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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: MAR, Incorporated

File: B-246170.3

Date: March 31, 1992

Paul Shnitzer, Esq., Crowell & Moring, for the protester.
Charles J. McManus, Esq., Eric A. Lile, Esq., and Michael S. Roys, Esq., Department of the Navy, for the agency.
Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's contact of offeror, after receipt of best and final offers (BAFOs), to require it to remove an outstanding request for negotiation which took exception to the agency's treatment of certain costs, constituted discussions. Having conducted discussions with one offeror, agency properly reopened negotiations to provide for submission of another round of BAFOs from both offerors.

DECISION

MAR, Incorporated protests the agency's decision to reopen negotiations, after award, with offerors under request for proposals (RFP) No. N00612-90-R-7004, issued by the Naval Supply Center, Charleston, South Carolina. MAR contends that certain exchanges between it and the agency after the submission of best and final offers (BAFOs) and before award did not constitute discussions; therefore, the agency should not have determined to solicit new BAFOs.

We deny the protest.

The RFP solicited proposals for technical analysis and management support services to be provided to the Naval Oceanographic Office. The agency contemplated award of an indefinite-quantity, time and materials contract for a base year and 4 option years. Offerors were required to furnish a separate cost proposal detailing straight time and holiday labor rates, material handling rates, computer time prices, and general and administrative (G&A) rates to be added to material, transportation, per diem, and miscellaneous subcontracting.

Prior to the closing date for initial proposals, the Navy issued Amendment 0003 which answered questions raised at a pre-proposal conference. Among questions concerning the charging of expenses for general office equipment such as computers and duplicating, was one asking if it was the government's "intent not to allow any direct charging of [such] expenses even when it is in direct support to produce deliverables. . . ." The amendment responded that "[g]eneral office equipment is considered an indirect charge under overhead and not a direct charge to the proposed contract." (Emphasis in original.)

MAR submitted a proposal by the July 27, 1990, closing date. In its cost proposal, under the heading "Requested Items of Negotiation," MAR raised several matters including the treatment of office expenses. Specifically, MAR noted that its standard accounting practice included the direct charging of costs such as communications and duplicating expenses to a specific contract when those costs were incurred in support of the contract statement of work (SOW). MAR concluded:

> "Therefore, as an item of negotiation, MAR proposes an additional contract line item to include costs that are directly chargeable to the contract, but do not fall within the definition of the materials line items [listed]."

Amendment 0004 reopened negotiations on January 30, 1991, and solicited revised proposals. Among other matters, under the heading "General Purpose Office Equipment & Expenses," the amendment provided that:

> "The costs for usage or rental of General Purpose Office Equipment including but not limited to typewriters, word processing machines, computers, computer time, printers, reprographics and xerographic copying machines, telecopiers, telephones and postage are considered overhead expenses and shall be included in the hourly rates payable under the labor categories [listed] in Section B."

MAR's March 5 revised cost proposal again included a section entitled "Requested Items of Negotiation" which repeated its standard accounting practice including the direct charging of costs such as communications and duplicating expenses to a specific contract when those costs were incurred in support of the SOW. After identifying its position as "an

item of negotiation," MAR "recommend[ed]" an additional contract line item to include directly chargeable costs which did not fall within the definition of certain materials line items. The Navy did not conduct further discussions on this matter before issuing its request for BAFOs.

MAR's September 9 BAFO contained the same "item for negotiation" that appeared in its March 5 proposal. On September 27, a Navy contract negotiator telephoned a MAR representative concerning "clarification" of the "exception" taken by MAR regarding direct cost accounting of duplication and communication expenses. She referred to the substance of Amendments 0003 and 0004 on the subject of these expenses and reminded MAR that such direct charging had been disapproved on a prior, similar contract. The negotiator advised that MAR's exception meant it was not in compliance with the RFP. MAR's representative replied that MAR's understanding was that after negotiations were held and BAFOs requested, its request for direct charging became null and void. The negotiator requested MAR's position in writing that day and advised that she was still evaluating the offers. MAR's response stated that the "request is hereby canceled."

The Navy awarded the contract to MAR on September 30, 1991. On October 9, Planning Systems, Inc. (PSI), a competing offeror, filed a protest of the award with our Office, on grounds unrelated to this protest. Performance under the contract was suspended on October 30. During the Navy's review of the matter, it determined that the contract negotiator had conducted discussions with MAR on September 27, without reopening negotiations with PSI. Accordingly, it amended the RFP on November 14 to provide an opportunity to revise proposals and submit BAFOs. We dismissed PSI's protest as academic and MAR protested the Navy's action.

MAR contends that the telephone conversation with the Navy's negotiator was merely clarification. While it concedes that the Navy made clear what kinds of expenses were G&A and which were directly chargeable, MAR asserts that it continued to include the item for negotiation as a "reminder" to the Navy that MAR could not recover these costs under its standard accounting practices. MAR contends that the request was merely precatory and not a condition on its offer. MAR concludes that the Navy's request for removal of the item and MAR's subsequent compliance with the request did not constitute discussions. We disagree.

Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information provided by an offeror is essential for determining the acceptability

of its proposal. Federal Acquisition Regulation (FAR) § 15.601; University of S.C., B-240208, Sept. 21, 1990, 90-2 CPD ¶ 249. Discussions are to be distinguished from a request for clarifications, which is merely an inquiry for the purpose of eliminating minor uncertainties or irregularities in a proposal. FAR § 15.601. The conduct of discussions with one offeror generally requires that discussions be conducted with all offerors in the competitive range and that offerors have the opportunity to submit revised offers. University of S.C., supra. This rule applies even to post-selection negotiations that do not directly affect the offerors' relative standing, because all offerors are entitled to an equal opportunity to revise their proposals. Id.

Notwithstanding MAR's contention that its "recommendation" was merely precatory and its reliance on the contract negotiator's reference to her call as "for clarifications," it is plain that the exchange between the agency and MAR constituted discussions. Both prior to and during the course of negotiations, the Navy made clear that the direct charges proposed by MAR were unacceptable and MAR concedes that it understood the Navy's position. Nonetheless, MAR twice "recommended" the additional line item "for negotiation" in its subsequent cost proposals. The recommendation in its BAFO made the cost proposal unacceptable since MAR ostensibly provided for direct charging, on a reimbursable basis, those expenses which the Navy required to be included in fixed overhead and hourly rates. Left unresolved, the recommendation effectively placed a condition on acceptance of MAR's offer, which, upon award, would have resulted in a contract requiring the Navy to engage in post-award negotiations to determine the appropriate charging of MAR's duplication and communication costs.

Thus, the negotiator reasonably viewed the outstanding "item for negotiation" as an exception to the RFP's pricing structure and required resolution of the matter before evaluation of the offers was completed. Since removal of the item was essential to determining the acceptability of the offer and MAR was provided an opportunity to revise its proposal, the agency conducted discussions with MAR. University of S.C., supra. Having conducted discussions with MAR, the agency was required to conduct them with all offerors in the competitive range. Id. Therefore, we have no basis to disagree with the agency's determination to reopen negotiations with all offerors.

Reopening negotiations is appropriate even though PSI was made aware of MAR's final prices. According to the agency, only total labor and material amounts were released to PSI

without divulging actual labor rates. Where, as here, reopening of discussions is otherwise proper, prior disclosure of an offeror's prices does not preclude reopening of discussions. Technical and Management Servs. Corp., B-242836.3, July 30, 1991, 91-2 CPD ¶ 101.

The protest is denied.

for James F. Hinchman
General Counsel