DECISION

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

FILE: B-184495 DATE: February 26, 1976

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MATTER OF: Union Carbide Corporation

DIGEST:

1. Failure of procuring activity to inform competing offeror in negotiated procurement for fixed-price contract that Government would directly reimburse contractor for interest on borrowings to finance plant expansion when reimbursement is prohibited by agency procurement regulation denied such offeror opportunity to compete on equal basis.

2. Although technical "transfusion" of one offeror's unique or innovative idea to other offerors is prohibited, offeror's request for direct reimbursement by Government of its interest expense is not such a unique or innovative idea, but is suggestion for departure from procurement "ground rules" which, if accepted by agency, must be communicated to all competing offerors.

Union Carbide Corporation has protested the award of a contract by the National Aeronautics and Space Administration (NASA) to Air Products and Chemicals, Inc. (APCI), for NASA's east coast liquid hydrogen requirements (primarily for the space shuttle program) for the period 1975 to 1987. Union Carbide claims that NASA did not conduct meaningful discussions with it and did not provide it with an opportunity to compete on an equal basis with APCI.

The procurement was initiated with the issuance of request for proposals (RFP) No. 8-1-4-18-00009 by NASA's Marshall Space Flight Center. The RFP stated that NASA anticipated possible multiple awards for at least one portion of the contract period and it encouraged proposers with little or no liquid hydrogen production capability to submit proposals to fulfill at least a portion of the total requirement. The award of fixed-price contracts was envisioned.

On January 17, 1975, proposals were received from APCI and Union Carbide. APCI proposed to expand its current production facilities and to provide approximately 95 percent of the total requirement. Union Carbide did not propose to expand its facilities, and offered only 26 percent of the total requirement. Although neither firm was exactly compliant with the RFP and both proposed additional conditions and terms not contained in the RFP, NASA decided to conduct discussions with both offerors. This decision is explained as follows:

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"Since the two proposals were so widely divergent in terms of approach and amount of product offered, they were not truly competitive in that they were not susceptible of direct comparison. However, since the RFP stated that offers for less than the total requirement would be considered, the proposals were evaluated on the basis of the period of time for which each offered to furnish the product."

At the conclusion of discussions and after submission of best and final offers, NASA's Source Selection Official (SSO) selected both firms for further negotiations. As explained by the SSO:

"* * * Although APCI offered a substantially greater percentage of the total NASA requirement than did Union Carbide, it appeared that LH2 [liquid hydrogen] might have to be procured from both suppliers to meet the total requirement. * * *

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"Because of our inter-related uncertainties regarding the peak requirements, product availability, plant expansion possibilities, availability of private financing for expansion, and ultimate probable cost to the Government, we decided to pursue these and other related considerations with both firms prior to reaching a final selection decision. * * *"

The SSO also recognized that "neither firm was fully compliant with" the RFP ground rules and that "it might become necessary to enlarge upon, if not waive, certain of them in order to be able to ultimately award an acceptable contract." Accordingly, the program office was instructed that it would be permissible to relax the original ground rules if necessary, "but only if both firms were given a substantially equal opportunity to respond to the changed ground rules."

During negotiations, NASA questioned Union Carbide on the possibility of building a new facility for the production of liquid hydrogen in the vicinity of NASA facilities. Union Carbide's response essentially was that due to the high cost of financing, the energy shortage, the excess capacity of existing facilities, and the need for a peak requirement of short duration, it would be more economical to utilize existing excess capacity while retaining options to build new plant facilities in a future, more stable economic climate. APCI's approach, however, involved the proposed expansion of its New Orleans facility, to be financed with commercial loans with NASA reimbursing APCI for actual interest incurred through short- and long-term interest pass-thru provisions.

NASA ultimately decided that it would be in the best interest of the Government to accept the APCI proposal, since that firm, through the expansion of its production facilities, would be able to provide NASA with the total or near total requirement. NASA recognized that, "for all practical purposes, effective competition for the total requirement between APCI and Union Carbide was not materializing due to the wide divergence between the two in relationship to the quantities required and differences in corporate commitments to enlarge production capacities to meet the total requirement." However, it was decided that since "APCI could furnish the entire East Coast requirement at prices which would not be unreasonable when considering the quantities required, the term of the contract, the lack of existing production capacity to meet peakload requirements, and the lack of meaningful competition," award should be made to APCI.

A fixed-price requirements contract, with a basic performance term of 12 years, was awarded to APCI on June 30, 1975 in the estimated amount of $286,800,000 after NASA's Assistant Administrator for Procurement approved the inclusion of several provisions, including interest pass-thru provisions in the contract. The latter provisions require NASA to pay to APCI monthly amounts representing short-term and long-term interest on construction and capital investment loans.

Union Carbide protests NASA's failure to inform it that interest pass-thru provisions would be permitted. According to Union Carbide, NASA is prohibited from paying interest by its own regulations. Therefore, Union Carbide argues, if NASA was willing to waive its regulatory provisions for this procurement, it should have so informed Union Carbide during negotiations. NASA's failure to do so, Union Carbide claims, was a breach of NASA's duty to conduct meaningful negotiations with all offerors and denied Union Carbide all the information necessary to enable it to compete with APCI on an equal basis.

Union Carbide also protests NASA's failure to inform it during negotiations that NASA was willing to award a contract for a basic term of 12 years in lieu of the eight years specified by the RFP.

In addition, Union Carbide objects to the fact that it was not advised of the possibility that the Government might build a coal gasification plant near the contractor's production plant which would produce gaseous hydrogen, an important raw material for the production of liquid hydrogen.

It is undisputed that NASA did not inform Union Carbide that interest pass-thru provisions for financing the construction of new production facilities would be permitted. It is NASA's position that is was not required to do so because the idea for the pass-thru provisions originated with APCI rather than with NASA. The agency bases its position on NASA Procurement Regulation Directive (PRD) 70-15 (September 15, 1972), which provides that contracting officers, in conducting discussions with offerors in the competitive range, shall not "transmit information which could give leads to one proposer as to how its proposal may be improved or which could reveal a competitor's ideas."

According to NASA, "the competition was * * * primarily one of ideas or means by which more product could be made available through new or expanded production capability * * * [which] necessarily involved various financing arrangements, the scope and extent of which would be governed by each individual offeror's particular approach. * * * The exact approach taken by the proposers was left entirely up to their inventiveness and ingenuity." Thus, NASA characterizes APCI's idea that NASA directly reimburse it for interest costs as "an offeror's independent approach to solving a problem" which went " to the essence of the procurement." Under such circumstances, says NASA, it would have been improper under both PRD 70-15 and our decisions reported at 51 Comp. Gen. 621 (1972) and 52 id. 870 (1973) for it to "transfuse" APCI's innovative approach to Union Carbide. However, NASA does state that during negotiations it discussed the possibility of various financing arrangements that would permit Union Carbide to expand its plant facilities and provided Union Carbide with opportunities to propose "some form of financing arrangement to increase its plant capacity without limitation."

Union Carbide does not agree that it was provided with those opportunities. While it admits that NASA and company representatives discussed various possible financing arrangements, it states that NASA "never * * * explain[ed] that a deviation from accepted cost principles was possible in the form of interest reimbursements" and therefore Union Carbide, as "an experienced Government contractor, rightfully assumed that it would not be expected to request a deviation" of NASA regulations so as to allow for direct reimbursement of interest.

As NASA points out, we indicated in 51 Comp. Gen. 621, supra, and 52 id. 870 supra, that technical "transfusion" should be avoided. See also 50 Comp. Gen. 1 (1970). This concern over possible "transfusion" arose in the context of conflicting claims as to whether the statutory requirement for discussions had been met. 10 U.S.C. 2304(g) (1970) requires that oral or written discussions be held with all offerors in a competitive range, and we have recognized that this statutory mandate can be satisfied only by discussions that are meaningful. 51 Comp. Gen. 431 (1972); Houston Films, Inc., B-184402. December 22, 1975, 75-2 CPD 404. In many cases we have indicated that discussions, to be meaningful, must include the pointing out of deficiencies or weaknesses in an offeror's proposal. See, e.g., Austin Electronics, 54 Comp. Gen. 60 (1974), 74-2 CPD 61; 50 Comp. Gen. 117 (1970). However, we have also recognized that the statutory provision:

> "* * * should not be interpreted in a manner which discriminates against or gives preferential treatment to any competitor. * * * Obviously, disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is unfair. We agree that such 'transfusion' should be avoided. It is also unfair, we think, to help one proposer through successive rounds of discussion to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal." 51 Comp. Gen. 621, 622, supra.

Thus, we have held that the "extent and content of meaningful discussions * * * are not subject to any fixed, inflexible rule," Decision Sciences Corporation, B-182558, March 24, 1975, 75-1 CPD 175, and that what will constitute such discussions "is a matter of judgment primarily for determination by the procuring agency in light of all the circumstances of the particular procurement and the requirement for competitive negotiations * * *." 53 Comp. Gen. 240, 247 (1973). We have upheld that judgment many times in cases where some limitations were placed on the extent and content of discussions in order to avoid "transfusion" or leveling. See Sperry Rand Corporation (Univac Division), et al., 54 Comp. Gen. 408 (1974), 74-2 CPD 276; Dynalectron Corporation, et al., 54 Comp. Gen. 562 (1975), 75-1 CPD 17, and 54 Comp. Gen. 1009 (1975), 75-1 CPD 341; Raytheon Company, 54 Comp. Gen. 169 (1974), 74-2 CPD 137; 53 Comp. Gen. 240, supra; 52 id. 870, supra; 51 id. 621, supra.

Although it is clear from these cases that NASA is correct in stating that "negotiations must be conducted in a manner to avoid 'transfusion' of" an offeror's "innovative approach and ideas" to other offerors, we do not agree that the issue presented can be disposed of on that basis. In our view, the real issue here is not whether meaningful negotiations were conducted, but whether offerors were permitted to compete on an equal basis.

It is a fundamental principle of competitive negotiation that offerors must be treated equally by a procuring activity, and we have often pointed out that an essential element of that treatment involves providing offerors with identical statements of the agency's requirements so as to provide a common basis for the submission of proposals. Computek Incorporated et al., 54 Comp. Gen. 1080 (1975), 75-1 CPD 384; B-172901, B-173039, B-173087, October 14, 1971. Accordingly, we have consistently held that when there is a change in an agency's stated needs or when an agency decides that it is willing to accept a proposal that deviates from those stated needs, all offerors must be informed of the revised needs, usually through amendment of the solicitation, and furnished an opportunity to submit a proposal on the basis of the revised requirements. Corbetta Construction Company of Illinois, Inc., B-182979, September 12, 1975, 55 Comp. Gen. __, 75-2 CPD 144; Computek Incorporated, et al., supra; Unidynamics/St. Louis, Inc., B-181130, 74-2 CPD 107; Annandale Service Company, et al., B-181806, December 5, 1974; 48 Comp. Gen. 663 (1969).

It is clear, we think, that a similar result is warranted when there is a change in what may be termed the "ground rules" that are applicable to the procurement. For example, in 48 Comp. Gen. 605 (1969), 47 id. 778 (1968); B-170276, March 25, 1971, and B-166072(2), March 28, 1969, we held that when an apparent noncompetitive procurement (as where a specific firm's part number is identified by the solicitation and the firm is not aware that competitive offers are being considered) in fact becomes competitive, procuring activities must amend the solicitation and provide the manufacturer of the part numbers an "opportunity to amend [its] proposals to reflect such changes as [it] might deem appropriate in light of the competitive nature of the procurement." B-176861, January 24, 1973. See also Instrumentation Marketing Corporation, B-182347, January 28, 1975, 75-1 CPD 60. Also, in Bristol Electronics, Inc., et al., 54 Comp. Gen. 16 (1974), 74-2 CPD 23, we held that an agency could properly accept a proposal which deviated from a solicitation provision establishing an option price ceiling only after the contracting officer reopened negotiations or issued an amendment to the RFP deleting the provision. Further, in 51 Comp. Gen. 272 (1971), we said that while a source selection official has the right to change the relative importance of evaluation factors, "when this occurs offerors should be informed of such revisions, and be afforded an opportunity to submit proposal revisions reflecting such changes * * *." 51 Comp. Gen. at 281.

Here, we think the ground rules were changed when NASA decided it was willing to consider APCI's request that it directly reimburse APCI for the interest expense to be incurred in connection with the financing of APCI's proposed plant expansion. Until that time, the rules governing the procurement were those set forth in the solicitation and the NASA Procurement Regulation (PR). NASA PR 15.205-17 provides that interest expense is an unallowable cost item in cost-reimbursement contracts. NASA PR 15.106 provides that the principles applicable to cost type contracts "shall be used in the pricing of fixed-price type contracts * * * whenever cost analysis is performed" but that "notwithstanding the mandatory use of these cost principles, the objective will continue to be to negotiate prices that are fair and reasonable, cost and other factors considered."

NASA suggests that these provisions should be interpreted as not prohibiting interest reimbursement in a fixed-price contract when the contract "reflects the basic thrust of the regulation which is to arrive at a fair and reasonable price * * *." In this regard, the contracting officer characterizes the agreement with APCI as merely an "advance understanding" as provided for in NASA PR 15.107. In any event, says NASA, no violation of NASA regulations has taken place because "[t]o the extent that the agreement with APCI * * * might constitute a deviation from NASA regulations," the provisions of those regulations were waived pursuant to NASA PR 1.109 when the Assistant Administrator for Procurement approved the inclusion of the interest reimbursement provisions in the APCI contract.

The question, however, is not whether there has been a violation of NASA regulations, but whether both offerors were effectively apprised of NASA's willingness to depart from the regulations. That such a departure occurred in this case, we think, is quite clear, despite NASA's suggestion to the contrary. First of all, while NASA PR 15.106 does establish fair and reasonable prices as the objective of negotiating fixed-price contracts, it does not even suggest that direct interest payments under such contracts would be permissible merely because the total cost to NASA under the contract remained reasonable.

Secondly, although subparagraph (a) of NASA PR 15.107 does provide for advance understandings as to the "reasonableness and allocability of certain items of cost [which] may be difficult to determine, particularly in connection with firms or separate divisions thereof which may not be subject to effective competitive restraints," subparagraph (b) explicitly states that "the contracting officer is not authorized by this paragraph to agree to a treatment of costs inconsistent with subparts 2 through 5. For example, an advance agreement may not provide that, notwithstanding 15.205-17, interest shall be allowable."

Thirdly, we think the interest pass-thru provisions should be recognized for precisely what they are: cost-reimbursement provisions (under an otherwise fixed-price contract) for a specific type of agreed-upon cost. As such, we think they must be regarded as subject to the cost principles of NASA PR Part 15, which of course would preclude NASA from agreeing to such provisions in the absence of a waiver under NASA PR 1.109. Thus, when NASA decided it was willing to consider the inclusion of cost-reimbursement type provisions in the contract to be awarded and was further willing to waive the provisions of NASA PR 15.205-17 in order to accommodate APCI's approach, it is our view that it changed the "ground rules" applicable to the procurement.

As indicated above, procuring activities, in order to insure that offerors are competing on an equal basis, are required to notify all such competing offerors of any change in the Government's requirements or "ground rules" and to provide them with an equal opportunity to submit offers on the basis of the change. Thus, while NASA was in no way precluded from waiving or enlarging upon the original applicable ground rules "in order to be able to * * * award an acceptable contract," it was required, as it itself recognized, to provide both firms with an "equal opportunity to respond" to the changed rules.

This essential requirement of competitive negotiated procurement was not obviated because the idea or suggestion for a particular change originated with one of the offerors. A review of our cases dealing with technical "transfusion" indicates that in almost every instance what was sought to be protected, through limited discussions with other offerors, was one offeror's ingenious or innovative idea of how to satisfy the Government's <u>stated requirements within the existing</u>

"ground rules." See Ocean Design Engineering Corporation, 54 Comp. Gen. 363 (1974), 74-2 CPD 249; Raytheon Company, supra; 52 Comp. Gen. 870 supra; B-173677, March 31, 1972, summarized at 51 Comp. Gen. 621, supra. While we have recognized that an agency may waive a specification requirement for one offeror only when that offeror's "technical breakthrough" results in a "unique and innovative design" to which the specification provision would not be applicable, see Baganoff Associates, Inc., 54 Comp. Gen. 44 (1974), 74-2 CPD 56, it is clear that here all that APCI proposed was that NASA depart from existing regulations and include special direct reimbursement of interest provisions in its contract, even though such provisions would also be inconsistent with the type of contract to be awarded.

Furthermore, while we do not find any reason to disagree with NASA's assertion that an offeror's innovative approaches are not limited to technical matters, but may also include proposed solutions of a financial or business nature, we believe that a proposal such as APCI's which calls for deviating from a Government regulation, regardless of whether it deals with technical or financial matters, is not unique or innovative in the sense that would permit the Government to keep from other offerors its willingness to grant the deviation. Rather, we think that under the basic concepts of fairness pursuant to which the Federal competitive procurement system operates, the Government's willingness to depart from the rules governing the procurement must be established as the new basis for competition for all competing offerors. To hold otherwise, we think, would substantially dilute the requirement for equal competition which is the touchstone of the procurement process.

In reaching this conclusion, we are mindful that NASA was faced with a complex and perhaps unique procurement situation involving a long-term arrangement that would insure the production and delivery of needed quantities of a critically important fuel for the space shuttle program. We further recognize that there were only a few potential suppliers of the fuel, that only two responded to the RFP, and that only one of them, APCI, seemed interested in the plant expansion which NASA believed was necessary to meet estimated peak need requirements. We appreciate NASA's desire to negotiate a contract that would effectuate the necessary long-term arrangement, and in this regard we understand NASA's willingness to include several unique provisions in the contract and to waive certain of its regulatory provisions in order to do so as part of its good faith efforts to reach agreement with an offeror.

We are also mindful of the NASA and APCI assertions that the interest pass-thru provisions merely reflect one portion of what in any event would be the total contract price and that the provisions are actually advantageous to the Government. For example, APCI states that the pass-thru concept merely "isolates a significant element that of necessity is part of the total contract price and limits it to actual cost, rather than having it lumped into the price on an estimated basis with appropriate contingency as part of the contractor's fee."

We do not believe, however, that these considerations can justify the denial of an equal opportunity to compete for one of the two offerors. Although we agree with APCI that in competing for a fixed-price contract a contractor may include interest on borrowings as an element of cost to be considered in computing its total price, we note from the record that APCI was not willing to accept a fixed-price contract which merely would have allowed it to recover its interest costs through sales of liquid hydrogen to NASA. Rather, the record shows that APCI advised NASA that a contract could not be entered into unless interest expense incurred to finance its plant construction was allowed as a straight pass-thru. It was as a consequence of APCI's position that NASA agreed to the interest pass-thru provisions.

We do not question either the authority of NASA to utilize these special contract provisions or the assertion that the provisions are advantageous to the Government. However, we think it is clear that these provisions also provided APCI with advantages it would not otherwise have had, and our concern is directed at NASA's willingness to depart from its regulations in order to use these provisions without putting Union Carbide on notice of that fact. (Although NASA does not explicitly concede that the pass-thru provisions represent a departure from the NASA PR, NASA obviously recognized that they might well be so regarded when special approval for their use was obtained. As indicated above, we believe the provisions do depart from the NASA PR).

Of course, consistent with NASA PRD 70-15, NASA could not reveal to Union Carbide details of its competitor's proposal. However, as indicated above, we do not believe that either 10 U.S.C. 2304 (g) or PRD 70-15 or decisions of this Office sanction the waiver of regulatory provisions for only one of two or more competing offerors merely because the suggestion for the waiver came from that one offeror. We think that is particularly the case where the regulation to be waived could well be a major obstacle to a more competitive proposal from the other offeror.

Here the record indicates that there was a considerable difference in the approaches taken by APCI and Union Carbide in their proposals and during the discussion and negotiation sessions with NASA. APCI proposed to furnish the bulk, if not all, of NASA's east cost liquid hydrogen requirements, based in part on a proposed plant expansion, while Union Carbide proposed to furnish only a small percentage of the requirement and declined, for several reasons, to expand its existing facilities or build new ones. It is clear, however, that Union Carbide's paramount reason for not wishing to build a new plant was the high cost of financing. Although it is apparent from the record that NASA regarded APCI's approval as more responsive to its needs, we cannot say that Union Carbide, had it been informed of the possibility of interest reimbursement (and also of a longer basic contract term), would not have submitted a proposal for at least a portion of the total liquid hydrogen requirement which would have been acceptable to NASA.

It is therefore our conclusion that NASA's negotiation of interest pass-thru provisions with APCI without informing Union Carbide that it would consider proposals which involved a departure from the NASA PR with respect to financing effectively denied Union Carbide an equal opportunity to compete. For that reason, we are recommending that negotiations be reopened with Union Carbide. Should that firm then submit a proposal, the acceptance of which would be in the best interests of the Government, then we would further recommend that NASA consider the feasibility of partially or completely (as appropriate) terminating the APCI contract for the convenience of the Government. Since NASA and APCI are now seven months into the contract, we recognize that any undue delay may adversely impact upon NASA's mission requirements. We therefore would expect that both NASA and Union Carbide will act as expeditiously as possible in response to these recommendations so as to minimize any possible disruption to NASA's space shuttle program.

As this decision contains recommendations for corrective action to be taken, it has been transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 84 Stat. 1170, 31 U.S.C. 1172 (1970).

Thomas B. Staats

Comptroller General
of the United States