



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Cajar Defense Support Company

File: B-239297

Date: July 24, 1990

Mason Ford, for the protester.
Edward J. Korte, Esq., Department of the Army, for the agency.
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DIGEST

1. Where request for proposals required offerors to propose fixed labor rates, agency was not required to make award to protester where its proposal stated that labor rates contained in the proposal were "average" rates rather than firm prices and that offeror intended to charge different rates after award depending upon skill levels of personnel assigned to perform each task order.
2. Where agency determined that protester's high-priced alternate proposal, first introduced in its best and final offer, and awardee's proposal were essentially technically equal, awardee's significantly lower price properly became the determining factor in the agency's selection of the awardee.
3. Subsequent to the submission of best and final offers and prior to award, agency's request that awardee verify and explain its lower hourly rates for particular labor categories did not constitute discussions because awardee was not given an opportunity to revise or modify its proposal, but information was obtained solely to determine responsibility of firm.

DECISION

Cajar Defense Support Company protests the award of a contract to Applied Ordnance Technology, Inc. (AOT) under request for proposals (RFP) No. DAA21-89-R-0072, issued by the United States Army Armament, Munitions and Chemical Command at Picatinny Arsenal, New Jersey for engineering ar

technical support services for the Close Combat Heavy Armament activity. Cajar principally challenges the agency's evaluation of its proposal and the subsequent award to AOT.

We deny the protest.

On March 13, 1989, the agency issued the solicitation as a total small business set-aside for a firm, fixed-price time and materials contract for performance of engineering and technical services, to be assigned on a task order basis, in support of the Close Combat Heavy Armament activity which is responsible for managing the research, development, and production of tank and artillery projectiles and rocket warheads. The solicitation required offerors to submit a single hourly rate for each of seven categories of labor.^{1/} Each single hourly rate was required to include direct labor costs, overhead, general and administrative expenses (G&A), and profit. The solicitation also set forth minimum education and experience requirements for each labor category, with estimated labor hours provided for each category of labor.

The solicitation provided that the evaluation would be based on technical, management, and price factors, with management more important than technical. The technical factor included the offeror's understanding of the task requirements in the statement of work and the offeror's proposed engineering and technical approaches for accomplishing the task requirements. The management factor encompassed the offeror's personnel qualifications, facilities, past performance, and project management and corporate capabilities. The technical and management point score ratings were combined into a merit rating which was considered significantly more important than price. The RFP advised that the award would be based on an integrated assessment of these evaluation factors and that award would be made to the offeror whose proposal offered the best prospect for accomplishing the government's requirements in a timely and cost effective manner. The RFP also advised that award could be made to other than the lowest priced offeror or to other than the offeror with the highest merit rating.

Nine firms submitted initial proposals by the April 24 closing date. In its proposal, Cajar offered an "average"

^{1/} The RFP's schedule contained a single pricing line for each line item. Specifically, the schedule required one pricing entry on an hourly basis for each category of labor.

hourly rate for each of the seven categories of labor supported by "breakdown rates" that showed three different proposed labor rates for each category of labor.^{2/} Cajar offered a range of hourly rates and skills (high, medium, and low) for each category of labor in order to "allow total contract flexibility in negotiating skill levels and rates for task effort." Cajar explained that the advantage of these cost ranges is to allow "negotiation of contract task effort costs and skills below the proposal average if lesser skills are required or above the proposal average in the event very senior skills may be required." Cajar stated that these rates for each category of labor were an integral part of its proposal and it required that the different rates for each labor category be included in any contract award.

Following the evaluation of its proposal and as part of discussions, by letter dated July 17, the agency informed Cajar of various deficiencies in its proposal. In relevant part, the agency stated that Cajar failed to cross-reference personnel with the required categories of labor, and that its average rate submitted for each category of labor was not acceptable. The agency informed Cajar that only one price for each category of labor for the hours as stated was to be submitted as part of its price proposal, and that the contract resulting from this solicitation would be based on the hourly rate for each category of labor which would become a fixed-rate to be used for the duration of the contract.

Following the submission of additional information by each offeror and the reevaluation of all proposals, the agency included three firms--Cajar, Applied Concepts Corporation, and AOT--in the competitive range. The agency determined that each of these firms met the minimum acceptance criteria, and each had a depth of experience in the munitions field, deemed critical to the performance of the contract. The agency again noted that Cajar remained vague when cross-referencing specific personnel against labor categories, thus making it difficult to evaluate certain of its labor categories.

By letter dated October 31, the agency requested that the three firms in the competitive range submit best and final offers (BAFO). In its letter to Cajar, the agency again asked Cajar to submit only one price per category of labor, explaining that Cajar's proposal of three different skill

^{2/} For one category of labor--Program Manager--Cajar offered four proposed labor rates.

levels per category of labor was not acceptable because the agency did not know what skill level Cajar would select to use nor the qualifications of the skill level.

Cajar submitted its BAFO by the November 30 closing date, and for the first time, it now offered three separate labor and price options, with the expectation that the agency could choose any single option or any combination of options for evaluation and award purposes. The agency rejected Option A, Cajar's original price proposal, because as the agency previously told Cajar in the deficiency letter and letter requesting BAFOs, this option reflected more than one rate per category of labor instead of one fixed-rate per category of labor as required by the RFP. The agency also rejected Cajar's low-priced alternate proposal (\$851,190), captioned Option B--"Lower Level Rates Based on Lower Level Skills for Anticipated Task Assignments." Cajar stated that Option B was "intended to price out the lowest level of skills which would be technically acceptable provided that [the agency] intends a lower level of effort." The agency stated it was not certain that Cajar would provide labor meeting the minimum qualifications as outlined in the RFP under this option, and the agency also stated it did not understand what Cajar meant by "lower level of effort." The agency did evaluate Cajar's high-priced alternate proposal (\$1,506,780), captioned Option C--"High Level Rates Based on High Level Skills for Anticipated Task Assignments." Cajar described this option as "a realistic senior level professional cost structure for senior level work." The agency believed that under this option, Cajar would provide personnel meeting the minimum qualification requirements of the RFP and would not be restricted to only performing "lower level" tasks, but could perform all tasks required by the RFP.

The agency evaluated the BAFOs of the three firms in the competitive range as follows:

	<u>Merit Rating</u>	<u>Price</u>
Applied Concepts Corp.	92.52	\$2,038,965
Cajar (Option C)	83.29	\$1,506,780
AOT	82.38	\$1,092,750

Although Applied Concepts received the highest merit rating, the agency determined that its superior technical rating did not justify paying it a substantially higher price. Because there was only a .91 difference between Cajar's and AOT's merit ratings, the agency considered these firms to be essentially technically equal, and therefore awarded a contract on March 30, 1990, to AOT, the low-priced offeror.

This protest followed.

Cajar challenges the agency's evaluation of its proposal, specifically the agency's decision to reject its lower-priced Options A and B and to evaluate its higher-priced Option C. Cajar also protests the award to AOT. In reviewing protests of allegedly improper evaluations, our Office will examine the record to determine whether the evaluators' judgments were reasonable and in accordance with the solicitation's stated evaluation criteria. Cajar Defense Support Co., B-237426, Feb. 16, 1990, 90-1 CPD ¶ 286. Here, after reviewing the record, we conclude that the agency's evaluation of Cajar's proposal was reasonable and in accordance with the RFP's stated evaluation scheme.

In a negotiated procurement, any proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for award. Cajar Defense Support Co., B-237522, Feb. 23, 1990, 90-1 CPD ¶ 213. Here, the RFP clearly required a single fixed rate for each category of labor. Cajar failed to provide such a single fixed rate in its Option A, which was its original price proposal. The record shows that each "average" rate it proposed did not represent a single fixed-price, and that Cajar's agreement to the terms of the solicitation was contingent on the agency's agreement to negotiate after award the required skill levels for each individual task order, using the three different labor rates for each category of labor it proposed. Cajar clearly expressed this intention when it originally submitted its price proposal, and then in its BAFO when it resubmitted the same price proposal designated as Option A, after receiving ample notice from the agency that such an offer was unacceptable. Where, as here, the RFP requires fixed prices, and a proposal does not offer fixed prices, the proposal as submitted cannot be considered for award. Computer Network Corp., et al.--Requests for Recon., 56 Comp. Gen. 694 (1977), 77-1 CPD ¶ 422; Burroughs Corp., 56 Comp. Gen. 142 (1976), 76-2 CPD ¶ 472. We therefore find the agency properly rejected Cajar's Option A.

Although Option B, Cajar's low-priced alternate proposal first introduced in its BAFO, contained fixed rates for each labor category, the record reveals that Cajar failed to define for the agency what it meant by "lowest level of skills which would be technically acceptable [if the agency] intends a lower level of effort." Since Cajar's Option B was ambiguous at best with respect to whether Cajar was proposing personnel meeting the minimum qualifications for each category of labor as outlined in the RFP and whether

Cajar would be able to perform all aspects of the task order as required by the RFP, not just "lower level" tasks,^{3/} we conclude the agency reasonably did not consider Cajar's low-priced Option B for award. See The EC Corp., B-236973, Jan. 5, 1990, 90-1 CPD ¶ 23.

While Cajar argues the agency should have reopened discussions to the extent it found its Option B to be deficient, an agency is not required to reopen discussions when a deficiency is first introduced in a BAFO in order to provide a firm with an opportunity to revise its proposal. Inter-Continental Equipment, Inc., B-224244, Feb. 5, 1987, 87-1 CPD ¶ 122. While an offeror may modify its earlier proposal in its BAFO, in doing so it assumes the risk that any change it makes might result in the rejection of its proposal, rather than in further discussion, if the agency finds the revised proposal unacceptable, as it did in this case concerning the alternate proposal first offered by Cajar in its BAFO. Id.

The agency did evaluate the "worst-case scenario" for Cajar--that is, Cajar's high-priced Option C, its other alternate proposal first introduced in its BAFO, which contained fixed rates for each labor category. From Cajar's description that Option C was "a realistic senior level professional cost structure for senior level work," the agency concluded that under this option, Cajar was proposing personnel meeting the minimum qualifications for each labor category as outlined in the RFP and that Cajar would be able to perform all of the tasks required by the RFP. Cajar maintains since it received a higher merit rating for its Option C than AOT received for its proposal, the agency should have awarded the contract to it, not to AOT.

The agency determined that Cajar's Option C and AOT's proposal (offering one price per labor category) were essentially technically equal. Cajar's merit rating for Option C was 83.29 and AOT's merit rating for its proposal was 82.38, a difference of .91 points. The closeness in points clearly supports the agency's decision that these

^{3/} The agency notes, and Cajar does not deny, that at the post-award debriefing, the agency's legal counsel stated that Option B was ambiguous, and when the agency questioned Cajar's representative as to what "low skill level" meant, Cajar's representative responded, "whatever you want it to mean."

proposals were essentially equal. Merdan Group, Inc., B-231880.3, Feb. 28, 1989, 89-1 CPD ¶ 210; see Cajar Defense Support Co., B-237426, supra. When proposals are viewed as essentially technically equal, price properly becomes the determining factor in the selection of the awardee. Harcourt Brace Jovanovich, Inc., B-234379, June 9, 1989, 89-1 CPD ¶ 546. Here, AOT's price was \$414,030 less than Cajar's price. The agency could not ignore the cost savings associated with AOT's proposal, and accordingly, the agency properly awarded the contract to AOT, the low-priced offeror.

Cajar next argues that the agency improperly reopened discussions with AOT after discussions had ended and BAFOs had been submitted.

After the technical evaluation, but prior to the award to AOT, the agency, in the course of its responsibility determination, requested that AOT provide information on its methodology for establishing rates for the seven categories of labor required by the RFP. Specifically, the agency was concerned that AOT's proposed labor rates for senior engineer and draftsman were based on low overhead, G&A, and fees. AOT responded by letter dated January 25, 1990, that to remain competitive, AOT used part-time, intermittent employees for the senior engineer and draftsman positions. AOT explained because these intermittent employee positions do not have to be fully burdened, AOT is able to reduce the amount of indirect costs incurred (thereby resulting in the lower hourly rate prices for these positions). AOT stated that the availability of personnel for the positions of senior engineer and draftsman exceeds the RFP's hourly requirements, and that its previous use of intermittent employees resulted in the timely and satisfactory completion of contracts.

Discussions occur when an offeror is given the opportunity to revise or modify its proposal. Pauli & Griffin, B-234191, May 17, 1989, 89-1 CPD ¶ 473. Requesting information that relates to responsibility does not constitute improper discussions or require that revised proposals be solicited from all offerors. Thermal Reduction Co., B-236724, Dec. 7, 1989, 89-2 CPD ¶ 527. In this regard, questions pertaining to an offeror's capacity or capability involve issues of responsibility, that is, the offeror's ability to perform the contract at the given price, as opposed to the acceptability of its proposal, and therefore may be requested or provided without resulting in the conduct of discussions. Advance Gear & Mach. Corp., B-228002, Nov. 25, 1987, 87-2 CPD ¶ 519. Discussions are distinguishable from requests for verification, which

involve advising an offeror of a suspected mistake and requesting affirmation or an explanation of its proposed price. Thermal Reduction Co., B-236724, supra. The record shows that AOT's proposed senior engineer and draftsman met the solicitation requirements and that AOT's proposal was found technically acceptable. The agency's request for information concerning AOT's low overhead, G&A, and fee rate for senior engineer and draftsman categories was obtained as part of the agency's responsibility investigation which occurred subsequent to the firm's proposal being found acceptable. We conclude that this exchange, which was essentially a request for a price verification, did not constitute discussions.

As part of the agency's determination to award to AOT, it concluded that AOT's prices were reasonable and that AOT could perform the contract by offering a part-time senior engineer at a fixed-rate of \$15 per hour and a part-time draftsman at a fixed-rate of \$20 per hour. An agency may accept offers based on low rates, and it is the contractor's obligation to provide the services at the level of expertise called for by the contract at the rates offered. Cajar's allegation that AOT cannot perform the contract at these fixed rates submitted under the RFP for these employees concerns a matter of responsibility, the affirmative determination of which will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials or that definitive responsibility criteria in the solicitation were misapplied. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1990). An awardee's ability to provide the labor required to perform the contract at the fixed labor rates proposed is a matter of responsibility. Armament Eng'g Co., B-228445; B-228582, Feb. 8, 1988, 88-1 CPD ¶ 121. Here, the record provides no basis to support a showing of possible fraud, bad faith, or failure to apply definitive responsibility criteria.^{4/} The agency determined that AOT was responsible

^{4/} To the extent Cajar believes that AOT will not be able to perform this contract due to its concurrent performance of other contracts for the agency, this allegation also involves a matter of responsibility and the record provides no basis to support a showing of possible fraud, bad faith, or failure to apply definitive responsibility criteria.

and that its rates were reasonable and realistic for the required contract.^{5/}

Cajar also asserts an unspecified conflict of interest and undue influence by government officials in awarding this contract, and other contracts, for the Picatinny Arsenal. Cajar admits it "[does not] have proof or any hint of anything incorrect, nor [is it] implying anything about any individual or firm," just that the history of the award gives it some concern. See Buck, Allmond & Co., B-236382, Nov. 6, 1989, 89-2 CPD ¶ 431. Accordingly, we reject this unsupported allegation.

Finally, to the extent Cajar complains that the procurement was unnecessarily delayed from the time of issuance of the RFP until award (approximately 1 year), the delay in award pertains to a procedural matter which does not provide a basis of protest. Federal Sales Serv., B-237978, Feb. 28, 1990, 90-1 CPD ¶ 249. Here, the RFP was issued subject to the availability of funds. The agency therefore could not make the award until funds became available, which in this case was not until February 1990.

Accordingly, the protest is denied.



for James F. Hinchman
General Counsel

^{5/} Cajar argues that AOT's \$15 per hour rate for the senior engineer has to be unrealistic since the agency accepted Cajar's rate of \$52.80 for the senior engineer under Option C and rejected its \$26.40 senior engineer rate under Option B. Option B was not rejected because the rate was unrealistic. The agency rejected Option B because it was unclear as to what level of effort the rate represented.