navy's discussions with ERA did not constitute improper leveling.

Lack of Price Discussions with UDI

UDI complains that the Navy never told it that the company's proposed price was considered to be too high and that ERA was given more discussion opportunities than was UDI. The

record of proposal evaluation shows that the Navy did not consider UDI's price too high for the approach the company proposed so that discussions were not required on the aggregate price proposed by UDI. Moreover, the Navy was also prohibited by FAR § 15.610(d)(3)(iii) (FAC 84-16) from informing UDI that its price was high in relation to ERA's price. Although ERA was given more opportunities for technical discussion than UDI, this circumstance reflects only the greater number of deficiencies found in the initial ERA proposal and not any unfair negotiating approach with UDI.

Protest denied.

James F. Hinchman
General Counsel