

DECISION



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

FILE:

DATE: September 13, 1982

B-206843

MATTER OF:

Technical Micronics Control, Inc.

DIGEST:

1. Award of a cost-plus-award-fee contract on the basis of lowest proposed fees, without solicitation or consideration of any other proposed costs, precludes conduct of an adequate cost realism analysis of competing offers, and is contrary to 10 U.S.C. § 2304(g) which requires that proposals, including price, be solicited in negotiated procurements.
2. In a cost-plus-award-fee contract, the award fee is intended to operate as an incentive for excellence in contract performance. A competition where offerors may propose award fees of 0 percent defeats the purpose of such fees.
3. A competition where neither cost nor technical proposals are requested, and where there is no basis for meaningful negotiations and none are therefore conducted, is a competition in form without substance.

Technical Micronics Control, Inc. (TMC) protests the U.S. Army Corps of Engineers award of a cost-plus-award-fee (CPAF) contract to M&G Enterprises under request for proposals (RFP) No. DACW01-82-R-0012. The solicitation was for operation and maintenance of Government-owned facilities in the areas of Walter F. George and George W. Andrews lakes in Georgia. We sustain the protest.

TMC alleges that the agency did not establish any specific evaluation factors for determining which proposal offered the lowest cost to the Government, and that it made no evaluation of the cost realism of the proposals submitted. TMC also asserts that M&G's offer should have been rejected because it does not provide

for any profit. Finally, TMC protests the agency's alleged failure to provide it with timely notice of the contract award to TMC.

Background

The solicitation contained the following provisions concerning proposal evaluation and contract award:

"1. EVALUATION AND AWARD FACTORS:

a. All offerors must insert in the space provided in Section B [Supplies, Services and Prices] proposed Base Fee and Award Fee to accompany the Government's Estimated Cost.

b. The price proposals of all offerors will be evaluated and award will be made as follows:

(1) Award will be made to that offeror whose Total (Base plus Award) fee percentage is lowest overall.

(2) If Total (Base plus Award) Fee is equal among offerors, the lowest Base Fee will govern for award purposes.

c. Award will be made to that responsive, responsible offeror submitting the CPAF arrangement considered most advantageous to the Government in accordance with the evaluation criteria set forth above." (Emphasis added.)

No technical proposals were requested. Thus, all offerors were required to propose only a CPAF fee structure utilizing the Government estimate of \$397,000 as their estimated base cost figure. The contracting officer states that this evaluation approach was used because it was the first time the operation and maintenance of the lake areas had been contracted out, and there were many variables beyond the contractor's control. This also provided the basis for the decision to award a CPAF type contract.

M&G proposed a 0 percent base fee and a 0 percent award fee, making it the offeror with the lowest overall fee proposal and thus in line for award under the terms of the RFP. The agency found M&G responsible after conducting a pre-award survey, and awarded it the contract on March 18, 1982. The award was made without discussions, a possibility which was provided for in the RFP.

Timeliness

The Corps of Engineers contends that TMC's protest is untimely insofar as it concerns the failure to provide for or perform an adequate cost evaluation since the agency's intent in this regard was clearly set forth in the solicitation, but TMC did not protest until after contract award. Our Bid Protest Procedures require that protests based upon apparent solicitation improprieties be filed prior to the closing date set for receipt of proposals. 4 C.F.R. § 21.2(b)(1) (1982).

TMC asserts that it is not protesting the adequacy of the evaluation factors contained in the RFP, but instead, the agency's failure to conduct any cost realism analysis of the proposals submitted. The protester contends that it did not learn of the agency's intent to base its total evaluation only on offeror's proposed fees until after the closing date set for receipt of proposals, and that its protest is timely because it was filed within 10 working days after it was so informed. See 4 C.F.R. § 21.2(b)(2).

We believe that this basis of protest should have been apparent to TMC from the solicitation. The RFP required only that offerors propose base and award fees, and clearly provided that those fees would be evaluated by using the Government estimate as the base cost for all offerors. The RFP contained no requirement that offerors submit independent cost proposals. Therefore, it is difficult to understand how TMC could have concluded that the agency would conduct a cost realism analysis. Nevertheless, we believe that the deficiencies in this procurement warrant consideration of the protest on its merits. See Security Assistance Forces & Equipment OIG, B-201839, December 31, 1981, 81-2 CPD 516.

Cost Realism Analysis

Where a cost-reimbursement type contract is to be awarded, proposed costs must be examined in terms of their realism since the Government is obligated under such a contract to reimburse the contractor for its allowable costs.

See Moshman Associates, Inc., B-192008, January 16, 1979, 79-1 CPD 23. Moreover, a cost realism determination cannot be permitted to stand when it appears that there has been little or no meaningful analysis, particularly where contractor selection ultimately depends on the estimated cost for performance of the contract. See Franklin Institute Research Laboratories, B-193057, June 29, 1979, 79-1 CPD 472.

In this case, we recognize that award was made solely on the basis of lowest proposed fees rather than on total proposed costs. It nonetheless is evident that the agency could neither perform the required cost realism analysis nor consider price as an element of the award since there were no cost proposals solicited.

The Armed Services Procurement Act, as codified at 10 U.S.C. § 2304(g)(1976), provides that:

"In all negotiated procurements in excess of \$10,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured * * *." (Emphasis added.)

Therefore, solicitation and consideration of competitive prices generally are material requirements in negotiated procurements. We think it is apparent that these requirements are not satisfied by the mere solicitation and consideration of an offeror's proposed fees, which constitute only one element of his price to the Government. In this connection, Defense Acquisition Regulation (DAR) § 3-803(c)(1976 ed.) specifically recognizes that proposed fees should not be considered controlling in the award of cost-reimbursement type contracts since they are not necessarily valid indicators of actual cost to the Government.

The Corps of Engineers argues, however, that it did perform an adequate cost realism analysis in this case because during the pre-award survey phase, it conducted an audit of M&G's accounting, purchasing, and billing procedures in order to compute a provisional overhead rate allocable to the contract. We do not consider this analysis to be meaningful since the fact remains that neither M&G nor any other offeror ever submitted a cost

proposal to the agency. In the absence of cost proposals, an effective cost comparison between competing proposals to determine the relative cost to the Government was not possible.

We do not agree with the agency's assertion that a competition based on fee only was justified because the services were being contracted out for the first time and there were many variables beyond the contractor's control. Cost-reimbursement type contracts are themselves suitable for use only where the uncertainties involved in contract performance are of such magnitude that cost of performance cannot be estimated with sufficient reasonableness to permit use of a fixed-price type contract, DAR § 3-405.1(b). While the alleged variables which may exist here (the agency has not specified what they are) may justify the use of a cost-reimbursement type contract, we do not believe that they also justify awarding a contract without solicitation and full consideration of an offeror's proposed costs.

In that connection, we note that the work contracted for in this case is to be performed in two designated areas and consists primarily of the operation and maintenance of buildings, structures, and mechanical and electrical systems; janitorial type services; maintenance of guardrails, signs and barricades; pest control, and landscape maintenance. The solicitation contained a reasonably detailed description of what each of these duties entailed, and we believe this description provided a reasonable basis upon which an offeror could arrive at an independent cost estimate. To the extent that there are variables beyond the contractor's control, the nature of a cost-reimbursement type contract itself provides adequate protection since the contractor will be entitled to payment of all his allowable costs incurred in performance of the contract. (Although the Government supplied the cost estimate, the solicitation specifically provided that its correctness was not guaranteed and that reimbursement would be for actual costs allowed in accordance with the provisions of DAR.)

Accordingly, we sustain TMC's protest on this issue.

Other Issues

Since we are sustaining TMC's protest for the reasons stated above, we do not consider it necessary to decide the merits of its other allegations concerning the

lack of any provision for profit in M&G's proposal and the agency's alleged failure to give timely notice of the contract award. Nevertheless, there are aspects of this procurement which we believe deserve comment.

The agency advised that in addition to M&G, two other offerors proposed 0 percent award fees. While we are aware of no prohibition on this, we note that when it is allowed, its effect is to defeat the very purpose which such a fee is intended to serve. In CPAF contracts, the award fee amount is intended to operate as an incentive for excellence in contract performance. It may be earned in whole or in part based on the Government's subjective appraisal of the contractor's performance against specified criteria such as quality, timeliness and cost effectiveness. DAR § 3-405.5(a). Obviously, no such performance incentive can be said to exist where offerors can propose a 0 percent award fee.

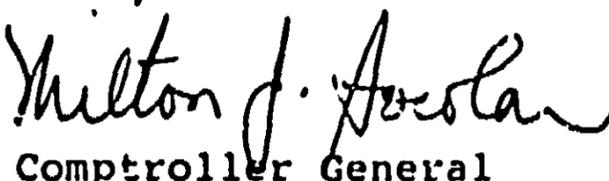
Further, where as here, neither technical nor cost proposals are requested, where as a consequence, there is no basis for any meaningful negotiations and none are in fact conducted, the result is a competition in form without substance. Consequently, this practice should be immediately discontinued.

Remedial Relief

TMC recognizes that termination of M&G's contract at this time may not be practicable and instead requests that we recommend against the exercise of any of the contract options. By letter of today to the Secretary of the Army, we are so recommending.

Since our decision contains a recommendation for corrective action, we have furnished copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to those committees concerning the action taken with respect to our recommendation.

The protest is sustained.

for 
Comptroller General
of the United States