



Comptroller General
of the United States

Washington, D.C. 20548

147606
S. Riback

Decision

Matter of: Lockheed, IMS
File: B-248686
Date: September 15, 1992

Robert J. Sherry, Esq., and C. Stanley Dees, Esq., McKenna & Cuneo, for the protester.
Wendy T. Kirby, Esq., Hogan & Hartson, for International Business Machines Corporation, and David V. Anthony, Esq., Pettit & Martin for Information Systems & Networks Corporation, interested parties.
James F. Trickett, Department of Health and Human Services, for the agency.
Scott H. Riback, Esq. and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that evaluation of cost proposals was not in accordance with solicitation's evaluation and award criteria is sustained where solicitation provided for evaluation of "total costs" and agency excluded from consideration some 40 percent of contract's overall cost.
2. Despite uncertainty over what ultimately will be needed when an indefinite quantity, indefinite delivery contract is to be awarded, the cost of those needs must be evaluated to the extent possible.
3. Cost/technical tradeoff which results in award to higher priced, higher rated firm is unreasonable where agency failed to consider total cost of contract in making award decision.

DECISION

Lockheed, IMS protests the award of a contract to International Business Machines Corporation (IBM) under request for proposals (RFP) No. 233-90-0102, issued by the Department of Health and Human Services (HHS) to acquire supplies and services for the establishment and maintenance of a child support enforcement computer network. Lockheed argues that HHS failed to evaluate proposals in accordance with the terms of the solicitation and made an unreasonable cost/technical tradeoff in awarding the contract.

We sustain the protest.

The solicitation was issued to acquire a wide area network computer system. The system will link together some 52 automated state child support enforcement systems to facilitate the transmission of child support enforcement case data between states. The RFP contemplated the award of a fixed-price contract. A portion of the contract's deliverables are hardware, software and related installation support services and are to be provided on a definite quantity, definite delivery firm, fixed-price basis. The balance of the contract is for the provision of "developmental services" to be provided on an indefinite quantity, indefinite delivery basis. These services are required to assist each state in interfacing its existing system with the HHS system, because each state's existing child support enforcement data collection system is different in terms of both system compatibility and level of technical development.

The RFP provided that proposals would be evaluated under five broad technical criteria, and further stated that award would be made to the firm whose proposal reflected the best overall value to the government, considering price and the technical factors. Offerors were also required to perform a live test demonstration as part of the technical evaluation. For award purposes, the solicitation provided that technical considerations were more important than price. The RFP stated that the agency's price evaluation would include consideration of "total system costs" for all hardware, software, documentation, installation charges, maintenance and any other cost that might be incurred to make the proposed system fully operational, and would include an evaluation of all option quantities called for under the RFP.¹ Regarding the developmental services portion of the contract, the solicitation originally required firms to provide loaded hourly rates for various classes of employees and also required firms to determine the labor mix necessary to accomplish the task. Offerors were also informed that the agency would acquire a minimum of 8,404 labor hours and a maximum of 60,154 labor hours for developmental services.

¹The RFP contemplated the award of a 3-phase contract to be performed over a 10-year period; phase 1 called for the delivery, installation and activation of the system's host computer and workstations within the contract's first 6 months; phase 2 called for the provision of contractor support to the state governments' ADP staffs within the 12 months following phase 1; phase 3 called for ongoing contractor support of the network after the completion of phase 1.

The agency received four initial offers, all of which were determined to be technically acceptable after the live test demonstrations and technical evaluations. During its initial evaluation of the cost proposals, the agency became concerned that offerors were proposing on differing bases with respect to developmental services. HHS concluded that it would be unfair to evaluate these costs based upon the offerors' estimates of the government's needs in view of the fact that, during contract performance, the agency would determine the necessary labor mix and level of effort. Consequently, during discussions HHS requested that offerors provide only loaded hourly rates for each category of employee which the firm considered necessary to accomplish the developmental services effort.² After concluding discussions, HHS solicited and received best and final offers (BAFO). All four offerors were again determined to be technically acceptable and were ranked on a 1,000 point scale. The awardee, IBM, received the highest overall technical rating.

In evaluating the BAFO cost proposals, HHS made no attempt to project the estimated cost of the developmental support effort. Rather, the cost evaluation consisted of comparing the offerors' loaded hourly rates with the qualifications of the personnel proposed for each labor category to ensure that the rates were commensurate with the qualifications of the proposed personnel. IBM received the award based on a cost/technical tradeoff favoring its higher technical merit over other offerors' lower prices for the system components. An independent government estimate of the total contract cost was used as the contract award price. (This apparently would have been the contract price regardless of which offeror received the contract.) Lockheed challenges the evaluation and cost/technical tradeoff that resulted in award to IBM.

As an initial matter, HHS maintains that Lockheed's protest regarding the cost evaluation is untimely. As noted above, HHS maintains that offerors were orally advised during discussions that the agency intended to evaluate the developmental services portion of the offers by comparing the firms' loaded hourly rates with their proposed personnel, but that there would be no attempt to evaluate the estimated cost of this aspect of the contract. HHS

²The parties disagree about what additional information was provided during oral discussions. HHS maintains that it told the offerors that it was requesting only loaded hourly rates for the developmental services portion of the contract because it did not intend to evaluate these costs. Lockheed, on the other hand, alleges that it was not informed of the agency's new basis for cost evaluation.

contends that Lockheed was required to protest this method of evaluating offers prior to the deadline for BAFOs in order to be timely. In support of its contention, HHS has furnished several affidavits from its contracting personnel stating that offerors were informed of the way in which cost would be evaluated for this aspect of the contract during oral negotiations.

Lockheed denies being informed that developmental support services costs would be excluded from the evaluation. According to the protester, HHS informed it that these costs would be evaluated on the basis of a labor mix and level-of-effort established by the agency and that, consequently, it was only necessary to provide loaded hourly rates. Lockheed explains that it did not file a protest regarding the agency's cost evaluation method until after award because it reasonably interpreted the oral discussions, along with all written solicitation materials, as consistent with its understanding that HHS would evaluate these costs. In support of its position, Lockheed directs our attention to the agency's written summaries of the oral discussions which contain no mention of the agency's intent to exclude developmental services from its cost evaluation. Lockheed also has provided affidavits in support of its position regarding what was said during oral discussions.

Where an offeror denies an agency claim that it was orally informed of changed requirements or a revised method of evaluation, there is no persuasive evidence to the contrary, and the agency did not follow up its alleged oral advice with a written amendment or other confirming writing, see Federal Acquisition Regulation (FAR) § 15.606, we will not hold the offeror to have been on notice of the change. Informatics, Inc. et al., 56 Comp. Gen. 388 (1977), 77-1 CPD ¶ 152; see also I.E. Levick and Assocs., B-214648, Dec. 26, 1984, 84-2 CPD ¶ 695.

We find nothing in the solicitation that apprised offerors of the agency's intent to exclude the developmental services from its cost evaluation. As noted above, the RFP's evaluation and award provisions stated that total system cost would be evaluated, including any cost necessary to make the system fully operational. It is clear from the record that for the system to be fully operational, all states must be effectively interfaced into the wide area network. We think offerors could reasonably interpret the RFP, therefore, as specifying that the costs of the developmental services, the purpose of which was to achieve this end, were to be evaluated.

HHS also argues that certain preproposal questions and answers put firms on notice of its intended cost evaluation method, including the following:

"Q. As prices are required per site, for what period of time should the senior and junior computer systems engineers be assumed to be required at each site?

"A. The offeror should propose the hourly rate for senior/junior engineers and any other personnel deemed necessary for the developmental support. The Government will determine the quantity per labor category based upon information contained in the Post-Award Site Contact Report."

While the agency's answer may have suggested that the agency would not determine how many personnel in each labor category would be required at each site until after award, it did not state that developmental services costs would not be considered in the cost evaluation. An offeror reasonably could assume, we think, that even though the labor mix was not definitized, labor costs nevertheless would be factored into the evaluation in some way, as the RFP reference to consideration of the total system costs indicated would be done. We thus do not agree that this or other preproposal questions or answers put Lockheed on notice that total cost would not be evaluated. In fact, it is not clear why the agency even relies on its answer to the above question since the question and answer were provided to offerors before HHS decided to exclude the developmental services costs from the evaluation. We conclude that the protest is timely.

Turning to the merits, Lockheed argues that HHS failed to evaluate offers in accordance with the terms of the solicitation by failing to consider the costs of the developmental services portion of the acquisition. According to Lockheed, the RFP provision calling for the agency to consider total system cost including "any other cost which might be incurred to make the proposed system fully operational" imposed an obligation on HHS to consider the cost of developmental services. Lockheed also argues that the Competition in Contracting Act of 1984 (CICA), the FAR and the Federal Information Resources Management Regulation (FIRMR) require agencies to evaluate total cost in making an award. In a similar vein, Lockheed argues that the agency's cost/technical tradeoff was inherently unreasonable because it did not take into consideration a significant portion of the contract's overall cost. According to Lockheed, agencies must necessarily consider the total costs associated with a contract in order to make a rational cost/technical tradeoff, especially in cases such

as this one where the technical scores are relatively close.³

HHS argues that its method for evaluating developmental support services was reasonable. In particular, the agency contends that, since it had no way of reliably determining the level of effort that might be required in connection with this aspect of the contract, it would have been improper for it to have applied any particular labor mix and level of effort in its evaluation of cost proposals. The agency also maintains that its cost/technical tradeoff was reasonable and in accordance with the solicitation's terms as amended during oral discussions. According to HHS, the technical merit of IBM's proposal outweighed any cost advantage available from the other offerors.

We agree with Lockheed that the cost evaluation was inadequate. As a general rule, agencies are required to include cost or price as a significant factor in the evaluation of proposals, 41 U.S.C. §§ 253a(b)(1)(A) and 253b (1988); FAR § 15.605(b), and FIRM § 201-39.1501-1(a) specifically requires agencies to evaluate "total cost" when acquiring federal information processing resources. An evaluation and source selection which fails to give significant consideration to cost, or which varies from the RFP's cost evaluation provisions, is inconsistent with CICA and cannot serve as the basis for a reasonable source selection. See generally Coastal Science & Eng'g, Inc., 69 Comp. Gen. 66 (1989), 89-2 CPD ¶ 436 (source selection in which price only accounted for 10 percent of overall evaluation was inconsistent with CICA and terms of RFP because nominal technical advantage was determinative regardless of overwhelming price premium, and because RFP specified only that technical considerations were "more important" than cost). While agencies have considerable discretion in determining the particular method to be used in evaluating cost or price, that method should, to the extent possible, accurately measure the cost to be incurred under competing proposals. Electronic Warfare Integration Network, B-235814, Oct. 16, 1989, 89-2 CPD ¶ 356.

As discussed above, we think this RFP did provide for the appropriate evaluation of cost including the cost of developmental services. The agency failed, however, to evaluate the full range of costs--specifically the developmental services costs--that are to be incurred under this contract. The agency justifies its action by stating

³We do not include the technical scores in our decision since that information is procurement sensitive and we recommend that the acquisition be reopened.

that it could not reliably determine what would be required in the way of developmental services.

Uncertainty over what ultimately would be needed is not itself a reason to ignore cost, particularly when the cost of the indefinite services is expected to be significant. Uncertainty is inherent in the use of indefinite quantity, indefinite delivery contracts. Nonetheless, in light of the statutory and regulatory requirements that cost be considered in the award of contracts, even when this type of contract is used cost must still be evaluated to the extent possible. To this end, agencies have developed various methods for evaluating proposed costs when the level-of-effort and specific tasks that may ultimately be required during performance are not known. One method is the use of a sample task or a "hypothetical plan" that is representative of what is anticipated to be required during contract performance. See Harding Lawson Assocs., ICF Technology, Inc.--Recon., B-239231.7; B-239231.8, Dec. 4, 1990, 90-2 CPD ¶ 450; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Another method is the development of estimates for the various labor categories required. See Carrier Joint Venture--Recon., B-233702.2, June 23, 1989, 89-1 CPD ¶ 594; Planning Research Corp., GSBICA No. 10694-P, Sept. 10, 1990, 91-2 BCA 23,882, 1991 BPD ¶ 74; Richard S. Carson & Assocs., Inc., GSBICA No. 11452-P, Nov. 15, 1991, 92-1 BCA 24,641, 1991 BPD ¶ 338.

HHS has offered no explanation as to why it could not use one of these approaches. We note, however, that it was able to promulgate an estimate which took cognizance of these costs, and ultimately used that estimate to establish the total estimated value of the contract award. Accordingly, on this record, we find that the evaluation of proposals, which excluded approximately 40 percent of the overall estimated dollar value of the contract, was inconsistent both with the solicitation itself and applicable law and regulation. This failure was particularly significant in view of the fact that IBM's loaded hourly rates appear higher than Lockheed's (although the labor categories proposed by the two companies were different) and therefore, had this been considered, the source selection decision could have been affected given the relatively close ranking of the two firms from a technical standpoint.

Indeed, HHS' failure to fully evaluate proposed costs makes the validity of the cost/technical tradeoff questionable. Agencies have broad discretion in making such tradeoffs, but any tradeoff must meet the test of rationality and consistency with the solicitation's award criteria. See, e.g., Cyqna Project Mgmt., B-236839, Jan. 5, 1990, 90-1 CPD ¶ 21. Here, the agency's tradeoff was based on a comparison of the technical merits of the proposals with only a portion

of the total contract cost considered--developmental services costs were ignored. We fail to see how a reasonable tradeoff determination could have been made without consideration of such a significant portion of the total contract cost when it appears that it may have been possible to utilize one of the recognized methods to evaluate developmental services costs.

In view of the foregoing, we sustain Lockheed's protest. HHS has advised us informally that IBM has incurred more than \$3 million in costs under its contract. Ordinarily, we would deem this to be substantial performance so as to render corrective action impracticable. However, because the deficiency on which our decision is based brings into question the ultimate cost to the government, the fact that such costs have been incurred does not necessarily lead to this conclusion. Under the circumstances, we are recommending by separate letter of today to the Secretary of HHS that HHS develop an appropriate method for evaluating the costs anticipated under this contract and, if necessary, amend the solicitation to so inform offerors and obtain revised cost proposals on the basis of the amended solicitation. If the results of the ensuing evaluation so warrants, the contract awarded to IBM should be terminated for the convenience of the government and award made based on the new evaluation. In addition, we find Lockheed entitled to the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1992).

The protest is sustained.

Milton J. Arolos
for Comptroller General
of the United States