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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

82-2 CPD 204

FILE: B-205829

DATE: September 8, 1982

MATTER OF: CMI Corporation

DIGEST:

1. It was improper for contracting agency to add prices for services to offer where contracting agency could not determine if offer included those services. Proper course would have been to conduct discussions to clarify matter and then to permit offeror to revise offer if necessary.
2. Award of contract on a non-fixed-price basis is improper where RFP required fixed-price offer.

CMI Corporation (CMI) protests the award of a subcontract for a computer and related hardware and software, installation, and maintenance to International Business Machines Corporation (IBM) under request for proposals (RFP) No. 5316-AM issued by ICI Americas, Incorporated (ICIA). ICIA is the prime operating contractor of the Indiana Army Ammunition Plant, a Government-owned (Army), contractor-operated facility located at Charlestown, Indiana.

CMI argues that ICIA improperly evaluated its price by adding charges to it that should not have been added. Additionally, CMI contends that IBM did not offer a fixed price as required by the RFP and, thus, comparison with CMI's fixed-price offer was invalid.

We sustain the protest.

As a preliminary matter, our Office does not consider protests of subcontracts except in certain limited circumstances. Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. One of those circumstances is where the subcontract is awarded by a prime contractor who operates a Government-owned facility. Therefore, we will consider this protest. We note that none of the parties has argued that we should not consider the protest.

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The solicitation provided that award would be made to the vendor with the technically acceptable system at the lowest overall cost for the system life of 96 months. The RFP also stated that, to be technically acceptable, the offeror must meet all mandatory requirements. Additionally, the term of the contract if the equipment is leased is 1 year. The solicitation provided further that the contract is renewable at the option of ICIA at the prices listed in the contractor's proposal. The cost information section of the RFP asked offerors to provide unit prices and tables showing the system life cost for purchase, lease or special plans for hardware, software, maintenance and support/services.

Proposals were received from IBM and CMI offering essentially the same hardware configuration--an IBM 4331 central processing unit and associated hardware. However, CMI's proposal did not offer maintenance or software, but suggested instead that ICIA purchase those separately from IBM's Federal Supply Schedule contract. Both proposals offered purchase, lease and lease with option to purchase (LWOP) plans. In addition, IBM offered what it calls its Alternate Purchase Plan. IBM's proposal did not offer a fixed price for the lease or LWOP plans. IBM's cost tables contained a statement that prices each year would change with the price changes in its Federal Supply Schedule contract.

Notwithstanding these deviations from the terms set forth in the RFP, ICIA determined that both proposals were technically acceptable and that "the only area for evaluation in the proposals is the difference in the pricing." Proposals were evaluated and price comparisons made by adding IBM's Federal Supply Schedule prices for maintenance and software to CMI's prices, since they were not included. Before any action was taken based on the initial evaluation, ICIA received authority from the Army to lease the system now and to seek funding for a future purchase. Also, IBM's offer was based on 1981 prices. Consequently, ICIA decided to obtain new prices and asked both offerors for best and final offers, which were submitted on essentially the same bases as the initial offers, but with different prices.

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According to ICIA, it now--

"* * * gained insight into the level of effort needed to efficiently bring about the generation of the Disc Operating System/Virtual Storage Extended system and conversion of the operational systems from the current environments to the new environment. This insight negates the original determination that the only area for evaluation is the difference in 'as bid' pricing. The evaluation of the proposals must now include impact on systems conversion as it relates to the technical support from the vendors and availability of test time prior to installation."

ICIA evaluated the prices submitted for a 24-month LWOP. Based on the prices submitted, CMI was low. ICIA then added a total of \$21,480 to CMI's price to cover computer time and engineering support services for the conversion, which it claims is required by the RFP and was provided for in IBM's offer. According to ICIA, it could not discern from CMI's proposal whether it had included these items. With that amount added to CMI's offer, IBM's offer was the lowest. ICIA awarded the contract on an LWOP basis to IBM.

CMI argues that engineering support cost should have been added to IBM's price as well, since CMI believes that IBM did not include the amount in its offered price and will charge separately for it under its Federal Supply Schedule contract. CMI contends that the RFP did not require offerors to provide the computer time for conversion and, therefore, addition of any price for that was improper. CMI also argues that since IBM's price was not fixed, it was impossible to compare with CMI's and IBM was not eligible for award.

The Army admits that the procurement conducted by ICIA was deficient. The Army states that ICIA should have held discussions with CMI to resolve the uncertainty over whether its proposal included the amounts added for computer time and engineering services. However, the Army argues that CMI was not prejudiced because discussions with CMI after its protest was filed revealed that

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it, in fact, had not included the items. ICIA priced these items at IBM's Federal Supply Schedule price. This was reasonable, according to the Army, because CMI would have had to contract with IBM for the items in order to provide them, since it did not have the capability.

Concerning CMI's argument that the RFP did not require offerors to provide computer time for conversion, the Army contends that the requirement to provide the time and to price it was clearly stated in the mandatory specifications of the RFP.

The Army also admits that comparing IBM's nonfixed price to CMI's fixed price was a deficiency, since all offerors must be permitted to submit offers on an equal basis. However, in response to the protest, the Army prepared a new analysis of IBM's offer using historical price data to project future price changes in IBM's Federal Supply Schedule. The Army states that the new analysis--

"* * * indicates that award to IBM would have resulted in any event. Therefore, to say that CMI is entitled to award because theirs is the low offer is speculative at best."

The Army also contends that CMI could have been declared technically unacceptable, since its proposal did not meet all of the mandatory requirements and that award to CMI would have been inappropriate.

Finally, the Army argues that termination of the contract with IBM and resolicitation are not practicable because the costs to the Government would be excessive.

As the Army recognizes, our standard for review of procurements by prime operating contractors is that the procurement must be "consistent with and achieve the same policy objectives as the Federal statutes and regulations" which apply to direct procurements by Federal agencies. Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10. Using that standard, we agree with the Army that this procurement was deficient in several ways.

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First, ICIA apparently decided after receipt of initial proposals that providing software and maintenance was no longer a mandatory requirement, since CMI's offer was considered acceptable on that basis at that time. When a material requirement is relaxed after receipt of initial proposals, at a minimum, all offerors should be notified of the relaxed requirements by an amendment to the solicitation. Defense Acquisition Regulation (DAR) § 3-805.4 (1976 ed.); Computek Inc., et al., 54 Comp. Gen. 1080 (1975), 75-1 CPD 384. This was not done by ICIA.

Second, generally, when there are deficiencies or ambiguities in a proposal which is within a competitive range, attempts should be made to resolve the problems through meaningful discussions which point out the deficiencies to the offeror and give it a chance to revise its proposal. 10 U.S.C. § 2304(g) (1976); 52 Comp. Gen. 409 (1973). Therefore, CMI should have been notified that ICIA could not ascertain whether the computer time and engineering charges were included in its proposal and CMI should have been permitted to clarify the situation. We agree with the Army that the RFP asked for the services and that they were included in IBM's proposal. However, we cannot agree that merely adding IBM's schedule prices to CMI's offer was appropriate. Given the opportunity, CMI might have provided the services itself or from another source at a lower price.

Finally, the RFP clearly contemplated fixed-price offers, as was expressed in the evaluation criteria and the option clause. The contract awarded to IBM was not a fixed-price contract. Consequently, the award to IBM was not made in accordance with the terms of the RFP nor were the offerors treated equally. This is clearly improper, as the Army admits. See, e.g., PRC Information Sciences Company, 56 Comp. Gen. 768 (1977), 77-2 CPD 11. We disagree with the Army's assertion that CMI was not prejudiced. The analysis of IBM's prices with estimated increases is sheer speculation and cannot be used as a basis to conclude that IBM would have been awarded the contract in any event. Also, our review of that analysis is not in agreement with the Army's. It appears to us

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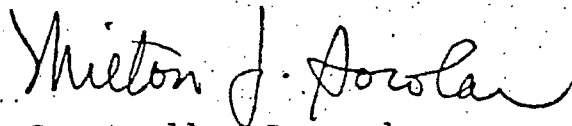
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that IBM's projected price on the 24-month LWOP would be higher than CMI's, even with the disputed amounts added into CMI's price. The only lower IBM price is the alternate purchase plan, which was not considered by ICIA and which was not the basis for award of the contract. That certainly cannot be used as a basis for concluding that award of the contract would have been made to IBM under any circumstances.

Concerning the Army's assertion that CMI was not prejudiced because its proposal could have been rejected as technically unacceptable since it did not include the mandatory software and maintenance, we cannot agree. ICIA was aware that the proposal did not include those items, but found it to be technically acceptable. It appears that ICIA really did not need software and maintenance from the same vendor that provided the hardware.

Concerning the matter of an appropriate remedy, we agree with the Army that termination of the present contract is not practicable because the contract is nearly completed. However, we recommend that ICIA not exercise the option to renew the contract and instead compete the remainder of the requirement. Since ICIA apparently does not need software and maintenance in a package with the hardware, we recommend that the new RFP reflect that. The effect will be to increase the range of potential competitors to other vendors of equipment like CMI who might have competed had they known that hardware could be offered separately.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency involved to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations concerning the actions taken with respect to our recommendation.



Acting Comptroller General
of the United States