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P.L. II

DECISION



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

FILE: B-187534

DATE: October 5, 1977

MATTER OF: Education Turnkey Systems, Inc.

DIGEST:

1. While agency should have confirmed, in writing, an oral change in recommended level of effort, all offerors were informed of the change and were able to offer on a common basis. Therefore, deficiency was not prejudicial to offerors or Government.
2. Agency was not required to reduce scope of work statement in solicitation when it reduced estimated manning requirements. Contract awarded did not obligate Government to pay an amount in excess of its current funding because Government was obligated to make payments only up to the estimated cost, which was less than the known funding limitation.
3. Agency did not utilize prohibited "auction technique" when it informed offerors of monetary amount available for the procurement.
4. Agency should not have informed one offeror that it had a good chance of award in one region and almost no chance in two other regions, at least not without providing similar assistance to other offerors. However, agency did not prejudice protester, in this case, because offeror who received information as to his relative chances between two regions did not use that information by significantly changing its proposal.
5. Record does not support contention that agency suggested to protester an allocation of personnel which exceeded agency's known budgetary limitations.
6. Protester's allegation of improprieties occurring at the negotiation session are untimely because they were filed more than 10 days after they occurred.
7. Claimant is not entitled to proposal preparation costs because agency selection was not arbitrary.

I. Introduction

Education Turnkey Systems, Inc. (Turnkey) protests the award of contracts under RFP 76-73 (Regions III and V), issued by the United States Office of Education, Department of Health, Education and Welfare (HEW). The RFP requested proposals for furnishing all necessary personnel, supplies, materials and equipment to operate Technical Assistance Centers, which were to provide assistance to state and local education agencies in the use of evaluation models under Title I of the Elementary and Secondary Education Act. The RFP specified that a separate cost-reimbursement contract would be awarded for each of the ten HEW Regions. The RFP provided region-by-region estimates of the professional manpower required to operate the Technical Assistance Centers. Discussions were conducted with those firms in the competitive range, including Turnkey. Thereafter, Turnkey was notified that National Testing Service (NTS) was the successful offeror in Region III and Educational Testing Services (ETS) was the successful offeror in Region V.

Turnkey subsequently protested to this Office upon the following bases: 1) the level of effort specified in the RFP was changed without providing written notice to offerors; 2) the estimated manpower level was reduced without reducing the scope of work; 3) a prohibited "auction technique" was employed when offerors were informed of a specific ceiling amount available for the procurement in each region; 4) competitors were advised of their relative chance of award as between several regions; 5) staffing organization recommended to protester exceeded budget limitations and thus protester received information inferior to that provided to its competitors; 6) cost negotiations were witnessed by persons other than those representing the procuring agency; 7) problems attributable to the agency were blamed on Turnkey, in the presence of potential clients.

II. Discussion of Protest

1. Level of Effort Changed Without Written Amendment

Turnkey first asserts that the level of effort specified in the RFP was changed without providing written notice to offerors. The RFP, as issued, stated that Region Three would require 30 man-months of effort and Region Five would require 41.25 man-months of effort. The offerors were informed, after submission of initial proposals,

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that due to budget constraints, the level-of-effort would have to be reduced in order to maintain high standards of staff quality. Written verification of the modification was not provided to the offerors.

Turnkey asserts that the agency, by changing the level of effort specified in the RFP, made a substantial change in the solicitation and thus was required to issue an amendment. Nevertheless, Turnkey concedes that it was aware of the change in the man-hour requirement prior to submitting its proposal. The post-negotiation memorandum indicates that Turnkey was informed of the change on the morning of September 7, 1976, during discussions for Region Three. The awardees, ETS and NTS, were informed of the change respectively on the afternoon of September 7, 1976, and the morning of September 8, 1976. Thus, it appears that Turnkey was aware of the change in the estimated level of effort at least as soon as the successful offerors. Under these circumstances, Turnkey was not prejudiced in the preparation of its proposal, and thus, interference with the award would not be appropriate.

2. Estimated Manpower Requirements Reduced Without Reducing Scope of Work

Turnkey contends that when HEW reduced the estimated manpower requirement, it also should have reduced the Scope of Work. Turnkey asserts that HEW, by reducing the estimated manpower requirement without reducing the Scope of Work, was aware that it was entering into a "cost-overflow" contract. Turnkey also alleges that HEW repeatedly referred to the amount of funds available at the time of negotiations as only "start up" funds.

We do not agree that HEW was necessarily entering into a cost-overflow contract. The payments provision of the RFP (Article 7, Section A of Attachment B) states that:

"The Government agrees to pay the Contractor as complete compensation for all work and services performed and materials furnished under this contract, allowable costs as defined in Clause four of the General Provisions in an amount not to exceed the estimated cost set forth elsewhere herein." (Emphasis added.)

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HEW informed all of the offerors of the limitation on funds available for the procurement so as to receive proposals with estimated costs within that limitation. The contracts actually awarded contained an estimated cost in an amount less than the known limitation of funds. Consequently, the Government did not enter into an obligation to pay at a level higher than its current funding. It was within the agency's discretion to determine whether it wished to retain a broad Scope of Work, while reducing the estimated manpower requirements.

3. Offerors Informed of Budget Limitation on Procurement

Turnkey next contends that the agency utilized a forbidden "auction technique" by informing offerors of the total dollar amount available for the procurement. The protester relies upon FPR 1-3.805-1(b) which states:

"Whenever negotiations are conducted with more than one offeror, no indication shall be given to any offeror of a price which must be met to obtain further consideration since such practice constitutes an auction technique which must be avoided."

This Office has held that "the term 'auction' connotes direct price bidding between two competing offerors, not the negotiation of a price between an offeror and the Government, provided an offeror's standing with respect to his competitors is not divulged." 52 Comp. Gen. 425, 429 (1973). In the present case, the agency, by informing the offerors of the funds available for the procurement did not divulge any offeror's standing with respect to its competitors. Rather, the agency was recommending that the offerors consider whether their initial proposals were "too high," a technique sanctioned by ASPR 3-805.1(b). See 52 Comp. Gen. 425, *supra*. Consequently, it was proper for the agency to notify offerors of the budget limitation on the procurement. Cf. R.L. Banks, B-186942, August 2, 1977, 77-2 CPD 66, at 5.

4. Agency Informed Offeror of his Relative Standing in Two Regions

The protester contends that NTS, the awardee in Region Three, was advised during discussions with the agency of its relative standing in Region Five in order for it to become more likely to succeed in Region Three. The post-negotiation memorandum

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states that: " * * * Dr. Stenner [the NTS negotiator] was told by Dr. Fishbein [the Government representative] to concentrate the best of his staff on Region Three in order to be strong under Region Three where NTS had a very good chance to be awarded the contract, and almost no chance to win under Regions Four and Five. "

Paragraph 1-3.805-1(b) of the FPR states that: " * * * no offeror shall be advised of his relative standing with other offerors as to price or be furnished information as to the prices offered by other offerors. " Here, the government representative's statement that NTS had a "very good chance" of award in one region and "almost no chance" in two other regions, did not violate the specific prohibition of the above regulation, because the information given to NTS as to its relative chance of award did not necessarily indicate to NTS its relative standing "as to price. "

Nevertheless, the negotiating technique employed here could operate unfairly. While the record shows that the awardee was informed of his relative chances in two regions, there is no indication in the record that the agency gave similar information to the protester. The agency should not have afforded only one offeror the advantage which might result from such information, at least not without providing similar assistance to other offerors.

Each situation of this type must be judged in light of the particular circumstances to determine if an unfair competitive advantage to an offeror has resulted. 53 Comp. Gen. 258 (1973). Here, the protester asserts that NTS was able to become more competitive in Region Three because it was informed of its relative chances in Regions Three and Five. However, NTS's best and final proposal does not indicate that it reacted significantly to the information received from the agency regarding its relative chances in Regions Three and Five. The only staff member which NTS shifted from Region Five to Region Three, after discussions, was Mr. Rohlf, whose offered time constituted less than three percent of the total staffing man-hours offered by NTS. Also NTS did not change either its overhead or fixed fee rate between its original proposal and its best and final proposal. Consequently, in the absence of a prejudicial effect on the protester, interference with the contract, which is near completion, would not be appropriate.

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5. Staffing Organization Recommended by Agency

The protester contends that the agency favored the awardees by recommending to them staffing organization plans which allowed them to submit the lowest "bid price." The record indicates that during discussions, HEW recommended to each offeror a staffing plan which specified which of the offeror's personnel and what percentage of each member's staff time the offeror should propose to improve the proposal.

First, we must consider whether it was proper for the agency to recommend specific staffing plans to the offerors. This Office has held that certain weaknesses, inadequacies, or deficiencies in proposals can be discussed with a proposer without being unfair to other proposers. 51 Comp. Gen. 621 (1972). There may be instances where it becomes apparent during the course of negotiations that one or more proposers reasonably have placed emphasis on some aspect of the procurement which differs from that intended by the solicitation. In such cases, it could be appropriate for the agency to point out in what respects an offer indicates a misunderstanding by the offeror of the agency's needs. In the present case, the record shows, and the protester concedes, that the protester received the same type of detailed information as was given to other offerors.

However, the protester alleges that, unlike the awardee, it was unable to comply with the manpower levels stipulated by the agency and still remain competitive in cost. The protester states that the separate notes of its own three negotiators show that the Government suggested the following percentages of staff time for Region Three: Morin, 20 percent; Goldstein, 80 percent; Stimart, 40 percent; Poynor, 20 percent; and secretary, 18 percent. (The use of these figures allegedly would have resulted in a proposal with costs exceeding the specified budget limitation.) HEW has responded that the manpower figures suggested to Turnkey were comparable to those suggested to other offerors and did satisfy the budget limitation. The agency's post-negotiation memorandum conflicts with the protester's notes and states that HEW suggested to Turnkey the following manpower percentages: Morin, 15 percent; Goldstein, 65 percent; Stimart, 31 percent; Poynor, 15 percent; and secretary, 18 percent. Based on the record, we are not convinced that the protester was treated unequally because the post-negotiating memorandum indicated that, like the awardee, the protester received from the agency a recommendation as to how best to allocate its staff within a staffing

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plan meeting the agency's budgetary limitations. See Contract Support Co., B-184845, March 18, 1976, 76-1 CPD 184.

The protester further asserts that the manpower levels recommended to ETS, the awardee in Region Five, enabled it to submit "the lowest bid price of \$112,432." However, the fact that ETS submitted the lowest cost estimate by complying with HEW's manpower levels does not show that the protester was prejudiced thereby. The evaluation criteria for the subject RFP (Article III, Attachment A) specified that technical considerations rather than cost were to be of paramount importance in the award decision. Our review of the record indicates that ETS was selected in preference to Turnkey for reasons other than cost. Consequently, merely because the manpower levels recommended by the agency resulted in ETS having the lowest estimated cost did not give ETS an advantage over the protester. We conclude that the agency did not materially prejudice the protester when it suggested manpower levels to both the awardee and the protester.

6. Improprieties Alleged to Have Occurred at Negotiation Session

The protester has alleged that HEW allowed state education agency representatives to attend the negotiations and that the HEW negotiator criticized the protester, during discussions, in the presence of the state education agency representatives. The procedures of this Office require that a protest be filed within 10 days after the basis of the protest is known or should have been known, whichever is earlier. 4 C.F.R. 20.2(b)(2) (1976 ed.). Turnkey protested to this Office more than 10 days after the discussions at which the alleged improprieties occurred. Consequently, Turnkey's allegations in this regard are untimely.

Accordingly, the protest is denied.

III. Claim for Proposal Preparation Costs


Turnkey has requested that, if it is not awarded the subject contract, it be allowed "a dollar amount equal to the costs incurred in preparation of all RFP 76-73 proposals." The Federal Courts and this Office have recognized that because bidders and offerors are entitled to have their bids and proposals considered fairly and honestly for award, the costs of preparing a bid or proposal which

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was not fairly considered may be recoverable in certain circumstances. See Keco Industries Inc. v. United States (Keco I), 428 F. 2d 1233, 192 Ct. Cl. 773 (1970); Keco Industries, Inc. v. United States (Keco II), 492 F. 2d 1200, 203 Ct. Cl. 566 (1974); Heyer Products Co. v. United States, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956); T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345.

In the present case, we do not find that the agency's actions towards the claimant were arbitrary and capricious. Although we have found an instance of questionable negotiating conduct, such conduct did not affect the award determination. Under the circumstances, the claimant is not entitled to reimbursement of proposal preparation costs.

Accordingly, the claim for proposal preparation costs is denied.


Deputy Comptroller General
of the United States