145643

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aydin Corporation

File: B-245461

Date: January 13, 1992

Peter B. Jones, Esq., Jones & Donovan, for the protester.
Bradley S. Adams, Esq., and Jerald D. Stubbs, Esq., Department of the Air Force, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. First article unit prices that are not even twice production unit prices are not so grossly front-loaded so as to involve an improper advance payment requiring rejection of the proposal.

2. Although the concept of unbalanced bidding is not always relevant in a negotiated procurement, where award is based upon the evaluation of cost and technical factors with technical factors considered more important than price, the agency is required, under a solicitation clause providing for the evaluation of price reasonableness, to consider the reasonableness of allegedly unbalanced first article and production unit prices.

DECISION

Aydin Corporation protests the award of a contract to AEL Defense Corporation under request for proposals (RFP) No. F09603-91-R-48645, issued by the Department of the Air Force, Warner Robins Air Logistics Center, Georgia, for band 9/10 high power radio frequency transmitters. Aydin contends that the Air Force should have rejected AEL's proposal as grossly front-loaded and materially unbalanced.

We deny the protest.

On May 2, 1991, the Air Force issued the RFP to acquire band 9/10 high power radio frequency transmitters as part of a system improvement program to enhance the reliability and performance of the "ALQ-99E/D Tactical Jamming System" on the Air Force's EF-111A and the Department of the Navy's EA-6B aircraft. The RFP called for the design, fabrication, test, trial installation, flight support, and production of the transmitters and contemplated the award of a fixed-price incentive contract.

The basic contract is for nonrecurring engineering services necessary to design and fabricate the first article and certain other associated deliverables. The first option is for other nonrecurring engineering services. Option 2, to be exercised any time within 15 months of award, is for eight first article units and related final design and fabrication nonrecurring engineering services; the first articles and nonrecurring engineering services are separate line items. Option 3, to be exercised within 12 months of the first article approval, is for the initial production quantities for the Air Force and Navy; there are separate line items for each service. Option 4 is for additional production quantities for the Air Force to be exercised within 12 months after the exercise of Option 3. Option 5 is for additional production quantities for the Navy to be exercised within 12 months of the exercise of Option 4, and Option 6 for even more Navy production quantities can be exercised within 12 months of the exercise of Option 5.

The RFP provided that the award would be made to the offeror whose proposal was determined to be the most advantageous to the government based upon the evaluation criteria set forth in the RFP. As between technical and cost considerations, the RFP indicated that cost/price would be a secondary consideration. The technical evaluation criteria were set forth in descending order of importance as: (1) Reliability, Maintainability, and Producibility, (2) Engineering, (3) Quality, (4) Logistics, (5) Management. Based upon the evaluation criteria, proposals were to receive a qualitative color rating and a risk rating based upon the risk associated with the offeror's ability to accomplish the requirements. Cost/price was not to be rated or scored, but was to be considered in relationship to the technical criteria and was to be evaluated for reasonableness, realism, completeness, and risk. All option prices were to be considered in determining the total evaluated prices of the offerors.

On June 17, the Air Force received four proposals, including proposals from Aydin and AEL. A Source Selection Evaluation Board (SSEB) determined all proposals to be within the competitive range. After two rounds of discussions, the Air Force received best and final offers (BAFO) on August 12. The SSEB determined all proposals to be acceptable. Aydin's BAFO, which the SSEB evaluated as having the second lowest total evaluated price of $236,315,855, received a green (acceptable) color rating, and was assessed as a moderate risk.

AEL had the lowest evaluated price of $216,024,477, received a green rating, and was assessed as posing a low risk in light of its manufacturing procedures. AEL was found to have proposed a sound conventional design for the transmitters based upon an existing production program, that the Air Force found to offer certain advantages over other offerors, and lower design and production risks. On August 23, the Air Force awarded the contract to AEL.

Aydin filed this protest against the award to AEL on August 30. Aydin primarily contends that the Air Force should have rejected AEL's proposal for being grossly front-loaded and materially unbalanced because AEL priced its first article units higher than its production units and because its Air Force units were priced higher than its Navy units. Aydin cites the following differences between Aydin's and AEL's unit prices for first article units contained in Option 2 of the RFP and for the production units in the remainder of the options:

	AEL	AYDIN
Option 2		
Air Force (8 ea.)	$816,493	$361,761
Navy (3-5 ea.)	632,265	376,688
Option 3		
Air Force (12 ea.)	568,832	388,381
Navy (5 ea.)	417,352	397,852
Option 4		
Air Force (14 ea.)	485,603	392,991
Navy (20 ea.)	416,262	412,421
Option 5		
Navy (25 ea.)	427,975	431,065
Option 6		
Navy (30 ea.)	417,506	448,796

Aydin argues that AEL's first article costs grossly exceed their value and actual costs, and contends that there is no justification for AEL's pricing the first article units materially higher than the production units. Aydin further alleges that there is no significant difference between the Air Force and Navy transmitters that supports AEL's differences in prices for these units, and that AEL's prices for these units are materially unbalanced.

[1]Aydin alleges that the Air Force indicated that the Navy requirements were under review and that AEL may have priced Navy unit options below cost in the hope that the Air Force would not exercise the options for the Navy units.

The concept of unbalanced bidding is not always relevant in a negotiated procurement; where, as here, award is based upon the evaluation of cost and technical factors with technical factors considered more important than cost/price, lowest overall cost the government, the paramount concern in sealed bidding, often is not controlling in the selection of an awardee. Signal Corp., B-241849 et al., Feb. 26, 1991, 91-1 CPD ¶ 218; Merret Square, Inc., B-220526.2, Mar. 17, 1986, 86-1 CPD ¶ 259. Here, it is clear from the selection statement that while price was taken into account, it was not the controlling factor that led to the selection of AEL.

In any negotiated procurement, however, offers that are grossly front-loaded, such that payment for an initial element of contract performance would be tantamount to a prohibited advance payment, cannot be accepted.[2] See Canaveral Maritime, Inc., B-231857.4 et al., May 22, 1989, 89-1 CPD ¶ 484. In other words, award of a fixed-priced supply contract, which requires a first article unit, should not be made on the basis of an offer that is so grossly front-loaded with regard to the first article, and in excess of the actual value of the unit, that payment for the first article will be tantamount to an advance payment.

It is clear in this case that AEL's first article pricing was not grossly front-loaded. Only where the first article prices were many multiples higher than the production unit prices, we have found bid prices to be grossly front-loaded. See, e.g., Riverport Indus., Inc., 64 Comp. Gen. 41 (1985), 85-1 CPD ¶ 364, aff'd, B-216626.2, July 31, 1985, 85-2 CPD ¶ 108 (where the first article unit prices were $185,000 and the production unit prices were $250); Islip Transformer & Metal Co., Inc., B-225257, Mar. 23, 1987, 87-1 CPD ¶ 327 (where the first article unit prices were $15,000 and the production unit prices were $408.90); Edgewater Mach. & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630 (where the first article unit prices were $125,000 and the production unit prices were $301); Nebraska Aluminum Castings, Inc., B-222476, June 24, 1986, 86-1 CPD ¶ 582, aff'd, B-222476.2, Sept. 23, 1986, 86-2 CPD ¶ 335, reaff'd, B-222476.3, Nov. 4, 1986, 86-2 CPD ¶ 515 (where the first article unit prices were $22,510 and the production unit prices were $19.17). AEL's first article unit prices are

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[2]31 U.S.C. § 3324(a) (1988) generally prohibits advance payments.

not even two times any of its production unit prices. Thus, we have no basis for finding gross front-loading. See Dodge Romig Tex Corp., B-241810, Mar. 5, 1991, 91-1 CPD ¶ 246 (first article priced two to three times production unit prices is not grossly front-loaded).

Our inquiry does not end here, however. The RFP expressly states that cost/price would be evaluated for reasonableness. In this regard, the government may not pay more for an item than its reasonable value--which may occur if an offer is materially unbalanced. Westbrook Indus., Inc., B-245019.2, Jan. 7, 1992, 92-1 CPD ¶ ___. Thus, in light of the protester's assertion that AEL's offer is materially unbalanced, we must consider whether the agency properly determined that AEL's pricing was reasonable.

The Aydin contention that AEL's pricing is unbalanced is primarily based on a comparison to Aydin's pricing. As indicated above, according to Aydin's analysis, its unit prices for the first articles, Air Force production units and Navy production units are comparable, while there is a disparity among AEL's prices for these items.

The Air Force reports that the differences in pricing between the two proposals merely reflect different technical and philosophical approaches to accomplishing the requirements under the RFP. Specifically, the Air Force states that due to the technical complexity involved in developing the transmitters, AEL identified the first article production as effort requiring a higher level of support and involving manufacturing problems, with reliability and reduced costs to be achieved during the production of the units.

In this connection, the record contains AEL cost data that supports that company's pricing structure for the units and indicates that the prices are related to AEL's incurred costs. The data shows that AEL did indeed provide for more labor dollars per unit for the fabrication of the first article unit for the production units. While Aydin argues that AEL's extra labor costs on the first article units should have been recouped under the nonrecurring engineering services line items, the Air Force states that AEL's accounting system was based upon assigning costs to the phase of the contract where the cost are incurred, which meant that problems encountered in the production of the first article would be charged to that phase and not to the nonrecurring engineering cost line items.

With regard to the noted disparity between AEL's Air Force and Navy production units, the Air Force indicates that there are specific differences in quantity and configuration between the Air Force and Navy transmitters, which reasonably account for the differences in pricing the two transmitters. Specifically, the Air Force reports that some Air Force transmitters are configured with internal modulators and technique generators, which are not required in the Navy transmitters; the Air Force transmitters are engineered to fit inside the aircraft, whereas the Navy transmitters are mounted externally on a pod.

We find, on this record, that AEL's pricing strategy reasonably reflected its particular technical approach. See Automaker, Inc., B-236601, Dec. 20, 1989, 89-2 CPD ¶ 571. The record also confirms that AEL's cost proposal was evaluated for realism, reasonableness, and completeness and audited by the Defense Contract Audit Agency.[3] Consequently, we find no basis to question the Air Force's determination that AEL's price proposal was reasonable.

The protest is denied.

for James F. Hinchman
General Counsel

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[3]While Aydin asserts that the record indicates that its BAFO price proposal was undocumented, the record indicates that AEL provided a rationale for the cost adjustments in its BAFO. We also note that the RFP did not require offerors to provide detailed cost or pricing data.