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147254



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SSDS, Inc.
File: B-247596.2
Date: August 7, 1992

James S. Hostetler, Esq., and Brian A. Ochs, Esq.,
Kirkland & Ellis, for the protester.
Robert M. Cambridge, Esq., for Secure Network Associates, an
interested party.
Capt. Gerald P. Kohns, Esq., and Kenneth John Allen, Esq.,
Department of the Army, for the agency.
Katherine I. Riback, Esq., John W. Van Schaik, Esq., and
John Brosnan, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Agency did not act improperly by failing to conduct a cost analysis of cost and pricing data submitted with the awardee's proposal and thus not considering direct labor rates contained in the data that were allegedly below Service Contract Act (SCA) minimum rates, where a fixed-price contract was contemplated and the requirement for cost and pricing data was waived by the agency because of adequate price competition and nothing on the face of the proposal indicated that the awardee intended to violate the SCA.

2. Where it appears that both the awardee and the protester made different assumptions as to the number of labor hours that would be required by the agency under a solicitation line item which required a fixed-price for services on a monthly basis, General Accounting Office will not interfere with the award because even if the protester is correct the relatively small difference in price would not impact the relative standing of the offers.

DECISION

SSDS, Inc. protests the award of a contract to Secure Network Associates under request for proposals (RFP) No. DAEA08-91-R-6004, issued by the Army for systems engineering, systems integration, and related services on local/wide area networks. SSDS argues that the Army's evaluation of the proposals was flawed because the agency failed to consider evidence that showed that Secure Network's proposal was based in part upon wage rates which

were lower than the applicable Service Contract Act (SCA), 41 U.S.C. § 351 et seq. (1988), wage rates. Also, the protester argues that the proposals were not evaluated on a common basis since, in the case of one contract line item (CLIN), the protester and the awardee based their proposed prices on different assumptions.

We deny the protest.

The RFP contemplated the award of a fixed-price-indefinite-quantity contract with cost reimbursement elements for certain materials for a base year and 4 option years. The solicitation required personnel in 12 labor categories. Under CLIN 0040, each offeror was to propose fully burdened hourly rates--these rates were to include direct labor, overhead, and profit--for each of the 12 labor categories and separate burdened hourly rates for overtime for each category.¹ Under CLIN 0041, each offeror was to propose fully burdened rates for on-site work at various locations for three labor categories: Network Manager/Administrator, Network Manager Assistant, and Electronics Technician III. For some locations, the labor categories under CLIN 0041 were to be priced on an hourly rate while in other locations they were to be priced on a monthly basis.² Under the contract to be awarded pursuant to the RFP, the awardee is to provide all labor and materials to perform tasks set forth in delivery orders. The labor is to be priced based upon the fixed burdened rates set forth in the awardee's proposal.

Pursuant to the SCA, the RFP incorporated by reference the clause set forth at Federal Acquisition Regulation (FAR) § 52.222-41, which requires that the contractor pay wages and fringe benefits in compliance with Department of Labor (DOL) wage determinations for localities in which the contract will be performed. This clause also establishes a "conforming" procedure to enable contractors to determine appropriate wages for labor categories that are subject to the SCA but not covered by applicable wage determinations. Generally, under this conforming procedure, the contractor must establish wages that are reasonably related to those of workers in classifications listed in an applicable wage determination with the same knowledge and skill level. The "conformed" wage rate must be finally approved by DOL and the contractor must pay the wage rate ultimately set or approved by DOL.

¹CLINs 001-0039 are for materials and training and are not at issue in the protest.

²The solicitation did not require that offerors reveal their direct labor rates under any category or CLIN.

Of the 12 labor categories called for by the RFP, 5 are considered professional positions and thus exempt from the SCA, while the 7 others are subject to the SCA. Of those 7, DOL issued wage determinations for 5 while no specific wage determinations were issued for 2 categories--Network Manager/Administrator and Network Manager Assistant.

The RFP listed the following four main technical evaluation factors: (1) Corporate Capabilities, (2) Engineering Support and Services, (3) On-Site Support, and (4) Hardware and Software LAN/WAN Components. As far as price was concerned, the RFP stated that proposals "will be evaluated for the purposes of award by adding the total price of all CLINS, including options. . . ."

According to the solicitation, award was to be made to the offeror whose proposal represented the best value to the government with technical considerations weighted significantly more important than price. The solicitation also stated that if the proposals were determined to be technically equal, price would become predominant in the selection decision.

The agency received initial proposals from SSDS, Secure Network,³ and a third firm that was eliminated from the competitive range. The proposals were evaluated, discussions held, and best and final offers (BAFO) submitted. The proposals of SSDS and Secure Network were determined to be essentially equal technically. SSDS's overall BAFO price was \$17,209,573.62 and Secure Network's overall price was \$16,050,068.45. According to the agency, it reviewed the price proposals for compliance with the SCA. In doing so, the agency reports that it determined that Secure Network's proposed burdened labor rates exceeded the SCA for the five labor categories for which wage determinations existed.

Since the two proposals were considered equal technically, the agency awarded the contract to Secure Network based on its low evaluated price.

SSDS principally argues that the Army was required, but failed, to consider information which in its view showed that Secure Network did not reasonably conform its labor rates to the appropriate SCA wage classifications. Specifically, SSDS argues that for the Network Manager/Administrator and the Network Manager Assistant positions--the two SCA categories for which no wage rate determinations existed--Secure Network did not conform its

³Secure Network is a joint venture consisting of three firms, ESG Incorporated, Paragon Systems Incorporated, and Spectrum Office Systems Incorporated.

wage rates to similar existing SCA wage determination categories and that the direct labor rates upon which its proposed burdened rates were based for those categories were below the rates that would reasonably be required by the SCA. According to the protester, since it properly conformed its wages for the Network Manager/Administrator and the Network Manager Assistant positions to the wage determinations for the most closely related positions and since the agency failed to evaluate Secure Network's direct labor rates for the two positions and failed to either bring the matter to the awardee's attention during discussions or consider the impact of those low wages upon the awardee's proposed prices for the two positions, the competition was not conducted on an equal basis. In this regard, the protester cites our decision in Unified Indus., Inc., B-237868, Apr. 2, 1990, 90-1 CPD ¶ 346, aff'd, RGI, Inc.--Recon., B-237868.2, Aug. 13, 1990, 90-2 CPD ¶ 120, where we concluded that an agency is obligated to consider in a cost realism analysis the fact that a firm is proposing labor rates below SCA mandated rates.

For the two positions in question--Network Manager/Administrator and the Network Manager Assistant--the solicitation at CLIN 0040 called for offerors to propose burdened hourly rates, while CLIN 0041 called for burdened monthly rates. SSDS does not focus on the burdened hourly and monthly rates proposed by Secure Network; rather, the protester's argument focuses on the direct labor rates for these categories found in data submitted by Secure Network's joint venturers in the mistaken assumption that the agency required the submission of cost and pricing data.⁴ This information was included under a standard form (SF) 1411 submitted by each joint venturer. That form specifies that it is to be used if cost and pricing data is required.

SSDS argues that the Army should have evaluated those direct joint venturer labor rates included in the backup data to determine if Secure Network was proposing to pay wages required by the SCA. According to the protester, the labor rates proposed by Secure Network's joint venturers for the two positions in question were far below what is required by a properly conformed wage rate.

⁴The agency concluded that the submission of cost and pricing data and a cost analysis of such data was not required because it had obtained adequate price competition within the meaning of Federal Acquisition Regulation (FAR) § 15.804-3(b).

For the reasons set forth below, we do not believe that the Army was obligated to analyze the cost and pricing data and therefore had no reason to question the labor rates.⁵

Where, as here, a fixed-price contract is to be awarded and the agency concludes that adequate price competition has been obtained, the agency generally is not obliged to perform a cost analysis on the proposals even if offerors submit cost and pricing data. Research Mgmt. Corp., 69 Comp. Gen. 368 (1990), 90-1 CPD ¶ 352; Contract Int'l Corp.--Recon., B-246937.2, Feb. 5, 1992, 92-1 CPD ¶ 150. Further, the RFP here did not inform offerors that the agency intended to conduct any analysis of price other than to add the individual CLIN prices together. Thus, under normal circumstances, in the context of this RFP, we think that the agency could have properly ignored the unneeded cost and pricing data submitted by Secure Network's joint venturers in the mistaken assumption that such data was required.

Nevertheless, we have held that where a contract involves the payment of SCA-mandated wage rates and there is an indication in an offer that the offeror does not intend to be bound by the terms of the SCA, that offer cannot be accepted, as is, without either an adjustment in the cost evaluation, if any is conducted, or some other method of ensuring that other offerors who have in fact complied with the SCA are not prejudiced. See Unified Indus., Inc., supra; Johnson Moving & Storage Co., B-221826, Mar. 19, 1986, 86-1 CPD ¶ 273. So even though under the general rule, the agency did not have to review the cost and pricing data here we think that such an analysis would be required, since such data by its nature would include information concerning a firm's direct labor rates, if there was an indication from the face of Secure Network's proposal that the offeror did not intend to comply with the SCA.

We find that, with the possible exception of the unanalyzed cost and pricing data submitted under the SF 1411, there was no such indication. First, the protester does not argue that the burdened wage rates offered by Secure Network for these two labor categories under CLINs 0040 and 0041 were

⁵Since the Army did not actually consider the direct labor rates disputed by SSDS and we agree with the agency that it had no duty to do so, there is no need for us to consider whether or not the labor rates were in fact reasonably conformed to the existing SCA wage rate categories. SSDS raised the matter in its protest based upon its access to the data pursuant to a protective order issued in the protest. See Bid Protest Regulations, 4 C.F.R. §§ 21.3(d)(1)-(5) (1992).

too low for the firm to cover any conformed rates which are ultimately determined to be applicable by DOL.⁶ Further, we cannot find and the protester has not pointed out anything else in the Secure Network technical or price proposal which would reasonably lead to the conclusion that the firm did not intend to comply with the SCA.

We therefore have no legal basis upon which to object to the agency's failure to analyze the cost and pricing data submitted with Secure Network's fixed-price offer, and consequently cannot fault the agency for failing to consider the allegedly insufficient direct labor rates contained in that data.⁷

SSDS also argues that the evaluation of the price proposals was faulty for another reason. It points out that Secure Network included information in its proposal that should have put the Army on notice that there was confusion concerning how CLIN 0041 should be interpreted. CLIN 0041 required offerors to propose burdened labor rates in monthly units for some of the labor categories for different locations.⁸ Some were to be based on a 40-hour week and others on a 50-hour week. Secure Network's proposal states on its face that it calculated prices for these labor categories on the basis of 2,004 hours per year for 40-hour per week personnel, and 2,520 hours per year for 50-hour per week personnel. SSDS states that it based its proposed prices for these labor categories on 2,100 hours per year for 40-hour per week personnel and 2,580 hours per year for the 50-hour per week personnel. According to SSDS, the failure of the agency to clarify the number of hours to be required annually under CLIN 0041 meant that the offerors did not compete on an equal basis.

⁶On a firm-fixed-price contract such as this, where the awardee is required to pay the actual SCA wages out of whatever price it offers, labor rates that are less than the SCA-specified rates may simply constitute a legally unobjectionable below cost offer. Allen-Norris-Vance Enters., Inc., B-243115, July 5, 1991, 91-2 CPD ¶ 23. This does not mean, however, such low labor rates may be ignored when a cost analysis is conducted. Unified Indus., Inc., supra.

⁷Although SSDS argues that the disputed data was necessary for an even-handed evaluation of the offers, neither the protester nor the other offeror submitted comparable data showing their direct labor rates for any of the labor categories.

⁸For evaluation purposes, the monthly rate was to be multiplied by 12 for a yearly fixed rate.

The solicitation did not require that proposed prices for CLIN 0041 be based on any specific number of annual hours, and even if there was some confusion as to the basis for these fixed rates, SSDS does not show how it was prejudiced by it. In this regard, we have examined Secure Network's price schedule, and we find that even if the prices in the joint venture's proposal for CLIN 0041 were increased to reflect the annual level-of-effort that SSDS states that its proposal was based on, Secure Network's overall price would remain low. Under the circumstances, even if the SSDS and Secure Network proposals were based on differing assumptions as to the annual level-of-effort required for CLIN 0041, we conclude that SSDS was not prejudiced by those differing assumptions.

The protest is denied.



James F. Hinchman
General Counsel