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

Decision

Matter of: Mine Safety Appliances Company

File: B-242379.5

Date: August 6, 1992

Virginia D. Green, Esq., Reed, Smith, Shaw & McClay, for the protester.
Gerald D. Morgan, Jr., Esq., William H. Espinosa, Esq., and David S. Christy, Jr., Esq., Winthrop, Stimson, Putnam & Roberts, for National Draeger, Inc., an interested party.
Eric A. Lile, Esq., and Steve R. Conway, Esq., Department of the Navy, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that agency should have permitted correction of its proposal after submission of best and final offers (BAFO) is denied where the proposed fee in the BAFO, for the first time, exceeds the statutory limit on such fees, and nothing in the BAFO suggests that the fee was erroneously calculated.

2. Contention that contracting officer abused discretion by failing to reopen discussions and permit a second round of BAFOs is denied where the contracting officer reasonably concluded that there would be no great advantage to reopening discussions because there was no evidence that protester would have lowered its proposed costs and fees, and there had already been substantial delay in the procurement.

DECISION

Mine Safety Appliances Company (MSA) protests the award of a contract to National Draeger, Inc., under request for proposals (RFP) No. N61331-91-R-0019, issued by the Department of the Navy for full-scale engineering development of a Fire Fighters Breathing Apparatus (FFBA) for shipboard use. MSA argues that the Navy unreasonably rejected MSA's best and final offer (BAFO) because MSA's proposed fixed fee exceeded the statutory limitation imposed by 10 U.S.C. § 2306(d) (1988). According to MSA, the Navy's action was improper because: (1) the statutory fee limitation was used as an undisclosed evaluation factor; (2) the agency violated

its duty to seek clarification or permit correction of MSA's BAFO; and (3) the Navy abused its discretion when it failed to reopen discussions to permit MSA to revise its BAFO.

We deny the protest.

BACKGROUND

This protest is the fourth in a series of challenges by MSA to the Navy's program to procure a new generation of FFBA equipment. Unlike the complex history of this procurement, the facts here are simple and uncontested.[1]

The RFP was issued on June 14, 1991, seeking the development of FFBA equipment via award of a cost-plus-fixed-fee contract. The RFP requires offerors to develop, fabricate and deliver an FFBA in two stages: first, the contractor is required to provide 5 engineering models of its FFBA, together with 200 expendable oxygen supply packages; then, after qualification testing, the contractor is required to deliver 100 service test models of its FFBA, together with 1,800 expendable oxygen supply packages.

Three offerors submitted initial proposals in response to the solicitation. After evaluating the initial proposals, the agency included two of the offers in the competitive range--MSA's and Draeger's.

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[1]Briefly, the history of this procurement is as follows. MSA's first protest against the FFBA procurement, filed in early 1990, was sustained on the basis that the Navy failed to follow the evaluation plan in the RFP for selecting between MSA and Draeger--both of whom had been awarded parallel development contracts. See Mine Safety Appliances Co., 69 Comp. Gen. 562 (1990), 90-2 CPD ¶ 11. Rather than reevaluate the proposals, the Navy canceled the procurement to rewrite its solicitation. MSA next challenged the rewritten specifications--or more precisely, challenged the specifications as described in a Commerce Business Daily notice. When the Navy canceled that procurement, did not issue the solicitation, and again set about to rewrite its specifications, we dismissed MSA's challenge as academic on February 7, 1991. After the Navy reissued the solicitation, MSA again claimed that the specifications were unduly restrictive. We denied that protest. See Mine Safety Appliances Co., B-242379.2; B-242379.3, Nov. 27, 1991, 91-2 CPD ¶ 506, aff'd, B-242379.4, Apr. 24, 1992, 92-1 CPD ¶ 389. During our consideration of that case, the Navy continued its evaluation of proposals. This protest involves the selection decision eventually made under that solicitation.

After conducting discussions with both MSA and Draeger, and performing a cost realism analysis of the initial proposals, the Navy requested submission of BAFOs by March 16, 1992. Draeger's BAFO cost plus fee was approximately $2.8 million, while MSA's was approximately $1.5 million. Despite the lower total cost, MSA's BAFO proposed a substantially higher fee than in the initial offer. In short, MSA had increased its proposed fee in its BAFO to an amount that exceeded the statutory limitation of 15 percent established in 10 U.S.C. § 2306(d).[2] (MSA's initial fee had not exceeded the statutory ceiling.)

Despite this apparent problem with MSA's proposal, the contracting officer permitted the technical evaluation panel to review both BAFOs without knowledge of MSA's proposed fee. That panel concluded that the Draeger-proposed design was technically superior to MSA's proposed design. Considering the technical evaluation of the two offerors, and their relative costs, the technical evaluation panel advisory board recommended selection of Draeger as the offeror providing the best value to the government. After receiving the recommendation, the contracting officer advised the advisory board that MSA's BAFO was unacceptable because its proposed fees exceeded the statutory ceiling.

By letter dated April 17, the Navy advised MSA of this fact, stating:

> "Although your proposal was determined to meet the minimum technical requirements, your cost proposal was unacceptable because you proposed a fixed fee that exceeded the statutory limitations on fee imposed by 10 U.S.C. § 2306(d) and 41 U.S.C. § 254(b) (reference [Federal Acquisition Regulation] FAR § 16.306(c) and FAR § 15.903(d)(1)(i)). Therefore your [BAFO] could not be considered for award."

On April 23, MSA filed this protest.

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[2]MSA's BAFO included a separately-calculated fee for 7 of the 8 separately-priced line items. For 4 of the line items, MSA proposed profit, or fee, of 20 percent; for 3 of the line items, MSA proposed a fee of 15 percent; for the 1 remaining line item, MSA proposed no cost at all. Therefore, overall, MSA's proposed fee in its BAFO is between 15 and 20 percent of the total proposed cost.

DISCUSSION

MSA's protest raises the issue of what an agency must do when an offeror makes a material negative change to its proposal in its BAFO.

As a general rule, competitive negotiated procurements involve submission and evaluation of initial proposals; determination of a competitive range; written or oral discussions; and finally, request for, and submission of, BAFOs. BAFOs are intended to be the final submission from offerors prior to an agency's selection of an awardee. See generally FAR subpart 15.6.

Once this process is completed, contracting officers are generally advised not to reopen discussions "unless it is clearly in the [g]overnment's interest to do so (e.g., it is clear that information available at that time is inadequate to reasonably justify contractor selection and award based on the [BAFOs] received)." FAR § 15.611(c). In addition, contracting officers within the Department of Defense (DOD) are required to obtain high-level review and approval before requesting a second or subsequent BAFO. DOD FAR Supplement (DFARS) § 215.611(c)(i). Specifically, before making such a request, the contracting officer must obtain approval from the source selection authority and the senior procurement executive under formal source selection procedures, or the head of the contracting activity under all other competitive acquisitions. Id. Further, DOD has created a system to monitor the use of successive rounds of discussions and to provide training and other corrective action in response to such activity. See DFARS § 215.611(c)(ii) and (iii).

In this procurement, there is no dispute about the issue first presented to the contracting officer by MSA's BAFO. Simply put, MSA's proposed fees in its BAFO exceeded the statutory ceiling for such fees imposed by 10 U.S.C. § 2306(d). This provision prohibits DOD, the National Aeronautics and Space Administration, and the Coast Guard from paying as a fee more than 15 percent of the estimated cost, exclusive of the fee, of a cost-plus-fixed-fee contract for experimental, developmental, or research work.[3] See CACI, Inc.--Federal, 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542, revised, CACI, Inc.--Federal, 64 Comp. Gen. 439 (1985), 85-1 CPD ¶ 363 (interpreting application of the statute's similar 10 percent ceiling on fees paid under non-developmental cost-type contracts).

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[3]A similar limitation is imposed on civilian agencies under 41 U.S.C. § 254(b) (1988).

Given that the fee increase rendered MSA's BAFO unacceptable, the contracting officer here had three options for proceeding with the procurement: (1) treat MSA's proposed fees as an error in the BAFO and permit MSA to clarify and/or correct its BAFO; (2) conclude that MSA's proposed fees were not offered in error, and reopen discussions with all offerors and permit submission of revised BAFOs; or (3) decline to reopen discussions, and proceed to make the selection decision on the basis that MSA was ineligible for award. As described above, the contracting officer opted to proceed with award to Draeger.

MSA argues that it was an abuse of discretion not to either permit MSA to clarify or correct its proposal without discussions, or reopen discussions and call for a second round of BAFOs. For the reasons set forth below, we conclude that the contracting officer could not have properly permitted MSA to correct its BAFO without reopening discussions with all offerors, and that the decision not to reopen discussions was not an abuse of discretion.[4]

Correction without Discussions

With respect to MSA's contention that it should have been allowed to correct its proposal without a reopening of discussions, we note initially that MSA has made no claim that its proposed fee was calculated in error. Instead, MSA simply argues that it was unaware of the statutory limitation on such fees, and thus made a "mistake" by proposing fees exceeding the statutory limitation and rendering its BAFO unacceptable as a result.

MSA's decision to propose fees in excess of the statutory limitation is not the type of error that constitutes a "mistake" within the meaning of the FAR provision governing correction without reopening discussions. FAR § 15.607(a) directs contracting officers to examine proposals for "minor informalities or irregularities and apparent clerical mistakes." FAR § 14.405 (referenced in FAR § 15.607(a)) explains that minor informalities or irregularities are

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[4]Although we reach the merits on two of MSA's claims, we dismiss MSA's contention that the Navy improperly used the statutory prohibition against excessive fees as an undisclosed evaluation criterion. Offerors for government contracts are deemed to have constructive notice of the contents of the United States Code governing the award of such contracts. See Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947); Delta Sys., Inc.--Recon., B-232235.2, Sept. 23, 1988, 88-2 CPD ¶ 282. Accordingly, the Navy had no obligation to advise offerors not to exceed the statutory limit at issue here.

matters of form and not substance. See also Timeplex, Inc., B-220069, Dec. 12, 1985, 85-2 CPD ¶ 651.

Here, since each of MSA's separate line item prices, broken down by cost category, clearly indicates the percentage of profit or fee applied, and since the actual amounts proposed match the percentage indicated, nothing about MSA's proposal indicates that the proposed fee was calculated in error, or that MSA has made some error of form. Rather, to the extent that MSA has made an error, it is an error of judgment in developing its proposed fees without regard to the statutory ceiling. The correction of such errors requires the holding of discussions. See Contact Int'l Corp., B-237122.2, May 17, 1990, 90-1 CPD ¶ 481. As a result, the contracting officer could not have permitted MSA to correct its proposal without reopening discussions and requesting a second round of BAFOs.

Reopening Discussions

Since we conclude that the contracting officer could not have permitted MSA to correct its BAFO without reopening discussions with all offerors, we turn to MSA's second issue: was it an abuse of discretion not to request a second round of BAFOs from MSA and Draeger?

As explained above, contracting officers, especially those within DOD, are admonished by the FAR and the DFARS not to reopen discussions after submission of BAFOs unless reopening clearly is in the best interest of the government. FAR § 15.611(c); DFARS § 215.611(c). Requesting successive rounds of BAFOs may increase the likelihood of technical leveling (see FAR § 15.610(d)), technical transfusion (see FAR § 15.610(e)(1)), or an impermissible auction (see FAR § 15.610(e)(2)), and may disrupt or postpone otherwise orderly procurements (see Schuerman Dev. Co., B-238464, Apr. 25, 1990, 90-1 CPD ¶ 423). The limitations in the FAR and the DFARS thus reflect a legitimate concern that requesting successive rounds of BAFOs, without assuring that such action is in the best interest of the government, poses a significant threat to the integrity of the procurement system.

Our review of claims that a contracting officer abused his or her discretion by not reopening discussions focuses on whether further negotiations would prove sufficiently advantageous to the government to justify reopening discussions. David Grimaldi Co., 69 Comp. Gen. 634 (1990), 90-2 CPD ¶ 57. We have held that the decision whether to reopen discussions is largely a matter of contracting officer discretion. Schuerman Dev. Co., supra; Orlite Eng'g Co., Ltd., B-227157, Aug. 17, 1987, 87-2 CPD ¶ 168.

In addition, offerors should not be allowed to unilaterally disrupt and postpone procurements by introducing material, but insufficiently explained or justified, changes in their BAFOs. See Schuerman Dev. Co., supra; Timex Corp., B-197835, Oct. 10, 1980, 80-2 CPD ¶ 266. In our view, placing the responsibility on offerors to avoid introducing new, and previously unconsidered, issues into a procurement after an agency has held discussions and requested BAFOs, strikes the right balance between protecting the rights of individual offerors and preserving the integrity of the procurement process. See Xerox Special Info. Sys., B-215557, Feb. 13, 1985, 85-1 CPD ¶ 192; RCA Serv. Co., B-197752, June 11, 1980, 80-1 CPD ¶ 407.

Given the limitations imposed by the FAR and the DFARS on reopening discussions after submission of BAFOs, as well as our recognition of the discretion afforded contracting officers in this area, we have upheld a contracting officer's decision not to reopen discussions in numerous instances. These include: where an offeror lowers its price after BAFO submission;[5] where an offeror seeks to change the place of performance for final assembly in order to change the application of a Buy America Act price differential;[6] where an offeror changes its performance approach in its BAFO rendering a previously acceptable proposal unacceptable;[7] where an offeror takes issue in its BAFO, for the first time, with the RFP's requirements for site studies;[8] and, where the offeror first submits an alternate proposal with its BAFO, and further discussion would be necessary to determine the acceptability of the alternate proposal.[9]

MSA's argument that it was an abuse of discretion not to reopen discussions here is based on the fact that MSA's proposed costs were significantly lower than those of Draeger. According to MSA, since the Navy might have received an even lower cost proposal by reopening

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[5]Schuerman Dev. Co., supra; Rexroth Corp., B-220015, Nov. 1, 1985, 85-2 CPD ¶ 505.

[6]Orlite Eng'g Co., Ltd., supra.

[7]Ramtech Modular Design, Inc., B-243700, Aug. 6, 1991, 91-2 CPD ¶ 132; Comarco, Inc., B-225504; B-225504.2, Mar. 18, 1987, 87-1 CPD ¶ 305; RCA Serv. Co., B-219643, Nov. 18, 1985, 85-2 CPD ¶ 563; and, Xerox Special Info. Sys., supra.

[8]Federal Elec. Corp., B-232704, Jan. 9, 1989, 89-1 CPD ¶ 18.

[9]Inter-Continental Equip., Inc., B-224244, Feb. 5, 1987, 87-1 CPD ¶ 122.

discussions, the contracting officer should have concluded it was in the best interest of the government to do so.

After the Navy had attempted to procure its new generation of FFBA equipment for more than 4 years--the original solicitation was issued February 12, 1988--MSA's BAFO, for the first time, presented an unexpected twist: proposed fees so high they exceed statutory limits. Although MSA believes that the Navy could have easily reopened discussions in this case--perhaps using the reasoning that with this much delay, a few more weeks would impose little additional hardship--we find nothing unreasonable about the contracting officer's decision not to reopen discussions with MSA and not to delay the purchase of this life-saving equipment further.

In support of this conclusion, we note that MSA did not suggest that its proposed fees were in error until it learned it would not receive award.[10] Also, there is no basis for concluding that MSA would have lowered its proposed costs in a second BAFO; rather, at best, one can assume that MSA would have lowered its proposed fee by an amount sufficient to comply with the statutory restriction applicable here. While this lowering of proposed fee--ranging from 3 to 5 percent of the total proposed cost--would have lowered MSA's total costs somewhat, the amount at issue was very small.

In this regard, we note that the Navy had already performed a technical evaluation of MSA's BAFO and determined, without regard to the fee issue, that Draeger's product, not MSA's, offered the best value to the government. This finding was based on a conclusion that the technical superiority of the Draeger-proposed device justified the additional proposed cost. We simply see no basis to conclude that this finding would have been affected by the relatively modest reduction in total cost represented by a lowering of MSA's proposed fees to comply with the statutory restriction, especially given the fact that the RFP placed far greater emphasis on technical merit than on cost.

Finally, the Navy reasonably concluded it had already experienced far too much delay in this procurement, and did not want to extend the process even longer by reopening discussions and requesting a new round of BAFOs.

As a result of all of the above, we find that it was reasonable for the contracting officer to conclude that there was

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[10]In addition, as explained above, MSA does not argue that it made an erroneous calculation, only that it mistakenly did not know the outer limits for applying profit or fee to a cost-plus-fixed-fee contract.

no clear benefit to the government to reopening discussions here. In our view, the balance of equities in this case--between overturning the agency's decision, thus imposing further delay, or placing the risk on contractors to assure that changes in their BAFOs do not raise additional questions about the proposal, or render it unacceptable--lies squarely with the Navy.

As an experienced contractor, MSA was well aware of the role of a BAFO: to provide the government a best and final offer. Since the contracting officer's decision was reasonable, we see no basis to conclude that it was an abuse of discretion not to reopen discussions.

The protest is denied.

for James F. Hinchman
General Counsel