

DOCUMENT RESUME

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[Alleged Improper Contracting Procedures]. D-188914. September 27, 1977. 5 pp. + enclosure (1 pp.).

Decision re: Homemaker Health Aide Service of the National Capital Area, Inc.; by Robert F. Keller, Acting 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: District of Columbia: Dept. of Human Resources; Homemakers Upjohn.

Authority: 54 Comp. Gen. 1680. 48 Comp. Gen. 663. 48 Comp. Gen. 605. 47 Comp. Gen. 778. 51 Comp. Gen. 272. 55 Comp. Gen. 802. 36 Comp. Gen. 259. 35 Comp. Gen. 684. 38 Comp. Gen. 253. F.P.R. 1-3.404-(1-3). F.P.R. 1-3.409(c). D-184263 (1976).

The protester alleged that the agency did not comply with proper contracting procedures and with the terms of the request for proposals. The solicitation provided for fixed-price hourly rates, and the agency's acceptance of an offer based on a fixed rate subject to escalation represented a change in the "ground rules" of the procurement which was unfair to other offerors. The agency should amend the solicitation to indicate clearly the Government's requirements and open negotiations so that offers can be submitted on an equal basis. (Author/SC)

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*Proposed
D.S. # 2*



DECISION

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

FILE: B-188914

DATE: September 27, 1977

MATTER OF: Homemaker Health Aide Service

DIGEST:

Where solicitation provides for fixed-price hourly rates, agency's acceptance of offer based on fixed rate subject to escalation, where escalation could result in higher price than that offered by competing firm, represents change in "ground rules" of procurement which is unfair to other offerors. It is therefore recommended that agency amend solicitation to clearly indicate Government's requirements and open negotiations so that offers can be submitted on equal basis.

Homemaker Health Aide Service of the National Capital Area, Inc. (HHAS) protests award of a contract to Homemakers Upjohn (Upjohn) for homemaker and home health aid services to be provided during the period from May 1, 1977 to April 30, 1978. The selection of Upjohn was based on proposals received in response to request for proposals (RFP) No. 1-F, which was issued by the Department of Human Resources, Government of the District of Columbia (DHR), on January 31, 1977. HHAS maintains that DHR has not complied with proper contracting procedures and with the terms of the RFP.

RFP No. 1-F sought offers to provide homemaker services in five basic categories: (A) Emergency substitute care; (B) Planned substitute care; (C) Teaching service and evaluation service; (D) Emergency substitute care to be given to community residential facilities; and (E) Caretaker program. Seven proposals were received in response to the RFP, including proposals from Upjohn and HHAS. The HHAS proposals were evaluated and the evaluation panel recommended that award be made to Upjohn for categories A thru D and HHAS for category E.

HHAS was orally advised of these proposed awards on April 18, 1977. By letter of April 21, 1977, HHAS filed protests with HRD and this Office. In its letter to HRD, the protester requested disclosure of the prices quoted by all offerors, the detailed point ratings and a description of the deficiencies found in the HHAS proposal. HRD furnished HHAS with the information it requested.

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The "Fact Sheet" portion of the HRD report further indicated that the awards had been made. However, we have since been advised by HRD that in fact the awards have been withheld pending resolution of the HHAS protest.

HHAS first challenges the award to Upjohn on the basis that Upjohn did not comply with the RFP, which, in HHAS' view, required an offeror to submit a single hourly rate for all the categories of work. Upjohn, as well as a number of other offerors, submitted one price for categories A thru D and a second price for category E. HHAS maintains that Upjohn's offer should have been rejected for this reason.

The original solicitation required offerors to quote on all five categories of work. HHAS maintains that at the pre-award conference on February 7, 1977, a question was raised whether a separate quote could be submitted for categories A thru D and another for category E, in view of the more costly nature of the work required by category E. HHAS states the DHR response was that there could be only "one bid". After the conference, the RFP was amended on February 11, 1977, as follows:

"Any offeror responding to subject RFP who fails to submit a quote for the entire package (all categories of required services) will not be considered for award.

"The 'Caretaker Program - Category E' will be evaluated independently of Items A through D utilizing the same evaluation criteria established in Section IX.

"It is conceivable that two (2) awards may be let as a result of this RFP, one (1) which encompasses categories A-D and a second (2nd) for category E."

DHR argues that this amendment did not require a "single" quote, but simply required all offerors to submit a quote for each category of service. The agency explains that the purpose for this was to compel offerors to submit an offer for category E, the least attractive category from the standpoint of the contractor. However, we need not resolve this issue in view of our conclusion as discussed below.

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The RFP as initially issued provided for payment to the contractor on a cost reimbursement basis for all categories of work. The February 11 amendment, however, deleted the cost reimbursable feature and provided instead that:

"The Contractor shall be remunerated for actual services * * * on a fixed-rate estimated quantities basis [except for emergency purchases which shall be on a cost reimbursable basis]."

In its proposal, Upjohn quoted fixed hourly rates but added:

"In the event that the direct cost to Homemakers were to increase at the discretion of the District Homemakers Upjohn reserves the right to renegotiate the base salary to reflect the rate increase * * *."

MHAS maintains that because Upjohn's offer specified a cost escalation contingency it was neither firm nor definite and, therefore, could not be accepted unless all other offerors are given an opportunity to offer on the same terms.

DHR argues, on the other hand, that this offer is acceptable since the RFP as amended merely stated that the contractor would be paid for actual services rendered at an established hourly rate and the Upjohn offer complies with this criterion. While the Upjohn hourly rate would be subject to escalation, DHR points out that in any event the total cost to DHR would depend upon the actual total hours of service provided by the contractor. In DHR's view Upjohn was free to propose the escalation feature since the procurement is being conducted under negotiated procedures, not formal advertising.

We agree with the protester. It is a fundamental rule of competitive negotiations that offerors be afforded the opportunity to compete on an equal basis. An essential element of that treatment involves providing offerors with identical statements of the agency's requirements. Minjares Building Maintenance Company, B-184263, March 10, 1976, 76-1 CPD 168. Thus, when an agency decides that it is willing to accept a proposal that deviates from its stated needs or requirements, all offerors must be informed of the change, usually through amendment of the solicitation, and furnished an opportunity to submit a proposal on the basis of the revised requirements. Computek Incorporated, et al., 54 Comp. Gen. 1080 (1975), 75-1 CPD 384; 48 Comp. Gen. 663 (1969). A similar

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result obtains when there is a change in the "ground rules" of the procurement, such as where a noncompetitive procurement in fact becomes competitive, 48 Comp. Gen. 605 (1969); 47 *id.* 778 (1968), or where the evaluation factors have been changed. 51 Comp. Gen. 272 (1971). In short, the procuring activities, in order to insure that offerors are competing on an equal basis, are required to notify offerors of any change in the Government's requirements or "ground rules" and to provide them with an equal opportunity to submit offers on the basis of the change. Unioi Carbide Corporation, 55 Comp. Gen. 802 (1976), 76-1 CPD 134.

Here the RFP as amended called for offerors to quote on a "fixed-rate estimated quantities basis." The estimated quantities were set forth in hours and offerors were expected to quote fixed hourly rates. As explained in Federal Procurement Regulations (FPR) §§ 1-3.404-1, 404-2 and 404-3, fixed-price contracts are of several types, including the firm-fixed-price contract and the fixed-price contract with escalation. The difference between these two types is that the former provides for a firm price while the latter provides for the upward or downward revision of the stated contract price upon the occurrence of certain contingencies which are specifically defined in the contract. Also, FPR § 1-3.409(c) states that the indefinite quantity type contract, depending on the situation, may provide for (i) firm fixed prices, (ii) price escalation, or (iii) price redetermination. Clearly, under this solicitation offerors were required to provide a firm-fixed hourly rate. Since the solicitation did not provide for price escalation, Upjohn, by quoting a price which is subject to escalation, deviated from the "ground rules" of the procurement.

Finally, we agree with DMR that its total cost under these contracts will depend in part upon the total hours of services provided by the contractor. But the total cost will also depend upon the hourly rate specified in the contract. In fact the cost proposals were evaluated based on the hourly rates quoted by each offeror. In this connection, we note that Upjohn's hourly rate for categories A thru D was \$5.25, while HHAS quoted a rate of \$5.40. However, because of the escalation factor in Upjohn's price, we question whether its price is actually lower than the protester's price. For example, if Upjohn's price is escalated due to the increase in the D.C. minimum wage rate effective July 12, 1977 (from \$2.40 per hour to \$2.90 per hour), Upjohn's price could exceed the protester's price.

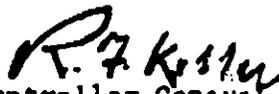
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We have held that the insertion by a bidder of an escalation provision does not automatically preclude consideration and acceptance of the bid, provided that it reasonably appears that the maximum price to the Government would be lower, even after the escalation provision is taken into account, than if another bid were to be accepted. 36 Comp. Gen. 259 (1956); 35 *id.* 684 (1956). On the other hand, we have also pointed out that bid rejection would be appropriate if it cannot be determined whether the maximum prices under an escalation provision would be less than the firm prices quoted by another bidder. 38 Comp. Gen. 253 (1958).

Here, as indicated above, it is not clear that Upjohn's price would be lower than the protester's price. Since this procurement is negotiated rather than formally advertised, rejection of Upjohn's proposal is not required. However, under the circumstances, we cannot sanction the proposed award of categories A thru D to Upjohn. Moreover, since it appears that the protester's hourly price was based on award of all five categories, we do not believe that an award should be made to that firm for category E alone. The protester obviously misunderstood the instructions contained in the RFP amendment concerning the requirement "to submit a quote for the entire package."

Accordingly, we recommend that negotiations be opened with all offerors after DHR issues an amendment to the RFP clarifying that one rate may be quoted for categories A thru D and another for category E. In addition, if escalation is to be permitted, we recommend that an appropriate escalation clause should be included in the RFP amendment so that all offerors may compete on an equal basis.

We recognize that initial prices have been exposed and that negotiations with the offerors in this situation would constitute an auction. On the other hand, we believe that making the awards proposed by DHR would not be proper for the reason stated above. Under the circumstances we believe that the integrity of the competitive bidding system would be best served by opening negotiations with all offerors as recommended above.


Acting Comptroller General
of the United States



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

D-188914

SEP 27 1977

The Honorable Walter E. Washington
Mayor of the District of Columbia

Dear Mayor Washington:

Enclosed is a copy of our decision in response to the protest filed by Homemaker Health Aids Service under solicitation No. 1-7 issued by the Department of Human Resources (DHR).

As indicated in the decision, it appears that competing offerors were not competing on an equal basis. Accordingly, it is recommended that DHR clarify the solicitation by issuing an amendment and then provide all offerors an equal opportunity to compete by opening negotiations with them and allowing the submission of revised offers.

We would appreciate your advice as to the action taken.

Sincerely yours,

R.F.KELLER

Acting Comptroller General
of the United States

Enclosure

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