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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Computer Related Services, Inc.

File: B-244638

Date: November 1, 1991

William E. Franczek, Esq., Vandeventer, Black, Meredith & Martin, for the protester.
James F. Trickett, Department of Health & Human Services, for the agency.
Paula A. Williams, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency is not required to conduct discussions with protester concerning its proposed labor escalation rates simply because such discussions were conducted with the awardee. The protester's proposed rates had been determined to be reasonable, while the awardee (but not the protester) had been provided by the agency during previous discussions with erroneous information concerning these rates, which appeared to have affected the rates which the awardee subsequently proposed.

2. Technical evaluation of awardee's second best and final offer was reasonable where the agency increased the awardee's technical score primarily because it obtained a firm commitment from its proposed project manager to accept that position, where the agency had previously downgraded the proposal because it failed to include such a commitment.

DECISION

Computer Related Services, Inc. (CRSI), the incumbent contractor, protests the award of a follow-on contract to CRS Technology Corporation under request for proposals (RFP) No. 273-91-P-0005, issued by the National Institute of Environmental Health Sciences (NIEHS) for the operation and maintenance of NIEHS' automated maintenance management system. CRSI contends that the contracting agency improperly evaluated the awardee's proposal and failed to hold meaningful discussions with CRSI.

We deny the protest.

The RFP, issued as a total small business set-aside, contemplated the award of a fixed-price, definite-delivery contract for a 1-year base period, with 2 option years. The RFP provided for award to the firm submitting the proposal most advantageous to the government, price and technical factors considered. Technical quality was more important than price and separate technical and business (price) proposals were required. The technical criteria, worth a maximum of 100 points, were: (1) technical experience and qualifications, 50 points; (2) supervisor/ management experience, 25 points; and (3) electronic data processing, 25 points. The maximum of 25 points was awarded to the technically acceptable offeror with the lowest overall price, with fewer points assigned proportionally to the other acceptable offers. The RFP further stated that award would be made to the responsible, technically acceptable offeror with the highest combined score--business plus technical.

Eight proposals were received by the March 13, 1991, due date for receipt of proposals. The technical proposals were evaluated by a technical evaluation panel which found four of the eight proposals technically acceptable, including those submitted by CRSI and CRS Technology. Of these four firms included in the competitive range, CRSI's proposal received the highest technical rating and was ranked first while CRS Technology's proposal was ranked second. CRSI's overall proposed price was the lowest and CRS Technology's was the second highest.

During discussions, the primary issue raised with CRS Technology under business concerns was its proposed salary rates for the option years. CRS Technology initially proposed constant salary rates for option years 1 and 2 but, during discussions, the agency advised CRS Technology by letter dated April 22, 1991, that:

> ". . . The contract resulting from this solicitation will not allow increases due to changes in any future wage determinations. If this will affect your business proposal you should adjust it at this time taking into consideration that the [g]overnment may award without further negotiations."

In its best and final offer (BAFO), CRS Technology responded by upwardly revising its labor rates for both option years. CRSI made no change in its proposed price under its BAFO, and the relative standing of the four firms remained the same with CRSI's price lowest and CRS Technology's second highest. The technical evaluation panel reviewed the revised proposals and found only CRSI's and CRS Technology's proposals were acceptable. CRSI's technical proposal was

ranked highest with a score of 87.5 and CRS Technology's technical proposal received a score of 81.5. CRSI's total price of $426,954, received a rating of 25 points, for a total combined score of 112.5; CRS Technology's total price of $430,725.44, received 24.775 points for a combined score of 106.28.

After initially determining that CRSI was the apparent successful offeror, the contracting officer realized that during discussions with CRS Technology the firm had been advised erroneously that adjustments for wage determination increases would not be made by the government during the option years. Because this information was contrary to an RFP provision, Federal Acquisition Regulation (FAR) § 52.222-43, entitled Fair Labor Standards Act and Service Contract Act--Price Adjustment (Multiple Year and Option Contracts), the contracting officer decided to correct the agency's erroneous discussion advice and its apparent price consequences by reopening discussions. Because the agency also still had a few remaining technical concerns with the BAFOs submitted by CRSI and CRS Technology, she disclosed these remaining technical concerns in this second round of discussions.[1]

By letters dated May 30, a second request for BAFOs was issued to the protester and CRS Technology. In the BAFO request sent to the protester, the agency explained that:

> "Due to an error which existed in one of the prior opening negotiation letters, negotiations must be reopened for a second round of Best and Final offers with those firms remaining in the Competitive Range."

The letter pointed out that the failure of CRSI's proposal to demonstrate the necessary technical background and experience for proposed supervisory personnel was a remaining technical concern, and also stated as a business concern that:

> "You are, as always, encouraged to reduce your business proposal to the lowest price you can offer to the [g]overnment, without compromising the ability to attract and retain qualified personnel over the contract terms."

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[1]The protester was orally advised that an error had been made in the prior round of negotiations and that negotiations would be reopened.

In the BAFO request sent to CRS Technology, the agency pointed out the vagueness of the proposed project manager's letter of intent and asked the firm to address whether this person would be firmly committed to the project. The agency also pointed out that under "business concerns":

> "A business point was in error in my letter to you of 22 April 1991. The following statement in that letter was partially incorrect: "You have proposed constant salary rates for all three years. The contract resulting from this solicitation will not allow increases due to changes in any future wage determinations. If this will affect your business proposal you should adjust it at this time taking into consideration that the Government may award without further negotiations. I have underlined the incorrect portions for emphasis. Increases due to upward changes in wage determinations will be allowed per the clause at I.2.e of the RFP. However, you are cautioned that DOL does not always change the Wage Determination rates each year. Those rates may not be increased, and in such event, you would not receive any additional compensation from the Government for any salary increase (inflation or merit increases) that you might elect to implement to retain or reward qualified personnel. You are hereby offered the opportunity to make corrections to your business proposal, if you wish, based on this information." (emphasis in original.)

Both firms submitted second BAFOs by the June 5 closing date. The protester's BAFO price remained the same at $426,954, but CRS Technology adjusted its labor rates and lowered its total price to $416,008.78. Accordingly, a third price evaluation of the revised offers resulted in CRS Technology receiving 25 points for its business proposal and the protester 24.35 points. In the final technical evaluation, CRS Technology's technical score improved to 88 points while the protester's score remained the same, 87.5 points. Based on CRS Technology's highest combined score, that firm became the apparent successful offeror and a responsibility review was conducted. Following review and approval by the contracting officer, pre-award notification of the apparent successful offeror was sent to the unsuccessful offerors by letter dated June 18. The next day, CRSI filed an agency-level protest challenging the intended award to CRS

Technology which was denied by the agency on June 25. Award was made to CRS Technology on June 28 and this protest was filed that same day.[2]

CRSI challenges the award decision on the grounds that NIEHS did not conduct meaningful discussions with CRSI and improperly evaluated CRS Technology's BAFO submissions.[3] The protester asserts that the agency did not conduct discussions in a fair and equal manner because while the agency informed CRS Technology that contract adjustments would be available in the option years in the event of a change in wage determinations, it did not similarly advise CRSI that the inclusion of labor escalations in its proposal for the option years might not be required since wage determination adjustments would be permitted. Had it been so informed, CRSI alleges that it might have utilized a level pricing structure for its labor costs in the option years thereby reducing its overall price to an amount less than that proposed by CRS Technology.

We find that the agency did satisfy its obligation to conduct meaningful discussions. As noted above, the agency had erroneously informed CRS Technology that upward labor cost adjustment during the option years would not be permitted. When the agency discovered that CRS Technology had revised its BAFO option year prices in a manner which suggested that the rates reflected a mistake, resulting from reliance on the agency's erroneous statement during discussions, the agency informed CRS Technology of the erroneous advice and conducted another round of BAFOs in order to afford the firm an opportunity to submit a revised proposal. See Woodward Assoc., Inc; Monterey Technologies, Inc., B-216714; B-216714.2, Mar. 5, 1985, 85-1 CPD ¶ 274. Since this erroneous information had been given only to CRS Technology, the agency properly did not discuss the nature of the error with the protester. FAR § 15.610(c)(4).

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[2]On July 8, the head of the contracting activity determined in writing and notified our Office that performance was continuing notwithstanding the protest because the services were urgently needed.

[3]In its initial protest, CRSI had also argued that it would have been the low offeror if the agency had not disclosed its price to the benefit of CRS Technology, which then lowered its prices under the second BAFO. In its agency report, NIEHS specifically denied that any disclosure had been made and since CRSI did not respond to the agency's denial in its comments on the report, we consider this issue abandoned. See Hydraudyne Sys. and Eng'g B. V., B-241236 et al., Jan. 30, 1991, 91-1 CPD ¶ 88.

We find without merit CRSI's argument that because its BAFO included labor rate escalations for the option years the agency was required to raise the question of the necessity for escalation during discussions. While this matter was discussed with CRS Technology, there is no requirement for an agency to hold identical discussions with different offerors; rather, because of the inherent differences in proposals, it is fair to have appropriately different discussions. TRS Design & Consulting Serv., B-218668, Aug. 14, 1985, 85-2 CPD ¶ 168. The FAR generally requires a contracting officer to disclose the existence of perceived deficiencies in an offeror's pricing and to afford the offeror an opportunity to revise deficient aspects of its pricing. See FAR §§ 15.610(c)(2), 15.610(c)(5). Consequently, for discussions to be meaningful, an offeror should be informed if its price exceeds what the agency believes is reasonable. See Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 154.

Here, however, the agency did not consider CRSI's pricing unreasonable, and CRSI's decision to include labor escalations in its proposal appears to represents its independent business judgment. The record indicates that unlike CRS Technology, CRSI as well as other offerors included labor rate escalations for option years in their initial proposals, as well as in their BAFOs. Since there is no indication in the record that the agency found these proposed escalation rates unreasonable, the contracting agency was not required to address this matter during discussions. On the contrary, the agency states that its experience has been that offerors frequently propose such escalations because of the need to retain qualified personnel by providing wage increases higher than those required by wage determination adjustments.

CRSI's other argument concerns the technical score which CRS Technology received under its second BAFO. Essentially the protester contends that since CRS Technology's proposed project manager is the same individual whom the firm had initially proposed, this individual's qualifications could not reasonably justify the significant increase in the firm's score between the first and second BAFOs. However, the record shows that the agency did not change its assessment of the project manager's qualifications; rather, it increased CRS Technology's technical score in substantial measure because the second BAFO included evidence of the project manager's firm commitment to the firm.

The RFP required the submission of resumes for key personnel and proscribed substitution of such personnel without permission of the contracting officer within the first 90 days of contract performance. Under CRS Technology's first BAFO, the proposed project manager's resume was submitted along

with a signed statement by the individual proposed, that he would enter into negotiations with CRS Technology for the position in the event the firm received the award. The agency downgraded CRS Technology's proposal because of the indefiniteness of this commitment, and in the reopened discussions pointed out this lack of commitment as a concern. As a result, CRS technology submitted with its second BAFO a firm commitment from the individual stating that he would accept the project manager position on stated terms if the firm received the award, and the agency reasonably considered that this remedied the uncertainty of this individual's commitment, for which CRS Technology's proposal had been previously downgraded. Thus, the protester's argument that the score change is unreasonable because the same person was proposed is inapposite because the score change related to the reasonable concerns which the agency had regarding the individual's commitment to the offeror.

We find nothing unreasonable in the scoring of the awardee's proposed personnel under its second BAFO. CRS Technology's second BAFO received an additional 6.5 points primarily because of additional information provided, which had been requested by the agency, which alleviated the agency's concerns about the definiteness of the availability of the proposed project manager. The mere fact that the protester disagrees with the agency does not establish that the evaluation was unreasonable. See ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

The protest is denied.

James F. Hinchman
General Counsel