DOCUMENT RESUME

03251 - [A2173291]

[Alleged Improper Contract Award]. B-186942. August 2, 1977. 5 pp.

Decision re: R. L. Banks, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Arthur Young and Co.; Dravo Corp.; Federal Railroad Administration; Gibbs and Hill.
Authority: B-184658 (1976). B-182742 (1975). B-181741 (1974). B-187547 (1977). B-187116 (1977). 52 Comp. Gen. 198.

The protester alleged that his competitor's bid should not have been accepted because: a subcontractor had a conflict of interest, evaluation criteria were improperly applied, and negotiations were not conducted fairly. The facts do not show that the alleged conflict of interest will affect contract performance. Since the protester's proposal was properly judged to be technically unacceptable, price considerations are not applicable. The protester failed to prove that the agency did not inform it of the proposal deficiencies. (Author/SC)

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P.L. #2

DECISION

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

FILE: B-186942 DATE: August 2, 1977

MATTER OF: R.L. Banks

DIGEST:

1. Protester alleges that successful subcontractor's relationship with barge operating company will inhibit railroad companies from cooperating with agency study project to improve railroad costing techniques. GAO concludes that such allegation does not sustain protester's charge of conflict of interest. Facts fail to show that subcontractor's technical judgment on project will be biased, and question of whether information will be furnished by railroads is matter for agency judgment.

2. Concept that as between two technically acceptable offerors the one offering the lowest price should be awarded a contract is not applicable where one of the two offerors' proposals is unacceptable.

3. Protester's allegation that there was no justification for its proposal to be found unacceptable is denied where record indicates that offeror failed to demonstrate validity of technical assumptions contained in its proposal.

4. Protester has not sustained its burden of proving that that agency did not inform it of the deficiencies in protester's proposal .

5. Protester's allegation that it was misled as to the level of effort required is without merit where agency clearly indicated the estimated cost of the project in solicitation.

R.L. Banks, Inc. (Banks) has protested the award of a contract by the Department of Transportation, Federal Railroad Administration to Arthur Young and Company (Arthur

Young). The contract is for developing methodologies and procedures to be used by railroad management for estimating the economic costs of providing, maintaining, and operating signal and communications systems. Banks sets out three grounds of protest: (1) Arthur Young's proposal should not have been accepted because a subcontractor has a plain conflict of interest; (2) there is no justification, based on properly applied evaluation criteria, for the Government's being willing to spend more than twice for Arthur Young's proposal than it would have spent had it accepted Banks' proposal; and (3) negotiations were not conducted fairly, i.e., the FRA's estimate as to the level of effort was increased to accomodate Arthur Young's proposal without notice to other offerors; moreover FRA failed to inform Banks of its deficiencies during the course of negotiations; and FRA had no justification for finding Banks' proposal was unacceptable.

Concerning the alleged conflict of interest, Banks notes that Gibbs and Hill, Arthur Young's proposed subcontractor, is a subsidiary of a parent firm, Dravo Corporation, which has another subsidiary, Union Mechling Corporation, a major operator of barges. Banks points out that the contractor is to gather information concerning railroad carriers. Banks believes that had FRA known that such a corporate relationship existed when it evaluated Arthur Young's proposal, it would have seriously downgraded the proposal. This is based on the theory that Gibbs and Hill's corporate relationship with a major barge operator will impede Arthur Young's gathering of proprietary cost information from railroads, the barge operator's competitor.

According to FRA, the Gibbs and Hill participation is minor (a negotiated 72 man-days of total effort) and "is to be utilized by Arthur Young and Company to provide technical engineering expertise, not manipulation of confidential cost information * * *." But even if the Gibbs and Hill personnel, as members of the project staff, do have access to such cost information along with other members of the project staff, we do not see how their technical judgment on this project would be biased or prejudiced because of Gibbs and Hill's indirect connection with a company engaged in barge operations. Indeed, the protester does not specifically allege that these project members could not render impartial technical advice, but rather that

the railroad carriers would not furnish cost information if they were aware of the Gibbs and Hill relationship to a barge operator. In short, the protester is contending that Arthur Young's ability to perform this study project will be impaired because of its subcontractor. However, we find no reason to question FRA's judgment to the contrary. We do not sustain the protester's contention as to conflict of interest.

Banks' second argument questions the "cost to benefit" of FRA's awarding a contract to Arthur Young whose cost proposal ($241,175.00) was more than double that of Banks'. In that regard, Banks cites our decision in Design Concepts, Inc., B-184658, January 23, 1976, 76-1 CPD 39 for the proposition that, as between two acceptable technical proposals scored relatively closely, the agency is not justified in awarding a contract to the offeror scoring slightly higher on its technical proposal when that offeror's cost proposal was four and one half times more than the competitor's. We believe, however, that the cited case is inapposite where, as here, Banks' technical proposal was determined to be unacceptable. See Pacific Training and Technical Assistance Corporation, B-182742, July 9, 1975, 75-2 CPD 22; National Designers, Inc., B-181741, December 6, 1974, 74-2 CPD 316.

Banks contends however, that FRA had no justification for concluding that Banks' proposal was unacceptable. FRA considered Banks' proposal to be in the competitive range for purposes of conducting further negotiations. During negotiations FRA detected serious weaknesses not evident in Banks' written proposal. It was FRA's judgment that Banks' final proposal, since it did not reflect Banks' intent to remedy the deficiencies alluded to in negotiations, was unacceptable and, therefore, was not considered for award.

The most serious weakness perceived concerned data collection, i.e., what data Banks proposed to collect and what it intended to do with it. More precisely, FRA concluded that Banks intended to use only historical data; foresaw no need for collecting new data; and proposed to perform "statistical gymnastics" with the data collected. Because Banks apparently did not appreciate what FRA believed could be an essential part of the project--collection of new data, FRA concluded that Banks' approach to the problem would not be likely to produce a useable end product.

Banks states it pointed out during discussions that refined cost ascertainment techniques could be derived from data already collected. Banks intended to imply by that position that the study could be undertaken efficiently with the use of existing data and that "* * * it did not propose to undertake work which was inefficient and unnecessary to accomplish the job, or to saddle the Government with tens of thousands of dollars of effort that would not improve the study."

While it is true that the solicitation did not require the development of new techniques for their own sake and that the solicitation did not expressly require the developing of new data, we do not agree that the result of the contract was merely to improve existing railroad cost ascertainment. The solicitation was structured so that the contractor would first become conversant with all economic costing and technical literature applicable to the economic costs of railroad communication and signal systems. At the same time, the contractor was to determine, with respect to three major U.S. railroads, one Canadian railroad, and the I.C.C., the procedures and methodologies currently used in costing railroad communications and signal systems. Having acquired a theoretical and working knowledge of these various methodologies and procedures, the contractor was then to develop methodologies and procedures usable by all railroads for costing the communication and signal system with respect to installation, maintenance, and operation. While this does not necessarily call for new, untried methodologies and procedures, FRA was careful not to preclude them. Thus, FRA was concerned about Banks' insistence that the form and content of currently available data regarding communications and signal costs would be usable in conjunction with whatever methodologies and procedures Banks developed. This is because FRA apparently recognized that currently available information and data were acquired in its present form as a function of the methodologies and procedures now in use. Consequently, the methodologies and procedures developed by Banks under the study might be too much a function of and unnecessarily limited by currently available data. Thus, while the collection of "new" data may not have been expressly required, the purpose and scope of the statement of work clearly implied that the collection of new data might be required.

In our view the circumstances cited above provide a rational basis for finding Banks' final proposal unacceptable. 52 Comp. Gen. 198 (1972). It should be noted that we do not evaluate proposals to determine their eligibility for award. The judgment of the agency

as to the technical adequacy of proposals will ordinarily be accepted by us absent a clear showing of unreasonableness. We will not regard a technical evaluation as unreasonable merely because there is a substantial disagreement between the contracting agency and the offeror; rather, it must appear from the record that there is no rational basis for the evaluation. Joanell Laboratories, Incorporated, B-187547, January 25, 1977, 77-1 CPD 51 and cases cited therein.

Banks contends that even if its proposal was properly evaluated, it was not advised during negotiations of any deficiencies in its proposal except for what Banks characterizes as a vague comment to the effect that Banks should slightly increase its level of effort. FRA contends, on the other hand, that Banks was advised of the deficiencies in its proposal; that it was advised that its proposed level of effort was inadequate especially in view of Banks proposed cost of $107,000 as compared with the FRA's cost estimate of $241,175; that Banks needed to have more persons with education and experience in economics; and that, as discussed above, Banks' proposal did not indicate that Banks intended to collect original data or that Banks appreciated the potential difficulty in obtaining such data. Thus, FRA maintains that Banks was put on notice of the deficiencies, and we have no basis to disagree. Sperry Rand Corporation, B-187116, January 31, 1977, 77-1 CPD 77.

Banks also alleges that it was led to believe that FRA's estimate as to the contract cost was $150,000, and that the FRA improperly revised its estimated costs to cover Arthur Young's proposed cost of $241,175--the practical effect of which was to misinform proposers on the level of effort that was really expected. The solicitation's "Limitation of Funds" clause indicated, however, that offerors were to refer to the Schedule to find the Government's estimated cost of the contract, because, if awarded the contract offerors would be obligated to perform the work specified in the Schedule and all obligations under the contract within the estimated cost. More importantly, however, the clause also put offerors on notice that funds allotted to that contract were less than the estimated cost of $241,175 (allotted funds of $150,000 plus $91,175 scheduled to be allotted). Consequently, we do not agree with Banks that it was misled by the Government's representations regarding the estimated cost of the contract.

Accordingly, Banks' protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States