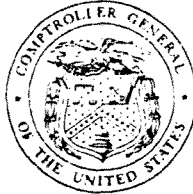


DECISION



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

396

FILE: B-194584

DATE: August 9, 1979

MATTER OF: Eastman Kodak Company

DIGEST:

1. When procuring agency, after receiving best and final offers, decides to evaluate costs over expected useful life of equipment, it should amend solicitation; in life cycle costing, offerors must have adequate notice of evaluation method and cost projections must be reasonable.
2. Alleged antitrust violations are for consideration by Department of Justice, not GAO.
3. While suspension of work during protest may be desirable, decision is for contracting agency; if it refuses, protester may seek action by Federal court.

Eastman Kodak Company (Kodak) protests the award of a contract for 16 millimeter roll film reader-printers to 3M Business Products Sales, Inc. (3M) under a solicitation issued by the Naval Regional Procurement Office, Philadelphia, Pennsylvania. The protest involves the Navy's evaluation of Kodak's offered price over the expected 8-year life of its equipment.

We find that the Navy did not adequately advise offerors of its cost evaluation procedures: it used Federal Supply Schedule rates, rather than estimates requested in the solicitation, to evaluate maintenance costs and projected operating and maintenance costs over the 8-year expected useful life of the equipment, without ever indicating that this would be done. We are sustaining the protest for this reason.

I. Introduction

Kodak's primary complaint is that the Navy evaluated maintenance costs for its equipment by using a Federal Supply Schedule rate, rather than a lower estimate included in its proposal. Although the Navy defends use of the Federal Supply Schedule, it argues that print costs, previously evaluated as equal for both offerors, actually would be so much higher for Kodak that the firm's relative standing with regard to price would be unchanged, even if Kodak's estimate for maintenance were used.

The Navy refused Kodak's requests to stop performance during the pendency of this protest, and 3M now has delivered all 365 reader-printers covered by the \$955,935 contract. Kodak, however, still seeks our decision, alleging that compatibility problems will seriously prejudice its ability to compete in future procurements--which it believes may exceed 3,000 units over the next 5 years--if the Navy is "locked in" to 3M equipment.

Kodak also protests on grounds that it was misled by the contracting officer with regard to the value of an extended warranty, as compared with the 3-month warranty offered in its initial proposal, and that it was not given credit for certain cost-saving features of its equipment. Following a conference at our Office, where the parties discussed the feasibility of using 3M paper with Kodak equipment, Kodak further alleged that there would be "serious questions of restrictive trade practices" if 3M refused to sell the Navy adaptors for this purpose.

II. Factual Background

A. The Solicitation

Under request for proposals No. N00140-79-R-0617, issued January 10, 1979, the Navy sought unit prices for stepladder quantities of reader-printers to be delivered to six Naval Air Rework Facilities and to installations in Philadelphia and Washington, D.C. The solicitation listed mandatory and desirable characteristics for the equipment; specific dollar allowances were to be made for certain desirable characteristics, and additional allowances were to be made for operating cost savings which offerors could demonstrate.

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While maintenance was not to be part of this contract, offerors were asked to estimate annual maintenance and operating costs, based on 1,000 hours of use and 5,000 prints per unit per year. The solicitation stated that offerors should be "capable of providing" general maintenance contracts at each location where the reader-printers would be used.

B. The Competing Proposals

Of 29 firms solicited, only Kodak and 3M responded. In its proposal, Kodak estimated that service costs would be

"approximately \$250 per year per unit at Kodak's current GSA [General Services Administration] Schedule per-call rates. This estimate includes parts necessary to effect repairs."

Kodak further stated that it maintained its own nationwide service organization, which was

"capable of supporting general maintenance contracts, warranty service, or alternatively, to provide per-call service at each of the specified sites."

Both Kodak and 3M hold Federal Supply Schedule contracts. With its proposal, Kodak submitted that portion of its contract which contained its 3-month warranty; however, it did not mention its contract price for maintenance, \$480.15 a year, or for lamps and paper. 3M, on the other hand, estimated maintenance at its Federal Supply Schedule rate for an annual maintenance contract, \$239.25 a year, and quoted contract prices for lamps and paper. 3M offered a 12-month warranty.

C. The Navy's Evaluation

The Navy first evaluated prices by using annual maintenance costs quoted by offerors. It estimated the number of lamps and rolls of paper which would

be needed for one year's operation, and multiplied these by offerors' lamp and paper prices from the Federal Supply Schedule; it allowed Kodak \$55 and 3M \$10 for desirable characteristics. Calculations for the desired quantity were as follows:

| | <u>Kodak</u> | <u>3M</u> |
|-----------------|----------------|----------------|
| Unit Price | \$2,598.00 | \$2,619.00 |
| Operating Costs | | |
| Prints | 474.14 | 316.77 |
| Lamps | 22.73 | 29.34 |
| Maintenance | <u>250.00</u> | <u>239.25</u> |
| | 3,344.87 | 3,204.36 |
| Allowances | <u>- 55.00</u> | <u>- 10.00</u> |
| Total | \$3,289.87 | \$3,194.36 |

After receiving best and final offers, the Navy re-evaluated proposals, projecting costs over the 8-year expected useful life of the equipment.

For the first year, Kodak's maintenance costs were evaluated at \$187.50 (9 months at its estimated annual rate of \$250, with a 3-month warranty). However, for each of the next 7 years, Kodak's maintenance costs were evaluated at \$480.15, its Federal Supply Schedule rate. 3M's maintenance costs were considered zero for the first year, since its reader-printers would be under warranty throughout that period; for each subsequent year, 3M's maintenance costs were evaluated at \$239.25.

The Navy considered print costs equal for both offerors, and therefore discounted them entirely, because Kodak had pointed out that paper manufactured and marketed by 3M was less expensive than its own and was "readily adaptable for use" in Kodak reader-printers.

Kodak was allowed an additional \$27 for cartridge savings; 3M's allowances were unchanged. Calculations for best and final offers were as follows:

| | <u>KODAK</u> | <u>3M</u> |
|----------------------------|-------------------|-------------------|
| Unit Price | \$2,598.00 | \$2,619.00 |
| Operating Costs (8 years)* | | |
| Lamps | 181.84 | 234.72 |
| Maintenance | | |
| 1st year | 187.50 | - 0 - |
| 7 additional years | 3,361.05 | 1,674.75 |
| | <u>\$6,328.39</u> | <u>\$4,528.47</u> |
| Allowances (8 years) | - 656.00 | - 80.00 |
| Total Evaluated Price | \$5,672.39 | \$4,448.47 |

*Does not include print costs

On the basis of this evaluation, the Navy awarded a contract to 3M on March 29, 1979.

III. Kodak's Protest

Kodak argues that its maintenance costs should have been evaluated at \$250 a year throughout the life of its equipment. This estimate, Kodak states, was based on its experience with mean time between failures and mean time to repair for the limited annual use of the reader-printers specified in the solicitation. Its Federal Supply Schedule annual maintenance rate, Kodak states, is based on much greater use--up to 25,000 prints a year. Moreover, Kodak argues, the Navy was inconsistent in using \$250 as a basis for evaluating first year maintenance costs and \$480.15 for evaluating the same costs for subsequent years. Finally, Kodak contends, if the Navy had any questions about its proposed maintenance costs, it had a duty to inquire before arbitrarily applying the higher rate.

The Navy responds that Kodak's proposal could only have been read as offering to provide either an annual maintenance contract at the Federal Supply Schedule rate or, alternatively, service on a per-call basis. The latter, the Navy contends, would require separate purchase orders and payment for each call, and would be totally unacceptable.

Kodak disputes this, pointing out that each of the facilities where its equipment would have been used could have negotiated either annual maintenance contracts or blanket purchase orders for service on a per-call basis, whichever was most advantageous. If maintenance had been evaluated at \$187.50 for the first year and \$250 a year for subsequent years, as Kodak suggests, its total evaluated price would have been \$4,061.34, or less than that of 3M.

The Navy responds that print costs, properly evaluated, would increase Kodak's price to more than that of 3M, even if Kodak's \$250 estimate for annual maintenance were used.

The Navy states that after receiving best and final offers, it inquired about adaptors which would permit 3M paper to be used with Kodak reader-printers; Kodak's representative could not provide any information, but made it clear that Kodak was not offering to furnish the adaptors as part of its proposal. The Navy also contacted two distributors listed by Kodak in its best and final offer. These firms repackaged 3M paper in disposable containers, but it was not available on the Federal Supply Schedule in this form. Neither of the distributors could provide adaptors. In evaluation reports, the Navy stated that it did not evaluate adaptor costs because they would only have increased the price differential between Kodak and 3M; it now argues that it would have had no choice but to buy Kodak paper at the Federal Supply Schedule price.

Kodak argues that the obvious source for information about adaptors--which the Navy ignored--was 3M. Kodak alleges that 3M has provided some paper customers with adaptors at no cost, but that the cost of adaptors

quoted by 3M during a conference at our Office, \$86, is the only amount which should have been added to its evaluated price. Even if this were added to the \$4,061.34 Kodak argues should be its evaluated price, its total would still be less than that of 3M.

3M, commenting on the protest, states that adaptors are not commercially available in sufficient quantity to meet the Navy's needs, and that 3M would not, as a matter of business judgment, have been willing to sell the Navy \$30,000 worth of adaptors if doing so meant that a \$1 million contract for reader-printers would go to a competitor.

IV. GAO Analysis

The real issue in this case, we believe, is whether the Navy's RFP adequately advised offerors of the basis and procedures for cost evaluation. We do not believe that it did.

Technical evaluation criteria were fixed, either as mandatory characteristics or as desirable characteristics to be allowed specific dollar values; the solicitation implied that award would go to the firm which satisfied the mandatory characteristics and offered the lowest evaluated price. Cost evaluation criteria, however, were not fixed; the Navy apparently decided to use offerors' Federal Supply Schedule rates for annual maintenance, and to apply those rates over 8 years, minus warranty periods, after receiving best and final offers.

Our Office has upheld life cycle costing, since it is logical to consider total anticipated costs, rather than merely purchase price; however, offerors must have adequate notice that evaluation will be on this basis, and projected costs must be reasonable. Hasko-Air, Inc., B-192488, March 19, 1979, 79-1 CPD 190. Without a sufficient statement of the basis for evaluation of maintenance and operating costs, a solicitation is invalid. See 36 Comp. Gen. 380, 384 (1956).

In this case, the solicitation gave no indication that the Navy would use the Federal Supply Schedule rate for annual maintenance or that it would project maintenance and operating costs over the expected useful life of the equipment. When the Navy decided to use life cycle costing, it should have amended the solicitation to advise offerors of this fact. We question, however, whether the Navy could reasonably use the Federal Supply Schedule to project costs for 8 years, since these rates may be negotiated yearly.

Even if the Navy had evaluated on the basis of offerors' estimates for operating and maintenance, it could not have been certain that it was getting the lowest price. The solicitation requested information on mean time between failures and mean time to repair; however, offerors were not committed to estimates based on these times. Moreover, there is no indication that the Navy made any attempt to validate offerors' estimates. It does not appear, for example, that the Navy was aware that Kodak's estimate was less than its Federal Supply Schedule rate for annual maintenance because the latter was based on up to five times more use.

As for print costs, once it decided to evaluate Kodak's operating costs on the basis of using 3M paper, we believe the Navy should have gone to all sources--including 3M,--for information on the cost, availability, and expected useful life of the adaptors. Instead the Navy merely assumed that a cost differential--which may not have existed--would be increased.

For the foregoing reasons, we believe the solicitation was deficient, and any evaluation based on the unannounced criteria also was deficient.

V. Other Bases of Protest

We need not consider Kodak's protests regarding the warranty and compatibility of equipment in the future, since the record is less than clear on these issues and in any event they do not affect the outcome of our decision. As for alleged antitrust violations,

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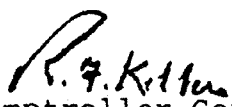
these are for consideration by the Department of Justice, and not our Office. Mars Signal Light Company, B-193942, March 7, 1979, 79-1 CPD 164.

Kodak also has argued that the Navy should have suspended performance while we were considering its protest. This is a decision for the contracting agency; if it refuses, the protester may seek relief in the Federal courts, Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 972, 989 (1976), 76-1 CPD 240, which Kodak did not choose to do.

VI. Conclusion

We recognize that there is no effective relief for Kodak, since all the reader-printers covered by this contract have been delivered. However, we are today advising the Secretary of the Navy that the solicitation was defective and the cost evaluation procedures improper, and recommending corrective action for future procurements.

The protest is sustained.


Acting Comptroller General
of the United States

CONTRACTS

Negotiation
Evaluation factors
Life of equipment
Operating costs

CONTRACTS

Negotiation
Requests for proposals
Additional evaluation factors
None in request for proposals

CONTRACTS

Negotiation
Evaluation factors
All offerors informed requirement

GENERAL ACCOUNTING OFFICE

Jurisdiction
Antitrust matters

CONTRACTS

Negotiation
Changes, etc.
Written amendment requirement
Evaluation method changes

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Protests
Resolution
Award preceding protest
Suspension of contract
performance
Administrative
determination

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Negotiation
Evaluation factors
Cost realism

CONTRACTS

Protests
Injunctive relief
Not available through GAO

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Negotiation
Evaluation factors
Price elements for consideration
Anticipated costs

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Protests
Performance under contract
continued

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Negotiation
Prices
Life-cycle costing

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Negotiation
Offers or proposals
Evaluation
Improper
On basis other than in RFP

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Negotiation
Requests for proposals
Defective
Evaluation factors

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Negotiation
Awards
Erroneous
Remedial action impracticable