



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** BNF Technologies, Inc.

**File:** B-254953.4

**Date:** December 22, 1994

Craig S. King, Esq., and John J. O'Brien, Esq., Arent Fox, for the protester.

Richard L. Moorhouse, Esq., and Dorn C. McGrath III, Esq., Holland & Knight, for Princeton Economic Research, Inc., an interested party.

Ronald E. Cone and Richard Leotta, Department of Energy, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

In response to the recommendation of the General Accounting Office in a decision sustaining a protest that the agency perform a new cost evaluation and obtain proposal revisions, if necessary; the agency reasonably determined to reopen negotiations with competitive range offerors, notwithstanding the disclosure of the protester's price advantage during the prior protest, where the agency found that the offerors' previously submitted best and final offers (BAFO) may no longer be valid because, since the submission of BAFOs, offerors' labor rates have changed and key personnel proposed by the protester were no longer in the protester's employ but in the awardee's, such that no valid source selection could be based on the BAFOs.

### DECISION

BNF Technologies, Inc. protests the Department of Energy's reopening of negotiations under request for proposals (RFP) No. DE-RP01-92-CE35060, in response to our recommendation in BNF Technologies, Inc., B-254953.3, Mar. 14, 1994, 94-1 CPD ¶ 274, in which we sustained BNF's protest of the award of a contract to Princeton Economic Research, Inc. BNF argues that we recommended only that the agency perform a new cost evaluation and that it will be prejudiced by Energy's determination to obtain revised proposals.

We deny the protest.

The RFP, issued on September 8, 1992, contemplated the award of a cost-plus-fixed-fee, level-of-effort contract for management and administrative support services for Energy's Office of Utility Technology (UT). The RFP required the contractor to provide assistance to the UT program offices, and the Deputy Assistant Secretary for UT and support staff, and stated the estimated number of labor hours required. The RFP provided for award on a "best value" basis and informed offerors that technical merit was more important than cost. The following technical evaluation criteria were identified: (1) technical approach, (2) organization and management capabilities, (3) key personnel qualifications, and (4) corporate qualifications.

Proposals were received from nine offerors, including BNF, the incumbent contractor, and Princeton. Discussions were conducted with the three highest-ranked offerors, which included BNF and Princeton, and best and final offers (BAFO) were received. Princeton's BAFO was awarded the high technical score of 891 points while BNF's proposal had the lowest score of 707 points. BNF's proposed BAFO costs were significantly adjusted upward in the agency's cost realism analysis, while Princeton's proposed costs were not significantly adjusted; as a result, BNF's and Princeton's probable costs were evaluated as being "virtually identical." Princeton received the contract award on September 14, 1993, based upon Energy's determination that Princeton's technical proposal was significantly superior to the other competitive range proposals, as evidenced by the point scores, and "in the absence of any appreciable cost benefit."<sup>1</sup>

We sustained BNF's prior protest on March 14, 1994, because we found that the agency had failed to conduct a reasonable probable cost analysis of BNF's cost proposal, resulting in a source selection that was not supported by a valid cost/technical tradeoff. We recommended that Energy conduct a reasonable probable cost analysis, obtaining proposal revisions, if necessary, and make a source selection decision in accordance with the RFP using that analysis.

Energy states that in response to our recommendation it started to perform a new cost realism analysis of the offerors' BAFOs, including new labor and indirect rate checks with the Defense Contract Audit Agency (DCAA). The agency determined that, because of the passage of time (from the submission of BAFOs on August 5, 1993) and the possible changes in the offerors' labor and indirect rates

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<sup>1</sup>The third offeror's proposal received the second highest technical rating, but was significant lower-rated than Princeton and had a much higher probable cost.

reported by DCAA, the previously submitted BAFO data were invalid and that revised proposals should be obtained from the competitive range offerors. Consequently, Energy initiated the reopening of discussions on both technical and cost proposals to permit the submission of revised BAFOs.

BNF argues that reopening negotiations and obtaining revised proposals is unreasonable. The protester contends that our recommendation only allows Energy to reevaluate the offerors' BAFOs and to obtain, if necessary, revisions of cost BAFOs only. In this regard, BNF complains that it would be prejudiced by a reopening of the competition because several of the key personnel it originally proposed are no longer in BNF's employ, but are now employed by Princeton. BNF argues that its proposal should be evaluated as if these key personnel were still employed by the protester. BNF also complains that Energy improperly released BNF's protected protest to Princeton during the course of our consideration of the protest, which disclosed to Princeton the magnitude of BNF's price advantage as well as the protester's pricing strategy to cap indirect cost rates.

We find that the agency had a reasonable basis to reopen negotiations with the offerors and to permit both technical and cost proposal revisions. While we only sustained BNF's prior protest because Energy's cost realism analysis was defective, we expressly recognized in our recommendation that Energy might need to obtain proposal revisions, if appropriate. We did not state that the reopened discussions should be limited to cost matters only, but left the matter of whether discussions should be reopened and their extent to the exercise of the agency's reasonable discretion.

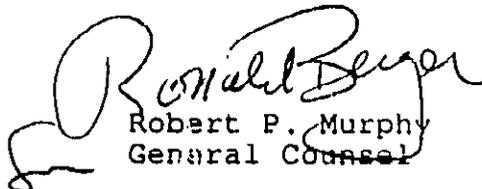
As a general rule, offerors in response to reopened discussions may revise any aspect of their proposals that they see fit--including portions of their proposals that were not the subject of discussions. American Nucleonics Corp., B-193546, Mar. 22, 1979, 79-1 CPD ¶ 197. On the other hand, in appropriate circumstances, an agency may decide to limit the revisions offerors could make to their proposals after the conduct of discussions. System Planning Corp., B-244697.4, June 15, 1992, 92-1 CPD ¶ 516; Metron Corp., B-227014, June 29, 1987, 87-1 CPD ¶ 642. In any case, contracting officials have the discretion to reopen negotiations after the receipt of BAFOs or after award where this is necessary to ensure a fair and impartial competition. Federal Acquisition Regulation (FAR) § 15.611(c); see, e.g., PRC, Inc., 72 Comp. Gen. 530 (1992), 92-2 CPD ¶ 215; Burns & Roe Servs. Corp., B-248394, Aug. 25, 1992, 92-2 CPD ¶ 124.

Here, the record supports the agency's view that material changes have occurred that affect the offerors' technical and cost proposals since the submission of previous BAFOs, e.g., the proposed labor rates may no longer be valid and proposed personnel may be unavailable. Thus, the record evidences that the offerors' cost and technical proposals may no longer reflect what the offerors can propose. In its protest, BNF confirms that key personnel it identified in its BAFO are no longer in the protester's employ, but are now employed by Princeton. While BNF argues that its key personnel may return to its employment if BNF were selected for award, BNF does not state that it has contacted any of these key personnel to obtain commitments to return to BNF's employ or authorization for the continued use of their resumes. An agency's evaluation of key personnel should be based upon personnel which an offeror reasonably believes to be available for contract performance and which the offeror intends to use during contract performance. See CBIS Fed. Inc., 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308. Since the record shows that material changes have occurred in the BAFOs, e.g., in the key personnel offered by BNF and Princeton, which can reasonably be expected to affect both the technical and cost evaluations, we cannot say that the agency's decision to reopen the negotiations to allow offerors an opportunity to revise their proposals was unreasonable. See Quintron Sys., Inc., B-249763, Dec. 16, 1992, 92-2 CPD ¶ 421. Indeed, reopening discussions after receipt of BAFOs is appropriate "where it is clear that information available . . . is inadequate to reasonably justify contractor selection and award based on [BAFOs] received." FAR § 15.611(c).

BNF also complains that it will be prejudiced by the reopening of negotiations, given the disclosure of its confidential business information. Where an agency proposes to reopen a competition after a price disclosure, the reason for recompeting and the prospective benefit to the competitive procurement system must be weighed against the risk of, and regulatory prohibition against, an auction. See Park Sys. Maintenance, Inc., B-252453.4; B-253373.3, Nov. 4, 1993, 93-2 CPD ¶ 265. However, the possibility that a contract may not be awarded based upon true competition on an equal basis is more harmful to the integrity of the competitive procurement system than the risk of an auction, and therefore the statutory requirements for competition outweigh concerns regarding auctions. The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425. Here, as noted above, the agency reasonably concluded that, given the changes in key personnel offered by BNF and Princeton and in offerors' labor and indirect rates, a fair competition could not be conducted based upon the originally submitted BAFOs that no longer reflected what was being offered the government. Under the circumstances, we find that reopening

the negotiations is not precluded by the disclosure of BNF's protected protest when balanced against the fact that the proposals no longer reflect what is being offered the government.<sup>2</sup>

The protest is denied.

  
Robert P. Murphy  
General Counsel

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<sup>2</sup>BNF's protest disclosed only its overall price advantage and that it proposed to cap indirect cost rates--which was specifically invited by the RFP; the amount of BNF's proposed caps was not disclosed.