



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

REDACTED VERSION

Decision

Matter of: Milcom Systems Corporation

File: B-255448.2

Date: May 3, 1994

Daniel R. Weckstein, Esq., Howard W. Roth, Esq., and Arthur Serratelli, Esq., Vandeventer, Black, Meredith & Martin, for the protester.

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Eric A. Lile, Esq., and Michael S. Roys, Esq., Department of the Navy, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where request for proposals in a negotiated defense agency procurement advised offerors of the agency's intention to award a contract without discussions, agency properly could conduct discussions with competitive range offerors where discussions were believed necessary to determine the proposal most advantageous to the government.

2. Where request for proposals (RFP) required offerors to state their policy on the use of uncompensated overtime and cognizant Defense Contract Audit Agency (DCAA) representatives told contracting agency officials that awardee's practice was not to use uncompensated overtime, agency reasonably accepted awardee's best and final offer statement confirming DCAA advice that its policy was not to use uncompensated overtime and, consistent with the RFP evaluation scheme, had no reason to conclude that awardee's performance would be degraded by using uncompensated overtime.

The decision issued May 3, 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]."

3. Protest alleging that awardee's proposed labor rates are less than the Service Contract Act wage rates for an indefinite quantity, time and materials contract is denied where the request for proposals required offers to propose labor rates on a fixed-price per hour basis, and awardee's offer did not show any intent to violate the Service Contract Act.

4. Protest that agency failed to conduct a detailed cost analysis is denied where agency conducted a proper price analysis and request for proposals: solicited offers for an indefinite quantity, time and materials contract, with fixed hourly labor rates; did not require submission of cost or pricing data because it was anticipated that there would be adequate price competition and, in fact, adequate competition was attained; and did not require agency to perform a cost analysis, but instead, required only that contracting officer determine whether proposed prices were "fair and reasonable."

DECISION

Milcom Systems Corporation (Milcom) protests the Department of the Navy's award of a contract for external communications installation services to Resource Consultants Inc. (RCI) pursuant to request for proposals (RFP) No. N00612-93-R-7302. Basically, the protester alleges that the Navy improperly: (1) did not award the contract on the basis of initial proposals without discussions, (2) did not consider the risks for uncompensated and under compensated overtime associated with RCI's proposal or RCI's failure to propose wage rates equal to or greater than the rates required under Service Contract Act, and (3) failed to perform an adequate cost realism analysis.

We deny the protest.

Issued by the Naval Supply Center¹ on December 29, 1992, the RFP solicited offers for services for:

"the design, development, and/or modification of engineering drawings, list of materials, technical data and/or specifications, development

¹Now called the Fleet and Industrial Supply Center.

of test/checkout procedures, and fabrication, installation, repair, field change, and modification of electronic/electrical equipment, and systems for submarine/surface ships."

The RFP contemplated award of an indefinite quantity, time and materials contract, with fixed hourly labor rates, for a base period of 1 year and contained options for 2 additional years. The Navy would order specific tasks by issuing delivery orders negotiated with the contractor using the labor rates set forth in the contract.

The RFP stated that award would be made to the offeror whose proposal was considered most advantageous to the government on the basis of price and other factors, including: (1) detailed technical approach, (2) personnel qualifications, (3) corporate experience, (4) management plan, and (5) facilities. The RFP further stated that "other factors" would be weighted two and one-third times more than price.² However, the RFP stated: "[w]here competing proposals are found to be substantially equal technically, price will be the controlling factor in award."

Eight offers were received by the March 25, 1993, due date for receipt of initial proposals. After evaluation of initial offers, all eight offers were considered to be in the competitive range. Written and oral discussions were conducted with all competitive range offerors, and all eight submitted best and final offers (BAFO) by the July 13 closing date.

Evaluation of BAFOs resulted in Milcom's and RCI's BAFOs receiving the highest combined cost/technical ratings, as follows:

²In other words, other factors were worth 70 percent and price worth 30 percent of the overall evaluation.

Offeror	<u>Milcom</u>	<u>RCI</u>
Total Price	{DELETED}	\$37,481,591
Raw Technical Points	{DELETED}	{DELETED}
Price Points ³ (weighted @ 30%)	{DELETED}	{DELETED}
Technical Points ⁴ (weighted @ 70%)	{DELETED}	{DELETED}
Total Score (weighted cost + weighted technical points combined)	96.19	96.86

The third and fourth highest-rated offers received total scores of 97.82 and 96.38 points, respectively.

The contract review board determined⁵ that there were "no significant differences" demonstrated in the four highest-rated proposals (including Milcom's and RCI's). Because the four highest-rated proposals were essentially technically equal, the board recommended that the contract be awarded to RCI because it was the lowest-priced offer. The contracting officer concurred and awarded the contract to RCI on September 9, 1993. After a debriefing conference and receipt of documents requested of the Navy under the Freedom of Information Act, Milcom filed its initial protest in our Office on October 15. Subsequently, by letter of December 21, Milcom filed its comments on the Navy's report and raised additional protest grounds.

The protester has alleged a number of improprieties in the procurement and has submitted extremely voluminous arguments to support its allegations. We will not restate and discuss

³The lowest-priced offer received 30 points, while higher-priced offers received proportionately less points. For example, RCI's lowest-priced offer (\$37,481,591) received the maximum price score (30 points), while Milcom's next low-priced offer {DELETED} received {DELETED}.

⁴The highest technically rated proposal received the maximum weighted technical score (70 points), while lower technically rated proposals received proportionately less weighted technical points. For example, the highest technically rated proposal ({DELETED} raw technical points) received 70.00 weighted technical points, while Milcom's second highest technically rated proposal ({DELETED} raw technical points) received {DELETED} weighted technical points.

⁵Business clearance memorandum dated August 26, 1993.

the details of each argument here. However, we considered all of the arguments raised by Milcom, the Navy, and RCI, as well as the rest of the record in resolving the protest.

The protester contends that, under the terms of the RFP, the Navy was required to make award on the basis of initial proposals without holding discussions and allowing offerors to submit BAFOs. Had award been made on the basis of initial proposals, Milcom asserts, it would have been selected for award because its offer was "high technical and low in price of all those offers that were realistic." Milcom argues that since RCI's initial proposal price [DELETED] was [DELETED] lower than RCI's BAFO price (\$37,481,591) the Navy should have rejected RCI's initial offer as unrealistically low priced.

The record shows that after evaluating initial proposals on the technical/management factors, the evaluators indicated⁶ that every proposal contained "discrepancies" or weaknesses but that the three highest-rated offers, including Milcom's and RCI's, were "highly satisfactory." After examination of price proposals, the contract review board determined⁷ that RCI's initial proposal received the highest combined cost/technical score while Milcom's received the second highest combined score. Because RCI's proposal was the lowest-priced proposal and had received the highest combined cost/technical score, the board determined that award to RCI would be in the best interests of the government and recommended that the contract be awarded to RCI without discussions. However, the board's recommendation was rejected by the approving official because RCI's proposal "failed to address the issue/policies on uncompensated overtime as required by the solicitation." Therefore, in order to determine which proposal was most advantageous to the government, the Navy conducted discussions with and solicited BAFOs from all eight offerors.

The RFP incorporated Federal Acquisition Regulation (FAR) § 52.215-16(c) (Alternate III) (Aug. 1991), which states in pertinent part:

"The Government intends to evaluate proposals and award a contract without discussions with offerors. Therefore, each initial offer should contain the offeror's best terms from a cost or

⁶Memorandum dated June 11, 1993.

⁷Business clearance memorandum dated June 9-15, 1993.

price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary." [Emphasis added.]

Thus, the RFP expressed the agency's intent to award the contract based on initial proposals, but also advised that discussions would be conducted if "necessary."

In view of the RFP's clear notice that discussions might be held, and because the FAR at 15.609(a) directs that all proposals that have a reasonable chance of being selected for award be included in the competitive range, we cannot fault the Navy for deciding to hold discussions rather than to award on an initial proposal basis. See Perez Housing Maintenance, B-249309, Nov. 12, 1992, 92-2 CPD ¶ 341. Moreover, since RCI proposed the lowest price and the Navy reasonably believed that its failure to address the uncompensated overtime issue was correctable, we think the Navy reasonably included RCI's proposal in the competitive range. Id. Furthermore, once the Navy opened discussions, RCI was then free to revise its cost and technical proposals and to address the uncompensated overtime policy requirement. Id.; Fordel Films, Inc., B-186841, Oct. 29, 1976, 76-2 CPD ¶ 370.

The protester contends that the Navy improperly did not consider the risks relating to RCI's policy of using uncompensated and under compensated overtime and RCI's failure to propose required Service Contract Act wage rates. According to Milcom, RCI's proposal violates the Service Contract Act requirement that nonprofessional employees be

Milcom also contends that the Navy improperly engaged in technical leveling during discussions with RCI. In support of this assertion, Milcom simply states that "a large jump in RCI's technical scoring occurred between the original offer and the BAFO." Technical leveling means helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussions. FAR § 15.610(d). Here, the Navy held only one round of discussions and requested BAFOs only once, and, therefore, there was no opportunity for procurement officials to engage in technical leveling. See CBIS Fed. Inc., 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308. Moreover, the protester has provided no evidence, and we see nothing in the record, to suggest that agency officials improperly assisted RCI during discussions to improve its technical rating. Contrary to Milcom's assertion, the record shows that RCI's initial proposal increased only 1.26 points based on its BAFO. Thus, there is no merit in Milcom's contention that the award to RCI resulted from improper technical leveling.

compensated at a time and a half or double time rate for overtime and holiday work, respectively. Milcom states that its examination of RCI's cost proposal revealed that RCI does in fact have a policy of using uncompensated overtime in nonprofessional labor categories and that RCI is not paying its nonprofessional employees time and a half for overtime. As an example, Milcom points out that for the Drafter I labor category, RCI's proposed straight time hourly rate was [DELETED] while its overtime rate was [DELETED] per hour. Therefore, Milcom concludes that RCI employees will be required to work overtime and holiday hours without adequate compensation.

To demonstrate that RCI has a policy of using uncompensated overtime, Milcom cites RCI's proposed wage rates for 12 types of "nonprofessional" employees, falling within 8 different labor categories.⁹ However, the labor categories relied upon by Milcom were all included in the Service Contract Act wage determination issued for this procurement and, generally, are not relevant to determining whether uncompensated overtime will be used by RCI. Section 252.237-7019 of the Defense Federal Acquisition Regulation Supplement, which was incorporated into the RFP, defines uncompensated overtime as "hours worked in excess of an average of 40 hours per week by direct charge employees who are exempt from the Fair Labor Standards Act . . . without additional compensation." The labor categories cited by the protester are all service employees covered by the Service Contract Act, 41 U.S.C. § 351 et seq. (1988), and the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1988). Since these types of employees are not exempt from the Fair Labor Standards Act (and would be entitled to overtime pay) by definition the use of the term uncompensated overtime is inapposite to them.

The RFP, however, listed five other types of workers¹⁰ that were not included in the wage determination for this procurement. Depending upon the actual work performed by these employees, they would probably be exempt from Fair Labor Standards Act coverage as "bona fide executive, administrative, or professional" employees. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541 (1993). Therefore, Milcom's

⁹The labor categories are: engineering technician, drafter, clerk/typist, electronics technician, welder, supply technician, electronics assembler, and laborer.

¹⁰Dubbed "professional labor" by Milcom, these positions were: program manager, senior electronics engineer, electrical/electronics engineer, mechanical/structural engineer, and senior technical writer.

argument regarding the use of uncompensated overtime by RCI is in fact pertinent to these employees.

The RFP required offerors to identify any proposed uncompensated overtime hours and to state their policy regarding its use. Regarding the effect of uncompensated overtime on the price evaluation, the RFP stated:

"Offers will be evaluated to determine if uncompensated overtime is used and if the use of uncompensated overtime will degrade the level of technical expertise needed to fulfill the Government's requirements. Proposals which include unrealistically low rates, or which do not otherwise demonstrate cost realism, will be considered in the risk assessment and evaluated in accordance with that assessment."

The initial proposal submitted by RCI did not contain any policy statement regarding uncompensated overtime as required. The Navy examined an RCI proposal submitted in a different procurement and ascertained that RCI's policy is not to use uncompensated overtime. Navy officials also discussed the matter on several occasions with Defense Contract Audit Agency (DCAA) representatives who were familiar with RCI and its payroll and accounting systems. The DCAA officials explained that RCI uses a payroll system that requires input of all hours worked by its employees and indicated that it was RCI's practice not to use uncompensated overtime. Apparently, the evaluators were satisfied that RCI's policy was not to use uncompensated overtime, because they recommended award to RCI on an initial proposal basis without discussions as the "greatest value" to the government and stated that RCI's initial proposal was "fully compliant with the solicitation provisions" and was "technically acceptable."¹¹

Notwithstanding the evaluators' recommending award to RCI on an initial proposal basis, the Navy held discussions because RCI's initial proposal did not address its policy on uncompensated overtime as required. During discussions, the Navy asked RCI to state whether the use of uncompensated overtime was included in its proposal. In its BAFO, RCI responded:

"RCI does not propose uncompensated overtime. None of our personnel are required to work in excess of 40 hours per week. RCI's timesheet keeping procedures do require employees to record all hours worked."

¹¹Business clearance memorandum dated June 9, 1993.

RCI added that its prices reflected some instances where, due to work load demands, its exempt employees might work more than 40 hours in a week; RCI indicated that depending upon the circumstances it might pay those employees for time worked in excess of 40 hours, or it might not. RCI stated:

"RCI would estimate, therefore, that during performance of this contract some small percentage of the hours worked on the contract by exempt personnel may be hours for which RCI is either not compensating or only partially compensating the individual directly for working the 'excess' hours."

The Navy evaluated BAFOs and was satisfied with RCI's stated policy of not using uncompensated overtime.

The RFP did not say that uncompensated overtime could not be used or that an offeror would be disqualified if its policy was to use uncompensated overtime. The RFP merely required offerors to state their policy regarding uncompensated overtime. Where uncompensated overtime was proposed, the RFP indicated that the Navy would evaluate the proposal to determine whether the use of uncompensated overtime would degrade the offeror's performance. The Navy discussed the matter with cognizant DCAA employees, examined an RCI proposal submitted for another procurement, and held discussions with RCI. All of these actions led to the same conclusion--that RCI's policy was not to use uncompensated overtime. RCI confirmed that its policy was not to use uncompensated overtime except in a few instances. In these circumstances, the Navy reasonably accepted RCI's statement regarding its uncompensated overtime policy and had no reason to conclude that RCI's performance would be degraded thereby. We believe that the Navy's actions were reasonable and consistent with the RFP's evaluation scheme.

The protester's contention that the Navy failed to consider that RCI was proposing labor rates that were less than the minimum Service Contract Act wage rates prescribed by the Secretary of Labor for this procurement provides no basis for overturning the award. This RFP required offers to state firm, fixed prices for each category of labor; while the quantity of labor actually required to be performed was indefinite, delivery orders would be issued for each task based on the fixed labor rates stated by the offer and incorporated into the contract. On a fixed-price contract such as this, the awardee is required to pay employees the applicable Service Contract Act wages out of whatever price it has offered the government; quoted labor rates that are less than the required Service Contract Act minimum rates may simply constitute a below cost offer and are legally

unobjectionable. See PacOrd, Inc., B-253690, Oct. 8, 1993, 93-2 CPD ¶ 211; Solid Waste Servs., Inc., B-248200.4, Nov. 9, 1992, 92-2 CPD ¶ 327; SSDS, Inc., B-247596.2, Aug. 7, 1992, 92-2 CPD ¶ 90.¹²

Milcom alleges that the Navy did not conduct an adequate cost realism analysis as required by the RFP. According to the protester, RCI's proposed prices are unrealistically low and the Navy should have adjusted RCI's prices upward to realistic levels. Had an adequate cost realism analysis been performed and RCI's prices been adjusted upward to reflect realistic rates, Milcom asserts, its evaluated price would have been lower than RCI's evaluated price, entitling Milcom to award of the contract.

The RFP stated that price would be an important factor in the award decision, and that it would be the controlling factor if competing proposals were found to be substantially technically equal. The RFP also stated that the contracting officer would have to determine whether proposed prices were "fair and reasonable." However, the RFP did not state that a cost analysis would be performed. In fact, the only mention of cost realism in the RFP, quoted above, was concerned with the potential for unrealistically low rates resulting from the proposed use of uncompensated overtime.

While a cost analysis was neither required nor conducted, the Navy did conduct a price analysis as required in FAR § 15.805-1(b) using some of the price analysis techniques set forth in FAR § 15.805-2. The Navy compared RCI's proposed labor rates to the labor rates proposed in the other offers. The Navy also compared RCI's proposed rates for professional employees to those proposed by Milcom in this procurement, to Milcom's rates under the predecessor contract, and to the rates contained in other Navy contracts for similar types of labor. As a result, the Navy concluded that RCI's rates were realistic.

We have no reason to question the Navy's price analysis methodology. The RFP required the Navy only to determine whether offers were "fair and reasonable"; it did not specify the manner or degree of analysis to which proposals would be subjected. Moreover, the RFP did not provide any mechanism for upward adjustment of prices in the event agency officials thought an offer was too low for a particular element, and, therefore, the agency could not

¹²We note that the labor rates set forth in RCI's BAFO are not the rates that RCI is required to pay to its employees, but instead, are the rates the government is required to pay to RCI for work performed under the contract. [DELETED].

properly make upward adjustments in proposals since this was essentially a fixed-price contract. See PHP Healthcare Corp; Sisters of Charity of the Incarnate Word, B-251799 et al., May 4, 1993, 93-1 CPD ¶ 366. We also note that the total price proposed by KCI is only about [DELETED] percent lower than the total price proposed by Milcom. In these circumstances, we have no basis to question the Navy's determination that RCI's proposed prices were fair and reasonable.

The protest is denied.

Robert P. Murphy
Acting General Counsel