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DECISION



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

FILE: B-202707

DATE: October 28, 1981

MATTER OF: The BDM Corporation

DIGEST:

1. Protest alleging that Air Force should have discussed with protester Air Force perception that proposal was "excessive" and priced too high is timely because protester was not aware of these alleged perceptions until after it received Air Force report on protest.
2. Contracting agency need not discuss with protester fact that protester's proposed costs were significantly higher than lower rated albeit technically acceptable awardee's proposed costs where: (1) solicitation provided that award could be made without discussions; (2) offerors had competed on same basis; and (3) protester's proposed costs were below agency estimate.
3. Although protester had highest rated technical proposal, it was not unreasonable for Source Selection Authority to make award to awardee to take advantage of lower cost. Technical evaluators believed awardee would be able to perform as acceptably as protester and Source Selection Authority determined (after cost analysis required by RFP evaluation scheme) that extra technical merit offered by protester was not worth probable extra expenditure of over \$1.5 million over life of basic contract plus 2 option years. In addition, though RFP indicated that technical factors were more important than cost, cost was listed as one of the significant factors to be considered in selection of contractor.

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4. Protest alleging that awardee attempted to recruit protester's employees and that Air Force should have discussed alleged recruitment with awardee prior to making award is dismissed as untimely because this basis for protest was known to protester more than 10 days before protest was filed in our Office. 4 C.F.R. § 21.2(b)(2) (1981).
5. Protest that Air Force evaluators should have downgraded awardee's technical proposal because awardee attempted to recruit protester's employees is denied because awardee did not list protester's employees in its proposal.

The BDM Corporation (BDM) protests against award of a cost-reimbursement contract for scientific and technical assistance by the Department of the Air Force to Application Research Corporation (ARC) pursuant to request for proposals (RFP) No. F33657-81-R-0041. Essentially, BDM protests on the grounds that: (1) no discussions were held with any offeror and, therefore, BDM was not given a chance to correct any deficiencies which the Air Force may have perceived in its proposal; (2) award to ARC was not in accord with the RFP's stated selection criteria; and (3) ARC attempted to recruit certain BDM employees and may have listed such employees in its proposal even though these employees are still employed by BDM.

The protest is denied.

BDM has attempted to obtain from the Air Force information relating primarily to the evaluation of technical proposals. The Air Force has refused to release this information to BDM but has given the evaluation material to our Office for our in camera review. Due to the nature of this information, our discussion will be limited.

The Air Force argues that BDM's first basis of protest (lack of technical discussions) is untimely because BDM should have been aware that no technical

discussions were going to be held upon receipt of the February 13, 1981, request for best and final offers or, at the latest, by March 2, 1981, when best and final offers were submitted. The Air Force concludes that BDM's protest of March 27, 1981, was filed more than 10 days after BDM was aware of this basis for protest in contravention of the time limit set forth in section 21.2(b)(2) of our Bid Protest Procedures. 4 C.F.R. part 21 (1981).

While at the time of best and final offers, BDM was aware no discussions would be held, it had no reason to believe such discussions were necessary. As BDM points out, it was not aware that the Air Force considered BDM's proposal to exceed the Air Force's needs until June 23, 1981, when it received the Air Force report on the protest. Thus, BDM argues that it is timely in protesting that discussions should have been held to inform BDM that its proposal was "excessive." BDM believes that, because it offered very experienced and, therefore, higher priced personnel and it now appears such a high level of experience was not needed, it was not afforded an opportunity to compete on the same basis as ARC.

To the extent that BDM is protesting that the contracting officer should have told BDM that its offer was excessive because it surpassed the Government's needs, we consider the protest to be timely and will consider it on the merits.

The Air Force argues that it did not have to conduct negotiations with BDM concerning possible technical deficiencies because the technical evaluation revealed no significant deficiencies in BDM's proposal. The Air Force reports that BDM's proposal was rated an overall "Blue" which in the Air Force color code system means that BDM's proposal "Exceeds specified performance or capability * * * no significant weaknesses." Thus, the Air Force requested and received BDM's best and final offer without holding any technical discussions.

We do not agree with BDM's contention that the Air Force should have informed BDM that it was offering an overqualified personnel team resulting

in an unduly high price. The solicitation cautioned offerors that the Government reserved the right to make an award without further discussions or negotiations and the record shows that no technical discussions were held with any offeror. Moreover, the minimum acceptable experience levels were set forth in the RFP. After examining both ARC's and BDM's proposals, we do not believe that the award was made to ARC on a different basis than that set forth in the RFP or that proposed by BDM. Rather, we conclude that BDM was given an opportunity to compete on an equal basis with other offerors and did so. Moreover, while the contracting agency must point out deficiencies or excesses in an offeror's proposal if discussions are held, we cannot fault the Air Force for failing to tell BDM that its price was significantly higher than the price offered by either of its competitors, especially in view of the fact that BDM's offer was significantly below the Air Force's estimate of the cost for this contract. See, for example, University Research Corporation, B-196246, January 28, 1981, 81-1 CPD 50. In these circumstances, we conclude that the contracting officer's determination that BDM's cost proposal was not so high as to be excessive and require specific discussions was reasonable.

Therefore, the protest is denied on this issue.

BDM next alleges that the award to ARC was improper because it was not made in accordance with the basis for award stated in the RFP. Essentially, BDM contends that the award was improper because it was made on the basis of ARC having submitted the lowest priced proposal while the solicitation indicated that factors relating to technical merit would be more important than cost. BDM argues that the Air Force's reliance on price to select ARC had the effect of turning the least important evaluation criterion into the most important. In support of its position, BDM cites paragraph "B," attachment 4, of the RFP, entitled "Basis for Award," which states, in part:

"Selection will be made on the basis of an integrated assessment of pertinent factors set forth in the

proposals received in response to the RFP. Subjective judgment on the part of the Government evaluators is implicit in the entire process. Throughout the evaluation, the Government will consider 'correction potential' when a deficiency is identified. Proposals unrealistic in terms or technical or schedule commitments, or unrealistically low in cost or price, will be deemed reflective of an inherent failure to comprehend the complexity and risks of the contract requirements, and may be grounds for rejection of the proposal. The SSA will make a determination of the overall value of each proposal judged in terms of its potential to best satisfy the needs of the Air Force, price and other factors considered. The primary evaluation considerations, listed in descending order to relative importance, are:

1. Understanding the Concept of Operation
2. Personnel Capabilities
3. Specialized Organizational Experience
4. Organizational Experience
5. Ability to Acquire External Support
6. Cost

It should be noted that cost to the Government is not the primary basis for award in this selection. Therefore, the Government reserves the right to award a contract at other than the low proposed price. The offeror's proposed price, and other aspects of cost which can be reasonably defined, will be considered in determining the Government's estimate of the most probable cost to the Government. These factors will be compared against the aforementioned considerations to

determine the combination of most probable cost and technical/management approach that is most advantageous to the Government, and award will be made on this basis. Offerors are encouraged to submit their best proposals initially, inasmuch as the Government reserves the right to make an award without further discussions or negotiations."

The Air Force admits that ARC's lower cost was the deciding factor in the selection of ARC over BDM. However, the Air Force argues that, since the technical proposals of ARC and BDM were essentially technically equal, cost could properly become the determinative award factor even though the RFP stated that factors relating to technical merit were to be considered more important than cost.

The record shows that three proposals were received and all three proposals were found to be technically acceptable. The technical evaluation resulted in BDM being rated the highest technically while ARC was rated the lowest of the three in accord with a color-coded, adjectival system used by the Air Force. Under this system, BDM was rated an overall "Blue," meaning its technical proposal exceeded specified performance standards and it was believed to have a high probability of success; ARC received an overall "Green" rating, signifying that its technical proposal met the performance standards and it was believed to have a good chance at success. The Air Force also performed a cost analysis on each offer in accord with the above-quoted section of the RFP. The Air Force determined that ARC's probable cost for the basic period would be \$1,009,668 and its probable cost for the basic period plus both option years would be \$3,083,191, while BDM's probable cost for the basic period would be \$1,395,225 and its probable cost for the basic period plus both option years would be \$4,652,734.

Since the difference in probable cost to the Air Force over the basic and option periods was so great, the Source Selection Authority met with individual members of the source selection team

and discussed, among other things, the reasons for the variations in technical scores, the fact that BDM's higher technical rating was due in part to experience gained as the incumbent contractor, and the probability that each contractor would be able to perform in accord with the Air Force's needs. Based upon these discussions, the Source Selection Authority determined that all three offerors would be able to perform adequately. Therefore, in view of the potential savings to the Government, the Source Selection Authority selected ARC for award.

We have recognized that in a negotiated procurement, selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation factors. Thus, we have upheld awards to lower priced, lower scored offerors where it was determined that the cost premium involved in making an award to a higher rated, higher priced offeror was not justified in light of the acceptable level of technical competence available at the lower cost. The determining element is not the difference in technical merit but the considered judgment of the procuring agency concerning the significance of that difference. On the other hand, we have also upheld awards to higher rated offerors with significantly higher proposed costs because it was determined that the cost premium involved was justified considering the significant technical superiority of the selected offeror's proposal. See Hager, Sharp & Abramson, Inc., B-201368, May 8, 1981, 81-1 CPD 365, and cases cited therein.

Therefore, the issue presented for our determination is whether the Source Selection Authority's selection was reasonable in view of its broad discretion and the RFP's evaluation scheme.

Although the Air Force now contends that the technical proposals offered by BDM and ARC are essentially equal, the evaluation as indicated above resulted in BDM's proposal being rated as clearly superior to ARC's. However, all offerors were on notice that cost would be one of the factors used in selecting a contractor. Even though cost was listed as the least important factor and was clearly subordinate to technical factors, it was listed in the RFP as one of the significant factors to be considered by the Source Selection Authority. After technical evaluations were completed, it was incumbent upon the Source Selection Authority under the RFP evaluation scheme to consider the cost to the Government as well as the technical merit in order "to determine the combination of most probable cost and technical/management approach that is most advantageous to the Government." Accordingly, the Source Selection Authority consulted with the individual evaluators and determined that both ARC and BDM could perform quite well given the expertise shown in their proposals. In addition, these discussions led to the conclusion that ARC's lower rating was due in large part to the fact that it lacked the experience BDM had gained as incumbent and that ARC would quickly gain experience and expertise if awarded the contract. Finally, the Air Force estimated that BDM would cost the Government over \$1.5 million more over the life of the contract and its options. In view of these factors, the Source Selection Authority decided to select ARC for award.

Here, the Source Selection Authority consulted with the evaluators regarding the ability of all three offerors to perform adequately and carefully considered whether the additional technical merit offered by BDM was worth the extra expenditure. Even though BDM offered more technical merit, it was the considered judgment of the Source Selection Authority that the difference in technical merit was not significant in view of the great difference in cost. Since both ARC and BDM surpassed the levels of technical merit required for the successful performance of the contract, we do not believe it was unreasonable for the Source Selection Authority

to decide to award to ARC to take advantage of the significantly lower cost. See, for example, Lockheed Corporation, B-199741.2, July 31, 1981, 81-2 CPD 71.

Accordingly, the protest is denied on this issue.

BDM has also protested that ARC mounted a campaign to get BDM employees to join ARC's staff in the event it received the award. BDM speculates that ARC may have listed BDM's employees in its proposal and believes that award to ARC in such circumstances would be improper. In addition, BDM believes that the technical evaluation conducted by the Air Force was flawed since the Air Force should have found ARC not technically qualified because of its attempts to recruit BDM personnel and, at a minimum, should have discussed this matter with ARC before awarding the contract because BDM believes the Air Force would have found that ARC did not succeed in getting commitments from BDM personnel and should have downgraded ARC's proposal substantially.

To the extent that BDM is protesting any possible improper actions by ARC in recruiting BDM employees or that the Air Force should have held discussions with ARC to verify whether ARC had recruited BDM employees, the protest is untimely. BDM was aware of the alleged recruitment by ARC before best and finals were due on March 2, 1981. However, EDM did not file its protest with our Office until March 27. Since it did not file its protest for more than 10 days after it was aware of this basis of protest, this portion of the protest was untimely filed in accord with section 21.2(b)(2) of our Procedures. 4 C.F.R. § 21.2(b)(2). On the other hand, to the extent that BDM relies on the alleged recruitment to show that the evaluation was not performed in accord with the RFP evaluation formula, the protest is timely since BDM was not aware that ARC was rated as technically qualified. Therefore, this aspect of the allegation is timely.

However, based on our review, we find the ARC proposal did not list any BDM employees and, therefore, we find this basis of protest to be without merit.

The protest is denied.

for Milton J. Fowler
Comptroller General
of the United States