



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Burns and Roe Services Corporation

**File:** B-251969.4

**Date:** March 1, 1994

---

Frank J. Borgia for the protester.

Barbara Vail, Esq., Department of the Treasury, for the agency.

Thomas P. Humphrey, Esq., Crowell & Moring, for MAR, Inc., an interested party.

Paul E. Jordan, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

1. Protest that agency misled protester during discussions is denied where, although protester argues that agency told the firm to prepare its cost proposal on basis contrary to that set forth in the solicitation, in the absence of a written amendment changing the solicitation, protester unreasonably relied on alleged oral direction which contradicted the solicitation.

2. As part of cost realism evaluation, agency reasonably adjusted protester's prime labor costs to reflect full-time personnel to perform all maintenance where solicitation required this proposal approach and protester had erroneously included portion of prime labor costs under government furnished estimate of costs.

---

### DECISION

Burns and Roe Services Corporation (BRSC) protests the award of a contract to MAR, Inc., under request for proposals (RFP) No. CS-92-009, issued by the U.S. Customs Service, Department of the Treasury for maintenance of Customs vessels. BRSC contends that the agency misled the firm during discussions and erroneously evaluated the protester's cost proposal.

We deny the protest.

The RFP sought proposals to furnish personnel, services, materials and facilities to perform preventive maintenance and corrective maintenance for various Customs vessels on a nationwide basis as part of Customs' drug interdiction

mission.<sup>1</sup> The RFP contemplated award of a cost-plus-award-fee contract for a base period, with 4 option years. Technical factors were of greater importance than cost, which was to be evaluated on the basis of accuracy, adequacy, realism, and reasonableness. The RFP also provided that cost was to be the determining factor among technically equal proposals.

Prior to the initial closing date, Customs amended the RFP to clarify the instructions on the preparation of the corrective maintenance portion of cost proposals. In amendment No. 0002, Customs added clause H.21 which explained that "[s]ince it is difficult to predict with certainty the required corrective maintenance, for purposes of proposing," all offerors were required to use a government furnished estimate (hereinafter "plug" number) which covered all "repair parts, labor, subcontracts, etc. for corrective maintenance." In amendment No. 0003, which also was issued before the initial closing date, Customs deleted the earlier version of clause H.21 and replaced it with:

"For solicitation purposes, all offerors shall propose corrective maintenance (parts and subcontract services) exclusive of prime labor, material handling, G&A and other overhead costs as a separate cost category at \$2 million for the base period (8 months) and at \$2.7 million for each option period." [Emphasis added.]

The RFP provided no additional guidance for the treatment of corrective maintenance costs.

Six offerors, including BRSC, MAR, and General Offshore Corporation (GOC),<sup>2</sup> submitted proposals. After initial technical and cost evaluations, Customs included only the proposals of MAR and GOC in the competitive range. However, after a BRSC protest, Customs included BRSC's proposal. Telephonic discussions were then conducted with the three offerors.

---

<sup>1</sup>Preventive maintenance includes scheduled inspections, lubrications, cleaning and preservation actions. Corrective maintenance includes repair work resulting from accidents and material failures. In addition, the RFP advised that the contractor may be called upon to perform work associated with the refurbishment and rebuilding of seized and forfeited vessels.

<sup>2</sup>GOC also has filed a protest with our Office on unrelated grounds. GOC's protest will be the subject of a separate decision.

In the cost evaluation, Customs found that BRSC's initial proposal did not include the full corrective maintenance plug number required by amendment No. 0003. During discussions, BRSC explained that it planned to perform all corrective maintenance with prime labor instead of subcontractor labor and, as a result, it subtracted the value of its prime labor from the plug number set forth in the RFP. The agency found that BRSC's failure to use the plug number as required by amendment No. 0003 resulted in a substantial reduction of its proposed cost. According to Customs, during oral discussions, it instructed BRSC to follow amendment No. 0003 which stated that the corrective maintenance plug number was exclusive of all prime labor costs. At the conclusion of discussions, Customs requested best and final offers (BAFO).

In reviewing BRSC's BAFO, Customs found that, while the firm's cost proposal now included the full corrective maintenance plug number required by the amended RFP, BRSC still had not followed amendment No. 0003. The evaluators concluded that BRSC's BAFO took exception to the amendment No. 0003 instruction that the plug number was to be "exclusive of prime labor." BRSC's BAFO stated that:

"All staffing on our organization charts now reflects [p]reventive [m]aintenance only. Consequently, our organization chart no longer shows those positions, or portions of positions, that are expected to work on [c]orrective [m]aintenance tasks. . . . The BRSC staffing to perform [c]orrective [m]aintenance, rebuilds, refurbishments or forfeiture fund work will be in addition to the displayed staffing."

While virtually all of BRSC's personnel were listed on the firm's organization charts as less than full-time employees, the BAFO further explained that BRSC did not plan to hire "fractional persons." Instead, BRSC's BAFO stated that the amount of work indicated for corrective maintenance, rebuilds, refurbishments, and forfeiture-fund work would "provide the workload and funding for us to hire full persons." For example, a technician assigned "0" labor hours for preventive maintenance work was expected to be a full-time equivalent because he would perform exclusively corrective maintenance tasks under the contract.

Since the staffing set forth in BRSC's BAFO covered only preventive maintenance, the evaluators concluded that, contrary to the instructions of the RFP, BRSC considered all prime labor hours for corrective maintenance to be included in the corrective maintenance plug number. The evaluators concluded that BRSC's inclusion of all corrective maintenance labor under the plug number was inconsistent

with amendment No. 0003, which required that the plug number not include prime labor. As a result, Customs adjusted BRSC's personnel costs upward for cost realism purposes. When fully burdened with BRSC's overhead and general and administrative costs, BRSC's proposed cost was increased by more than \$2.4 million. Since MAR and GOC proposed their personnel as full-time employees, including direct labor costs for all work, including corrective maintenance, there was no need to similarly adjust their direct labor costs.

Customs concluded that all three proposals were substantially equal technically, thus making lowest cost the determinative factor in the award selection. Customs awarded the contract to MAR since MAR's evaluated cost of \$24,889,658 was lower than that of BRSC and GOC.<sup>3</sup>

BRSC contends that the agency misled it during discussions. According to BRSC, its May 1993 discussions with Customs centered on what items were included in the corrective maintenance plug number. At issue was whether the number included or excluded prime contractor labor for corrective maintenance. BRSC states that Customs "agreed" with BRSC that there was insufficient information for a contractor to estimate corrective maintenance labor, regardless of its source, and therefore the agency "concluded" that the plug number should include all prime labor. According to BRSC, Customs then "directed" BRSC to include all corrective maintenance costs in the plug number.

The Customs representatives state that they cannot recall everything that was said during discussions. However, they maintain that whatever else might have been said, they referred BRSC to amendment No. 0003 for guidance. Also, according to the contracting officer, had he changed the method of proposing corrective maintenance, he would have issued an amendment to advise all offerors in the competitive range.

In a negotiated procurement, contracting officers generally are required to conduct discussions with all offerors whose proposals are included in the competitive range. Federal Acquisition Regulation (FAR) § 15.610. Discussions must be meaningful, that is, the agency must lead offerors into the areas of their proposals which require amplification or correction. Jaycor, B-240029.2 et al., Oct. 31, 1990, 90-2 CPD ¶ 354. In conducting discussions, an agency may not prejudicially mislead offerors. See Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424.

---

<sup>3</sup>BRSC's proposed cost was approximately \$1.7 million less than MAR's evaluated cost.

As a preliminary matter, we find that the absence of some estimate of the amount of corrective maintenance on which to base a proposal made the RFP's procedure for proposing corrective maintenance prime labor difficult to apply. As observed by BRSC, contractors were left to "pull a number out of the air" for corrective maintenance. Nonetheless, while we believe that the procedure was difficult to use, to the extent BRSC is now protesting the procedure, its protest is untimely. Alleged solicitation improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1993). Although the flaws in the amendment No. 0003 corrective maintenance provision were clear at the time it was issued, BRSC did not protest by the closing date.

Although the parties dispute what was said during the telephonic discussions between BRSC and Customs, it is clear that BRSC's original proposal was inconsistent with the directions of clause H.21 in amendment No. 0003 and that the agency intended to apprise the protester of its error and how to correct it. Agency officials who participated in discussions state that they advised BRSC that its subtraction of prime labor costs from the plug number was inconsistent with amendment No. 0003. Although the agency acknowledges the lack of information on which to propose corrective maintenance, agency officials state that during discussions they read the H.21 language in amendment No. 0003 to BRSC and emphasized that the clause included parts and subcontract services, but did not include prime labor. Customs officials state that they then advised BRSC to look to amendment No. 0003 for guidance in preparing its BAFO.

While BRSC now asserts that it was misled by the agency's discussions, we believe that under the circumstances, its perception of the agency's directions was unreasonable. Based upon our reading of the parties' recollections of the discussions, we conclude that BRSC attempted to show Customs the flaws in its corrective maintenance proposal method and sought to have the agency change the way the plug number was to be used. However, instead of convincing Customs to change the terms of the solicitation, we believe BRSC misinterpreted Customs' lack of information on which to base a corrective maintenance estimate as a direction essentially to follow the amendment No. 0002 model: all corrective maintenance costs to be contained within the plug number. Since the agency also referred BRSC to amendment No. 0003 for guidance, we find BRSC's reliance on directions to the contrary to be unreasonable and not the result of being misled.

The provisions of clause H.21 (in amendment No. 0003) clearly required the exclusion of prime labor and associated burdens from the corrective maintenance plug number. Any direction which contradicted that provision represented a material change to the terms of the RFP. After the receipt of proposals, when the government changes its requirements, the contracting officer "shall issue a written amendment to the solicitation." FAR § 15.606(a). Oral advice of solicitation changes may be given if all offerors in the competitive range are notified and the contracting officer must confirm the advice in writing. See FAR §§ 15.410(c); 15.606(a). Here, BRSC was faced with a clear contradiction between what it believed was said in discussions and what was written in amendment No. 0003 and was aware that no written amendment reflecting this material change had been issued.

While BRSC argues that it believed the other offerors also would be told of the modification, we find that belief to be unreasonable since no written amendment was issued to BRSC. In fact, the agency did not so advise the other offerors. Although the protester apparently understood that Customs had orally modified the RFP, where as here, the modification is inconsistent with the written solicitation, absent a written amendment or confirmation of the oral advice, it was unreasonable for BRSC to rely on the alleged oral representation. See Young Eng'g Sys., 55 Comp. Gen. 754 (1976), 76-1 CPD ¶ 96 (an oral representation without written confirmation does not constitute an RFP amendment); Texnokpatikh, B-245835.2, Feb. 6, 1992, 92-1 CPD ¶ 153. BRSC notes that the BAFO request letter stated that BAFOs "should contain such price, technical or other revisions to your proposal as result from discussions." BRSC's reliance on this language is misplaced. Such general advice is insufficient to represent a written confirmation of an oral solicitation amendment. It was incumbent upon the protester to seek clarification or to follow the directions of amendment No. 0003. Under these circumstances, to the extent BRSC misunderstood, we do not believe it is entitled to relief.

BRSC also argues that when Customs discovered the protester's mistake in proposing corrective maintenance, it should have reopened discussions to make its requirements clear. We disagree. An agency in the position of Customs is not obligated to reopen negotiations to give an offeror the opportunity to remedy a defect that first appears in a

(S)

BAFO,<sup>4</sup> See Potomac Research, Inc., B-250152.8;  
B-250152.11, July 22, 1993, 93-2 CPD ¶ 109.

BRSC next argues that Customs improperly conducted its cost evaluation by adding more than \$2.4 million to BRSC's proposal. In the protester's view, it was inappropriate to add anything to its proposal. In fact, relying on the RFP's provision "proposed price will be the determining factor," BRSC contends that it should have received the award because its proposed price was lowest. We disagree.

First, we believe the protester's reading of the RFP is unreasonable. To be reasonable, an interpretation of a solicitation provision must be consistent with the solicitation when read as a whole and in a reasonable manner. See Crown Logistics Servs., B-253740, Oct. 19, 1993, 93-2 CPD ¶ 228. While the RFP stated that "proposed price" would be determinative in the case of technical equality, the "Cost Evaluation" provision of the RFP stated that the agency would take into account the probable cost to the government. It further provided that the proposal with the "lowest realistic total estimated cost-plus-award-fee" was to receive maximum consideration. This evaluation approach is consistent with the recognition that in cost reimbursement contracts, an offeror's proposed estimated costs are not considered controlling, since they may not provide valid indications of the actual costs which the government is required to pay. Tracor Applied Sciences, Inc., B-253732, Oct. 19, 1993, 93-2 CPD ¶ 238; FAR § 15.605(d). Accordingly, Customs' award decision was properly based on evaluated, rather than proposed costs.

Second, in conducting a cost evaluation for a cost-reimbursement contract, an agency's evaluation of estimated costs properly should consider the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. Arthur D. Little, Inc., B-229698, Mar. 3, 1988, 88-1 CPD ¶ 225. We

---

<sup>4</sup>In particular, BRSC notes that Customs failed to mention staffing issues during discussions. However, BRSC's initial offer proposed virtually all of its personnel as full-time employees. It was not until after discussions, in its BAFO, that BRSC proposed the majority of its personnel as "fractional" employees. Thus, there were no "staffing" issues to discuss until BRSC created them in its BAFO.

limit our review of these matters to determining whether an agency's cost evaluation was reasonably based. Tracor Applied Sciences, Inc., supra.

As discussed above, in conducting its cost evaluation, Customs found that BRSC had proposed less than full-time employees in virtually all labor categories. BRSC's BAFO explained, however, that it did not intend "to hire 'fractional persons' to work on the (Customs') program." Rather, the BAFO stated that the corrective maintenance and other (nonpreventive maintenance) tasks "will provide the workload and funding for us to hire full persons." As a result, BRSC's proposed prime labor costs only covered the preventive maintenance portion of the effort, and by Customs' calculation, the hours proposed for preventive maintenance represented less than 70 percent of BRSC's full-time workforce. Since BRSC intended to use prime labor for all tasks, its implicit inclusion of more than 30 percent of its labor effort under the plug number effectively shielded a significant portion of the labor costs which Customs would ultimately have to pay under the contract. Both MAR and GOC proposed full-time personnel to perform all tasks, both preventive maintenance and corrective maintenance, and unlike BRSC, their cost proposals reflected full-time, prime labor costs for those tasks. Since those offerors' use of the plug number represented parts and subcontract services only, their proposals were artificially high as compared to BRSC's proposal. In an effort to determine the actual costs of performance by BRSC and to ensure that its comparison of costs was on the same basis (i.e., normalized), Customs adjusted BRSC's costs upward to represent its full-time personnel.

The adjustments were based on the percentage of full-time labor proposed for each employee listed in the BAFO. For example, an employee proposed as .63 at a given labor rate was increased by a factor of .37 to result in a 100-percent full-time employee at that labor rate. Likewise, for an employee listed at "0" time for preventive maintenance, but anticipated by the BAFO to be full-time when corrective maintenance tasks were added, Customs added in a salary based on a full man-year. Finally, Customs used BRSC's proposed cost burdens to arrive at the fully loaded cost for these employees. While BRSC generally challenges Customs' upward adjustment of these salaries, it does not challenge any of the specific adjustments. Based upon our review, we find the adjustments were a reasonable method both for normalizing costs among all offerors and for comparing



BRSC's probable cost of performing to the probable cost of performing by the other competitive range offerors. As a result, we conclude that the adjustments were reasonable.

The protest is denied.

*for* *Ronald Beigel*  
Robert P. Murphy  
Acting General Counsel