

DOCUMENT RESUME

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[Reopening of Negotiations with Only One Offeror]. B-184194.
September 19, 1977. 7 pp.

Decision re: University of New Orleans; by Robert F. Keller,
Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: General Government: Other General Government
(806).

Organization Concerned: Environmental Protection Agency.

Authority: F.P.R. 1-3.000 et seq. 55 Comp. Gen. 1281. 50 Comp.
Gen. 117. 48 Comp. Gen. 536. 50 Comp. Gen. 1. 50 Comp. Gen.
739. 50 Comp. Gen. 746-8. 52 Comp. Gen. 198. 50 Comp. Gen.
202. 51 Comp. Gen. 102. 51 Comp. Gen. 479. 56 Comp. Gen.
142. B-188305 (1977). B-167417 (1969). B-186660 (1976).
B-183749 (1975).

The protester objected to a proposed contract award because the contracting agency conducted "touch-up" negotiations with only one of two offerors in the competitive range after the receipt of best and final offers. Since the negotiations resulted in changes to the offeror's proposed cost and fee, the agency should reopen negotiations, give offerors a reasonable chance to submit new best and final offers, and properly terminate negotiations upon receipt of those offers by a common cutoff date. (Author/SC)

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W. Gallant

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20540

FILE: B-184194

DATE: September 19, 1977

MATTER OF: University of New Orleans

DIGEST:

After best and final offers are received, it is not proper for Government to reopen negotiations with only one offeror where other offerors are still within competitive range. Thus, where contracting agency conducted "touch-up" negotiations with only one of two offerors in competitive range after receipt of best and final offers--resulting in changes to offeror's proposed cost and fee--GAO recommends that agency reopen negotiations, give offerors reasonable opportunity to submit new best and final offers, and properly terminate negotiations upon receipt of those offers by common cutoff date.

The Center for Bio-Organic Studies, University of New Orleans (UNO), has protested concerning the proposed award of a contract under request for proposals (RFP) No. WA 75-R148, issued by the U.S. Environmental Protection Agency (EPA).

Background

This is our third decision involving the present procurement. The RFP was originally issued in December 1974. In 1975 proposals were received and evaluated, and EPA rejected UNO's proposal. In University of New Orleans, B-184194, January 14, 1976, 76-1 CPD 22, we sustained a protest by UNO and recommended that EPA reopen negotiations with the six offerors which had submitted proposals. EPA then proposed to cancel the RFP and conduct a resolicitation, and UNO objected. In Environmental Protection Agency--request for modification of GAO recommendation, 55 Comp. Gen. 1281 (1976), 76-2 CPD 50, we expressed doubts about several of EPA's justifications for canceling the RFP, and recommended that the EPA Administrator review and reconsider the proposed cancellation. EPA then decided to amend the RFP and reopen negotiations as our January 14, 1976, decision had recommended. The present protest involves this latest phase of the procurement.

Over the course of this lengthy procurement a substantial amount of information has become public concerning the offerors' identities

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and the contents of their proposals, and our discussion of the issues reflects this fact.

Current Phase of Procurement

Amendment No. 2 to the RFP, November 12, 1976, clarified the RFP Scope of Work in certain respects and invited the offerors to submit revised proposals. Of the six offerors, only UNO and Research Triangle Institute (RTI) submitted revised proposals. These were technically evaluated, and RTI's proposal was rated at 764 points (out of a possible 1,000), while UNO's was rated at 631. RTI's proposed cost-plus-fixed-fee was \$524,339 while UNO's was \$645,743.

By letter dated March 21, 1977, EPA advised UNO that its proposal was technically acceptable and that "The technical review panel did not find any ambiguities in your proposal which would necessitate further clarification." At the same time, both offerors were requested to submit their best and final offers by April 1, 1977, and both did so. EPA reports that RTI made no changes in its proposal. UNO made technical changes and reduced its proposed cost-plus-fixed-fee to \$510,456.

The best and final offers were evaluated by EPA. The contracting officer states that "touch-up" negotiations were then conducted with RTI which resulted in a reduction of RTI's proposed cost-plus-fixed-fee from \$524,330 to \$521,390. By letter dated May 6, 1977, EPA informed UNO as follows:

"This is to inform you that negotiations for award of a contract for a preliminary assessment of halogenated organic compounds in man and environmental media are being conducted with Research Triangle Institute * * *

"The determination to award the contract to the above firm was made in accordance with the Federal Procurement Regulations, and award will be made to that firm which proposed to perform the effort in a manner most advantageous to the Government."

Protester's Position

After receiving EPA's May 6, 1977, letter, UNO protested. Mainly, UNO alleges that because its proposal was technically acceptable and

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lowest in cost, it should receive the award. The protester challenges EPA's conclusion that UNO's best and final offer made undue reductions in the proposed technical effort. In this regard, UNO questions the technical qualifications of one member of the EPA technical evaluation panel. Also, the protester expresses serious reservations as to whether RTI can perform the work given its proposed cost.

UNO also contends that EPA's conducting preaward negotiations only with RTI makes a sham out of the competitive negotiation process. In this connection, UNO alleges the contracting officer advised it that the cost of the contract could go considerably higher as a result of the preaward negotiations with RTI. Finally, the protester believes that EPA's contracting procedures are questionable in view of the inordinate amount of time involved in this procurement.

Agency's Position

The contracting officer states that his notes concerning the procurement give no indication that he advised UNO the cost of the RTI contract might be increased due to the touch-up negotiations. In this regard, he points out that the touch-up negotiations actually resulted in a decrease in RTI's proposed cost-plus-fixed-fee. As for UNO's objections concerning the evaluation of proposals, the contracting officer's position, in brief, is that the detailed record of the evaluation substantiates EPA's conclusions (1) that UNO's best and final offer made major and unsupported reductions in its proposed technical effort, and (2) that RTI's proposal realistically showed it can perform the work called for. The contracting officer points out that the difference in the technical scoring was a 21-percent advantage in favor of RTI (RTI--764; UNO--631) whereas the difference in cost was only a 2-percent advantage in favor of UNO (RTI--\$521,390 final negotiated cost; UNO--\$510,456 proposed cost-plus-fixed-fee in best and final offer). He concluded that this computation convincingly illustrates that the technical superiority of the RTI proposal more than offset the relatively minor cost savings that might be realized should award be made to UNO. Finally, the contracting officer agrees with the protester that the procurement has been long and difficult but notes that not all of the delay is attributable to EPA.

Discussion

The basic issue in this case relates to the fact that the offerors at EPA's request submitted best and final offers by April 1, 1977, and EPA then conducted further negotiations with RTI alone. We have

obtained from EPA a document entitled "Summary of Negotiations," dated May 11, 1977, which indicates that EPA conducted negotiations with RTI by telephone on May 2, 1977. The negotiations resulted in changes in three elements of cost in the RTI proposal as well as in the proposed fee. As already noted, the net effect was a reduction in RTI's proposed cost-plus-fixed-fee.

The requirements concerning the conduct of negotiated procurement by most of the nonmilitary agencies of the Federal Government, including EPA, are set forth in Federal Procurement Regulations (FPR) § 1-3.000, et seq. (1964 ed. as amended). These regulations require, among other things, that a common cutoff date be established for the closing of negotiations through the offerors' submission of their "best and final" offers. See 50 Comp. Gen. 117 (1970) where we stated at pages 124-125:

"The [contracting agency's] report of May 21 states that all offerors were given an equal time to revise their proposals but that a common cutoff date for negotiations was not prescribed since the promulgation of such a date would have allowed some concerns more time to prepare revisions than other offerors. It also expresses the view that 'In any event, the requirement for a common cutoff date should be considered de minimis.' In this connection FPR 1-3.805-(b) provides, in pertinent part:

"Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (see § 1-3.805-1(a)) shall be offered an equitable opportunity to submit such price, technical or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals should be submitted by that date.'

We have held that a similar provision in ASPR 3-805.1(b) requires the establishment of a common cutoff date to properly close negotiations. 48 Comp. Gen. 536. Any suggestion that a common cutoff date for all offerors concerns a trivial matter should be dispelled by the holding in our recent decision of July 2, 1970, 50 Comp. Gen. 1.

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"The report of May 21 also indicates that a proposal revision favorable to the Government should be considered even if submitted after the common cutoff date. If such action were permitted, without opening up new negotiations for all offerors in the competitive range, it is apparent that the purposes for establishing a common cutoff date for the close of negotiations would be frustrated. In this connection our Office has held that to properly terminate the close of negotiations all offerors must be advised that negotiations are being conducted; that offerors are being asked for their 'best and final' offer, and not merely to confirm their prior submission; and that any revision to their proposal must be submitted by the common cutoff date. B-167417, September 12, 1969." (Emphasis in original.)

It is true that after the common cutoff date, the Government may accept a late modification to an otherwise successful proposal which makes the terms of the proposal more favorable to the Government. See the late proposal clauses in FPR §§ 1-3.802-1 and 1-3.802-2 (1964 ed. amend. 118). However, we have held that this exception contemplates a voluntary, unsolicited modification by an offeror whose proposal has been determined to be "otherwise successful." See 50 Comp. Gen. 729 746-748 (1971). In the present case, the record indicates that the May 2, 1977, telephone negotiations were conducted with RTI because the contracting officer--based on an audit of RTI's cost proposal--had questions concerning some of the cost elements of the proposal as well as RTI's proposed fee. By letter to EPA dated May 3, 1977, RTI confirmed the negotiations and made certain changes in its cost proposal, including the reduction of total cost-plus-fixed-fee to \$521,390. Moreover, the record indicates that the final determination that award to RTI would be in the best interests of the Government was not made until May 11, 1977.

It is not proper for the Government to continue discussions with only one of the offerors in the competitive range after best and final offers have been received. If negotiations are reopened with one offeror, they must be reopened with all of the other offerors in the competitive range, and a new round of best and final offers requested. See, in this regard, 50 Comp. Gen. 117, supra; Elgar Corporation, B-186660, October 20, 1976, 76-2 CPD 350; Cf. Ocean Technology, Inc., B-183749, October 29, 1975, 75-2 CPD 262.

In this regard, there is no indication in the record that EPA at any time determined that UNO's proposal was not within the competitive range. The contracting officer does state that the reductions in technical effort in UNO's best and final offer "may affect" its technical acceptability. Also, one of the technical evaluators concluded that in the absence of a more detailed program plan, the reductions lessened the technical quality of an already marginally acceptable proposal. On the other hand, the numerical scoring of the best and final offers was unchanged from the scoring of the initial proposals--i.e., RTI--764, UNO--631. Also, the contracting officer's statement clearly indicates that RTI's proposal was selected for award based upon a determination that it was more advantageous than UNO's proposal--not on a determination that UNO's proposal had become unacceptable and that RTI's proposal was therefore the only proposal remaining within the competitive range.

Thus, the present situation is distinguishable from cases such as 52 Comp. Gen. 198 (1972), where an agency in selecting a proposal for award in effect determined that the protester's revised proposal was no longer within the competitive range because of an unrealistically low price and an unacceptably high risk of adverse impacts on contract performance.

In light of the foregoing, it is apparent that EPA's conducting negotiations solely with RTI after the receipt of best and final offers was not proper. In regard to the impact of the improper discussions on the relative standing of the offerors and the prejudicial effect on UNO, see PRC Information Sciences Company, B-188305, July 7, 1977, 56 Comp. Gen. _____, 77-2 CPD 11. In that decision, which involved a situation where improper post-selection discussions were conducted with only one of two offerors competing for an award, we stated:

"If discussions have been conducted with one offeror, it is required that discussions be conducted with all offerors within the competitive range, including an opportunity to submit revised offers. See FPR § 1-3.805-1, supra; 50 Comp. Gen. 202 (1970); 51 id. 102 (1971); id. 479 (1972); Burroughs Corporation, 56 Comp. Gen. 142 (1976), 76-2 CPD 472; Airco, Inc. v. Energy Research and Development Administration, 528 F.2d 1294 (7th Cir. 1975). The competition should generally

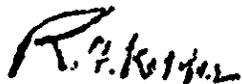
be reopened, even when the improper post-selection negotiations do not directly affect the offerors' relative standing, because all offerors are entitled to equal treatment and an opportunity to revise their proposals. See 49 Comp. Gen. 402 (1969), modified on other grounds in Donald N. Humphries and Associates et al., 55 Comp. Gen. 432 (1975), 75-2 CPD 275; 50 Comp. Gen., supra; Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201 (1975), 75-2 CPD 144, affirmed 55 Comp. Gen. 972 (1976), 76-1 CPD 240; Airco, supra. In this regard, although it has been argued that PRC was not prejudiced if discussions were in fact conducted with Rehab, the point is that every offeror within a competitive range has the right to change or modify its proposal, including price, for any reason whatever, so long as negotiations are still open; and that Rehab, but not PRC, was afforded this opportunity. * * *

Conclusion

In view of the foregoing, the protest is sustained. We recommend that EPA reopen negotiations so as to allow UNO and RTI a reasonable opportunity to submit new best and final offers, and that the negotiations be properly terminated upon the receipt of those offers by a common cutoff date.

By letter of today, we are advising the EPA Administrator of our recommendation.

This disposition of the protest makes it unnecessary to consider the other issues raised by UNO.


Deputy Comptroller General
of the United States