



Comptroller General
of the United States

Washington, D.C. 20548

23543

Decision

REDACTED VERSION'

Matter of: Price Waterhouse

File: B-254492.2

Date: March 4, 1994

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DIGEST

An agency failed to conduct meaningful discussions where it twice requested best and final offers from an offeror without apprising that offeror that its otherwise [deleted] proposal contained a deficiency--a level of effort that was considered unacceptably low--that rendered the proposal technically unacceptable.

DECISION

Price Waterhouse protests the rejection of its proposal as technically unacceptable under request for proposals (RFP) No. FCXA-SN-92009-N, issued by the General Services Administration (GSA) to obtain audit services from an independent public accounting firm. Price Waterhouse contends, among other things, that GSA failed to conduct meaningful discussions by not apprising Price Waterhouse

The decision issued on February 16, 1994, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

that its proposed level of effort was considered unacceptable.¹

We sustain the protest.

The RFP, issued on December 18, 1992, sought an independent public accounting firm to conduct an audit of GSA's combining financial statements and consolidated financial statements for the fiscal year ending September 30, 1993, with options for the 4 succeeding fiscal years.² The independent audits called for by the RFP were designed to ensure the accuracy of GSA's financial statements, the adequacy of GSA's internal control structure and the legality of GSA's financial transactions under applicable laws and regulations. The services required under this RFP were to be performed at a firm, fixed-price.

The RFP provided for award to "the responsible offeror whose offer conforms to the solicitation and is most advantageous to the Government," considering both price and technical factors. The RFP set forth four technical evaluation factors of equal weight: (1) Technical Experience; (2) Contractor Capability; (3) Qualifications of the Audit Team; and (4) Audit Approach and Work Plan. Each technical factor included at least two subfactors, which contemplated that the offeror demonstrate its proposal's technical merit through specific, relevant information, and which described what the offeror must demonstrate "at a minimum" [emphasis in original] to satisfy each subfactor's requirements.

¹Price Waterhouse initially protested that the award selection was not in accordance with the evaluation criteria. When the agency report on the protest showed that Price Waterhouse's proposal had actually been rejected as unacceptable, Price Waterhouse timely protested the rejection of its proposal, arguing that the agency had not apprised it that its level of effort was deficient when it was requested to submit best and final offers (BAFO). Our Office conducted a hearing pursuant to 4 C.F.R. § 21.5 (1993) to receive testimony regarding the protester's allegations that the agency misevaluated its proposal and conducted misleading discussions with respect to required level of effort.

²GSA annually prepares three "combining financial statements" for the Federal Buildings Fund, the General Supply Fund, and the Information Technology Fund, which are combined into an agency-wide consolidated financial statement.

Of relevance to this protest is the following evaluation factor and subfactor:

"Factor 4, Audit Approach and Work Plan: The offeror must demonstrate an understanding of the scope of the work to be done and a sound technical approach.

"Subfactor 4B. The offeror shall:
 (a) demonstrate realistic time estimates for each audit phase by outlining the estimated time and staff hours allocated to each audit phase and,
 (b) demonstrate the ability to meet the reporting deadlines specified in . . . Section F, Deliverables.

"At a minimum, the offeror demonstrates through a proposed audit approach with time estimates, that the deadlines required by the Deliverables can be met in a timely manner."

The RFP advised that proposals that were found unacceptable with regard to any technical factor would be rejected as technically unacceptable.

GSA answered prospective offerors' questions about the RFP in an amendment issued on January 13, 1993. One question raised was whether GSA could estimate how many labor hours per year the contract would require. To this, the agency responded:

"[t]he number of labor hours required to perform tasks under the RFP will depend on the audit scope, firm's audit approach and familiarity with GSA's operations. As with most audits, the effects of a learning curve could be anticipated. As a result, it is likely that the number of hours required to perform specific tasks the first year will be greater than the number required in subsequent years."

The government estimate for this contract--which GSA did not disclose in this amendment--was 17,300 labor hours for the base year of the contract; no estimate was computed for the option years.¹

¹The government estimate was developed based upon actual data from GSA's 1992 audit. This audit, which was more
 (continued...)

Four firms, including Arthur Andersen & Co. and Price Waterhouse, submitted proposals by the January 28 receipt date. Pursuant to the RFP instructions, offerors submitted separate price and technical proposal volumes. In its technical proposal, Price Waterhouse described its proposed audit approach and estimated the level of effort to accomplish the contract work at [deleted] labor hours per year for the 1993 audit and the succeeding year audits. The protester's separate price proposal was also based on a constant [deleted] labor hour level of effort for the 5-year contract term, escalated by a [deleted] percent inflation factor.

On April 6, the contracting officer transmitted to each offeror a set of price questions and technical questions requiring clarifications. With respect to Price Waterhouse's proposal, GSA questioned the protester's proposed use of a constant level of effort over the 5-year life of the contract as follows:

"[a]lthough your proposed annual escalation rate of [deleted] percent per year is consistent with the current rate of inflation . . . it is not reasonable to assume that there will be no increase in efficiency as the offeror becomes more familiar with GSA's accounting systems. In addition, GSA continues to improve its accounting systems making auditing it each year easier than in the prior year. With this background, offerors should anticipate lower levels of effort in each option year."

This concern was raised only in the protester's price proposal questions, and not its technical proposal questions.⁴

Price Waterhouse submitted proposal revisions in response to GSA's request for clarifications on April 21. As requested by GSA, the protester formatted its revisions to correspond with each clarification question, with the price and technical revisions submitted separately. As such,

³(...continued)

limited in scope than the one contemplated by the current RFP, had consumed more than [deleted] labor hours by the incumbent contractor, who had 4 years of experience.

⁴Responsibility for developing the technical and price questions resided in two different evaluation staffs, the Source Selection Evaluation Board (SSEB) and a GSA price analyst, and their questions were not coordinated. Hearing Transcript (Tr.) at 107, 131.

Price Waterhouse responded to GSA's concern about its constant level of effort in its price proposal revisions, where it revised its pricing schedule summary to reflect a declining level of effort in the option years. The revised pricing schedule was based upon [deleted] hours for the base year, [deleted] hours for the first option year (an [deleted] percent reduction), [deleted] hours for the second option year (a [deleted] percent reduction), and [deleted] labor hours for the third and fourth option years (an [deleted] percent reduction). Price Waterhouse was not requested to revise its technical proposal to reflect any changes to the firm's revised labor hour schedule and did not do so.

On May 19, the SSEB completed its initial review of the revised technical proposals, without access to any price proposal information. The SSEB followed the adjectival rating system set forth in the Source Selection Plan, where proposals could be ranked as outstanding, superior, acceptable, or unacceptable. In accordance with the RFP evaluation scheme, an unacceptable rating in any one technical factor would result in the entire proposal being found unacceptable. Under the Source Selection Plan, a subfactor would be considered unacceptable, if a proposal failed to meet the requirements stated "at a minimum" for that subfactor.⁵ An unacceptable rating for any subfactor resulted in an unacceptable rating for the corresponding evaluation factor and, consequently, for the proposal as a whole. Tr. at 74-75. If a proposal was found at least acceptable for all technical factors, then the ratings were blended to determine an overall proposal rating.⁶

Using this evaluation scheme, the SSEB rated the proposals of [deleted] and [deleted] as [deleted] overall. Although Price Waterhouse earned the [deleted] rating of [deleted] for factor No. 4, the SSEB expressed "serious concerns" over the wide disparity between the protester's proposed number of labor hours, [deleted] hours per contract year, and the government estimate of 17,300 hours.⁷ The SSEB recommended the inclusion of the proposals of Price Waterhouse, Arthur

⁵The Source Selection Plan excluded a few subfactors as minimum requirements, none of which are relevant to this protest.

⁶Under the Source Selection Plan, the highest rating that could be earned under factor No. 4 was acceptable; the full range of adjectival ratings were available under the remaining three factors.

⁷Arthur Andersen, the incumbent contractor for these services, proposed [deleted] labor hours [deleted].

Andersen and a third offeror, another major public accounting firm whose proposal was rated [deleted], in the competitive range.⁸ On May 17, the contracting officer informed Price Waterhouse that its proposal had "been determined to be technically acceptable" and was in the competitive range.

On May 27, GSA conducted oral discussions with the protester. At the time of discussions, the government attendees were unaware that the protester had offered a declining number of labor hours in response to GSA's price clarification questions; discussions were therefore premised on the incorrect assumption that the protester had offered a constant [deleted] labor hours per contract year, as reflected in its technical proposal. Tr. at 80, 111, 135-136. GSA questioned Price Waterhouse about this level of effort in relation to the government estimate, which it revealed to be 17,000 hours per year.⁹ Tr. at 80. The agency also discussed how the estimate was developed and outlined some of the issues and problems that offerors could expect to experience during the audit.¹⁰ Tr. at 26-28.

In response to the oral discussions, Price Waterhouse increased its proposed level of effort in revised technical and price proposals submitted on June 9. The protester explained that it had "increased the overall estimated number of hours by [deleted], from [deleted] to [deleted]." Although this estimate "remain[ed] short of GSA's 17,000 hour projection," Price Waterhouse's revised proposal defended its [deleted] hour level of effort as adequate to satisfy the RFP requirements, based upon the firm's experience and technical approach. In addition, Price Waterhouse revised its April 21 pricing schedule summary, so that the level of effort in its option years declined from the [deleted] hour estimate to [deleted]

⁸The fourth offeror's proposal was judged technically unacceptable and not included in the competitive range.

⁹GSA rounded off the 17,300 hour government estimate.

¹⁰According to GSA, it advised Price Waterhouse that unknown or unanticipated problems could arise during the audit and that an offeror could not reasonably assume that GSA's accounts were problem free merely because they had been subject to audit by the incumbent contractor. GSA also states that it apprised Price Waterhouse that the audit represented an increase over the incumbent contract statement of work, as the RFP encompassed audit work at the financial statement level.

hours, [deleted] hours, and [deleted] hours.¹¹ The protester did not state in its technical proposal response that its level of effort for the option years declined from the [deleted] hour level.

In its evaluation of the three competitive range proposals, the SSEB again was not provided Price Waterhouse's proposal information showing the declining level of effort in the option years.¹² Thus, the SSEB mistakenly assumed that the firm had offered a constant [deleted] labor hours for each year of the contract. Tr. at 18, 79. Although the SSEB debated the adequacy of the proposed [deleted] labor hour level of effort, it ultimately reached a consensus that this level of effort was acceptable and [deleted] rated the protester's proposal as [deleted] overall. Tr. at 55. Also, the SSEB [deleted] rated Arthur Andersen's proposal as [deleted], but downgraded the rating of the third competitive range proposal from [deleted] to unacceptable because that offeror failed to increase its proposed labor hours [deleted] after being advised during discussions that its proposed level of effort was too low.

Based upon the SSEB's recommendations, the contracting officer narrowed the competitive range to Arthur Andersen and Price Waterhouse. On July 12, the contracting officer requested BAFOs from the protester and the awardee. Consistent with the SSEB's evaluation, the protester's BAFO request did not identify any remaining proposal weaknesses or deficiencies.

In its July 14 BAFO, the protester reduced its price (but not its hours) and made no other proposal changes. On July 16, GSA notified the protester that it had reopened discussions and requested a second BAFO by July 19. The second BAFO request again identified no proposal weaknesses or deficiencies to Price Waterhouse, and advised the protester that it could respond by affirming its prior BAFO, which the protester did. Unbeknownst to the protester or the awardee, GSA requested the second round of BAFOs so that the offeror whose proposal had been eliminated from the competitive range could be provided with an opportunity to raise its labor hours to a technically acceptable level. Tr. at 154-155.

¹¹[deleted]

¹²The contracting officer's pre-negotiation memorandum shows that she was aware of Price Waterhouse's declining labor hour schedule at that time.

On July 23, the SSEB convened to review the three offerors' BAFOs. During the course of this meeting, the contracting officer, for the first time, provided the SSEB with Price Waterhouse's proposal information reflecting the declining number of labor hours for the option years from the base year's [deleted] hours. Tr. at 79-80, 112. When the SSEB realized that the protester's labor hours decreased from the base year estimate of [deleted] hours (an estimate which some SSEB evaluators considered "borderline"), the SSEB concluded that the level of effort proposed by Price Waterhouse for the option years was unacceptable. Tr. at 15-16, 45, 55, 62.

The SSEB documented its July 23 decision that Price Waterhouse's proposal was technically unacceptable in an August 3 post-BAFO report.¹³ While the SSEB acknowledged in its post-BAFO report that "contracting process mistakes" might prevent the contracting officer from accepting Price Waterhouse's altered rating, the SSEB recommended that the protester be found technically unacceptable. With respect to the remaining BAFOs, the SSEB maintained the [deleted] rating of Arthur Andersen's proposal and the unacceptable rating of the third offeror's proposal, which, the SSEB found, still proposed too few labor hours [deleted].

¹³In its post-BAFO report, the SSEB explained that the protester's rating had dropped from [deleted] to unacceptable because its proposed labor hours did not fall between an acceptable "range of hours" bounding the government estimate, that being between [deleted] and [deleted] labor hours per year. Price Waterhouse asserts that this [deleted]-hour figure was therefore an undisclosed, minimum requirement, by which the SSEB improperly disqualified its proposal. This argument is contradicted by the hearing testimony given by the SSEB chairman, which shows that the SSEB had not yet developed the "range of hours" when it judged the protester's level of effort unacceptable, but created the range afterwards to rationalize the drop in the protester's rating from [deleted] to unacceptable in its post-BAFO report. Tr. at 21-22, 32, 37-39, 41-42, 45. Nonetheless, since our decision contains a recommendation that the agency reopen discussions, the agency should consider whether it wishes to establish [deleted] labor hours per year as a minimum requirement, and, if it does so, it should disclose this requirement during discussions. See Allied Cleaning Serv., Inc., B-237295, Feb. 14, 1990, 90-1 CPD ¶ 275.

The contracting officer adopted the SSEB's recommendations and narrowed the competitive range to Arthur Andersen's proposal.¹⁴ That being the case, no cost/technical tradeoff was performed, and award was made to Arthur Andersen on August 6. This protest followed.¹⁵

The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b(d)(2) (1988), as implemented in Federal Acquisition Regulation (FAR) § 15.610(b), requires that written or oral discussions be held with all responsible offerors whose proposals are in the competitive range. Once discussions are opened--and a request for BAFOs constitutes discussions--the agency must, at a minimum, advise offerors of deficiencies in their proposals so that they are given an opportunity to satisfy the government's requirements. FAR § 15.610(c)(2); Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. After conducting discussions, if an agency elects to conduct a second round of discussions, it may continue in the competitive range only those firms with a reasonable chance for award. FAR § 15.609(b). If the agency includes a technically unacceptable proposal in the competitive range and invites the offeror to submit a BAFO, see FAR § 15.611(a), the BAFO request must, consistent with FAR § 15.610(c)(2), advise the offeror that its proposal contains a disqualifying deficiency. See Department of the Navy--Recon., B-250158.4, May 28, 1993, 93-1 CPD ¶ 422.

Discussions cannot be meaningful if the agency fails to advise the offeror, in some way, of such proposal deficiencies. Mikalix & Co., 70 Comp. Gen. 545 (1991), 91-1 CPD ¶ 527; E.L. Hamm & Assocs., Inc., B-250932, Feb. 19, 1993, 93-1 CPD ¶ 156. Additionally, an agency may not mislead an offeror during discussions into responding in a manner that does not address the agency's concerns. Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424.

¹⁴The contracting officer testified that she considered reopening discussions again when Price Waterhouse's level of effort was found unacceptable, but decided not to do so because she believed there "was no new information to relay to Price Waterhouse," and that the May discussions had adequately apprised that firm of GSA's concerns regarding its level of effort. Tr. at 88, 150-151.

¹⁵On September 1, GSA notified our Office that it had determined that continued contract performance would be in the best interest of the government, notwithstanding the pending protest, pursuant to the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(2) (1986).

The agency claims that it discharged its obligation to conduct meaningful discussions on May 27, when GSA informed the protester that its labor hours were low in relation to the government estimate and gave the protester an opportunity to submit a revised proposal. Thus, GSA essentially asserts that, even if the SSEB had then read Price Waterhouse's entire revised proposal showing the hours declining from (deleted) labor hours and judged it unacceptable, the subsequent BAFO requests to the protester did not need to state that the protester's labor hours were considered too low, and the agency could simply wait to reject Price Waterhouse's revised proposal.

Price Waterhouse argues that GSA failed to conduct meaningful discussions, by issuing the firm two BAFO requests that never mentioned that the agency did not accept the protester's significantly increased and justified level of effort, even though the agency's ultimate evaluation of this level of effort rendered Price Waterhouse's proposal technically unacceptable.

Certainly, agencies are not to "coach" offerors or engage in technical leveling, i.e., helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussions. FAR 15.610(d)(1). On the other hand, if a proposal is included in a second competitive range because it has a reasonable chance for award, then the agency must point out a deficiency making the proposal unacceptable. We agree with Price Waterhouse that it was not accorded meaningful discussions in two respects. First, Price Waterhouse reasonably interpreted the fact that GSA continued the firm's proposal in the competitive range, requesting two subsequent BAFOs, to mean that GSA had evaluated its revised proposal with an increased level of effort as at least technically acceptable. In fact, this is exactly what GSA had done; at the time of both BAFO requests, the SSEB had evaluated the protester's revised proposal as technically (deleted) and the contracting officer had issued the BAFO requests based upon this assumption. In this way, the BAFO requests, which did not inform Price Waterhouse that the revised level of effort was considered deficient, induced Price Waterhouse to stand by a proposal that was technically unacceptable.

Second, the misleading nature of GSA's BAFO requests was exacerbated by GSA's encouragement to Price Waterhouse to change its initially proposed, constant level of effort to a declining level of effort for the option years. While the record reflects that GSA at some point disavowed the view, expressed in the RFP amendment and in Price Waterhouse's April 6 discussion question, that offerors could expect a declining level of effort in the contract

option years,¹⁶ Tr. at 107-108, 110, GSA failed to inform Price Waterhouse that it should no longer expect such efficiencies in the option years.¹⁷ Yet, it was the declining level of effort that Price Waterhouse was encouraged to propose during the option years that ultimately led to its disqualification, given that GSA found a constant [deleted]-hour level of effort to be acceptable, but was not prepared to accept the lower hours proposed for the option years. See DTH Mgmt. Group, B-252879.2, Oct. 15, 1993, 93-2 CPD 227 (agency advised protester that its price was too low, but changed its opinion and awarded to offeror with lower price).

Under the circumstances here, the agency failed in its duty to conduct meaningful discussions when it twice requested BAFOs from Price Waterhouse without advising the firm that its otherwise [deleted] proposal contained a disqualifying deficiency that the agency reasonably should have detected and that was susceptible of being made acceptable. See National Medical Staffing, Inc.; RP/Healthcare Professionals, 70 Comp. Gen. 505 (1991), 91-1 CPD ¶ 486. This is so even though Price Waterhouse's level of effort was the previous subject of discussions because the agency, by twice requesting BAFOs from Price Waterhouse, reasonably led the firm to believe that its revised proposal--which had significantly increased and justified the proposed level of effort---contained no disqualifying deficiencies. Id.

We note that the agency had an opportunity to rectify its oversight regarding Price Waterhouse's proposal, when it reopened discussions with the third offeror to provide that firm with an opportunity to submit a BAFO that addressed an

¹⁶The SSEB post-BAFO report is the first document to state that the SSEB expected little or no efficiencies from the initial year's level of effort during the option years.

¹⁷While the SSEB chairman testified at the hearing that she may have advised the protester not to expect efficiencies or a reduced level of effort in the option years, she was "not quite sure." Tr. at 28, 80-81. This testimony does not persuade us that GSA advised the protester during oral discussions not to expect such efficiencies, especially since the SSEB was then laboring under the misconception that the protester had offered a constant level of effort and since the protester did not eliminate the declining level of effort for its option years in its subsequent proposal revisions. Moreover, Price Waterhouse has provided affidavits from its representatives insisting that they were never apprised that a constant level of effort was anticipated.

evaluated, understated level of effort. Notwithstanding its decision to reopen discussions and request a second round of BAFOs solely to allow this third offeror to raise its level of effort to an acceptable level, the agency did not review Price Waterhouse's level of effort, which it determined unacceptable shortly thereafter.

Arthur Andersen asserts that, by omitting the declining labor hours schedule from its technical proposal, Price Waterhouse "misled" the agency into believing that it had proposed a constant [deleted] labor hours per year and precluded the agency from identifying the latent proposal deficiency to Price Waterhouse in the BAFO requests. There is no evidence that Price Waterhouse's proposal was intended to mislead, or should have misled, GSA during its evaluation. On the contrary, Price Waterhouse formatted its proposal as requested by GSA, and GSA does not blame Price Waterhouse's proposal format for its acknowledged misreading of the Price Waterhouse proposal. Tr. at 61-62.

We conclude that GSA failed to conduct meaningful discussions with the protester regarding the labor hours issue. We recommend that GSA reopen negotiations and request a new round of BAFOs. If an offeror other than Arthur Andersen is selected for award as a result of the agency's reevaluation, GSA should terminate Arthur Andersen's contract.¹⁸ We also find that Price Waterhouse is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1993). In accordance with 4 C.F.R. § 21.6(f)(1), Price Waterhouse's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to GSA within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States

¹⁸Because the agency authorized performance of the contract as being in the government's best interest, notwithstanding Price Waterhouse's pending protest, we make our recommendation without regard to any cost or disruption from terminating, recompeting, or reawarding the contract. 31 U.S.C. § 3554(b)(2) (1988).