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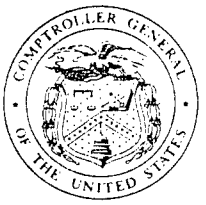
DECISION



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

18957

FILE: B-200814 DATE: August 3, 1981

MATTER OF: Law Engineering Testing Company

DIGEST:

RFP which does not state relative weight of cost and technical factors is defective, since offerors are entitled to know whether procurement is intended to achieve minimum standard at lowest cost, whether cost is secondary to quality, or whether the two are equally important.

Law Engineering Testing Company protests the award of a contract to F.M. Fox and Associates under request for proposals (RFP) BIA-M00-80-47, issued by the Department of the Interior, Bureau of Indian Affairs (BIA). The solicitation sought offers to perform an engineering geology feasibility study for a water development plan for the Mescalero Apache Reservation in New Mexico. Law complains that BIA, in selecting Fox as the awardee, failed to consider the fact that Law proposed to perform at a substantially lower cost; that BIA failed to conduct discussions after the receipt of initial proposals; that Law should have received a higher score upon technical evaluation; and that BIA failed to prepare a memorandum of any negotiations with Fox which might have taken place after the firm's selection, which Law asserts is required by Department of the Interior regulations.

The protest is sustained.

Facts

The RFP was issued on August 20, 1980, with proposals due by September 12. As issued, the RFP did not include any evaluation factors. Before the due date, a mailgram was sent to prospective offerors which set out four evaluation factors and their weights:

(1) Specialized experience and technical competence of the firm for type of services required --30 points

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(2) Capacity of the firm to perform the work within the time limitations --30 points

(3) Past record of performance --20 points

(4) Samples of completed projects --20 points

The mailgram advised that "on the basis of evaluations, firms considered to be eligible will be requested to submit a proposal."

Eight proposals were received and evaluated. Fox received the highest technical score, 84 points, while Law was scored fourth at 75 points. After noting that Fox's proposed cost of $60,000 was within the Government estimate of $55,000 to $80,000, BIA awarded the contract to that firm. Law's proposed cost was $41,918, which, according to BIA's view as expressed in the evaluators' worksheet, probably reflected the "low intensity" of the effort proposed by the firm.

Protest

Law's first basis for protest is that in comparing offers, BIA disregarded the fact that Law offered to perform the work at a lower cost than did Fox. Law essentially contends that the RFP indicated to offerors that cost was an important factor, and that award would, in effect, be made to the technically acceptable offeror proposing the lowest cost. The bases for the firm's interpretation of the RFP's evaluation scheme regarding the relative weight of cost and technical factors are:

(1) the general provision in Federal Procurement Regulations (FPR) § 1-3.805-1(a) (1964 ed.) that after initial proposals are received "discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and other factors considered * * *" (emphasis added);

(2) a "Special Notice to Offerors" in the RFP that:

> "All offerors are advised of the possibility that award of a contract for proposals submitted may be made without further discussion with responding organizations and, hence, that proposals should be submitted initially on the most favorable terms, from a price and technical standpoint which each offeror can submit to the Government"; and

(3) the advice in RFP section 203, "Cost Proposal," that "the contractor shall submit in addition to the plan of operation, a cost proposal believed to be adequate to provide the above stated contract requirements with sound engineering practices * * *."

Law asserts that when it considered all of these factors, it determined that cost was to be an important element in the award decision, and more specifically, that award would be made to that "eligible" offeror submitting the lowest realistic cost proposal, which turned out to be Law.

Discussion

In a negotiated procurement lowest cost is not necessarily the determining factor in making an award, and an agency therefore may select a higher rated technical proposal instead of a lower rated, lower cost one if the agency reasonably determines that the superior performance expected from the higher rated offeror justifies the additional cost involved. See FPR § 1-3.805-1. Olin Corporation, Energy Systems Operation, B-187311, January 27, 1977, 77-1 CPD 68. In making this determination, agency officials necessarily are given a considerable range of discretion, and their judgment therefore will not be disturbed by our Office unless clearly without a reasonable basis. University of New Orleans, B-184194, May 26, 1978, 78-1 CPD 401.

The extent to which such cost/technical trade-offs may be made is governed, however, by the evaluation scheme set out in the RFP. David A. Clary, B-200877, April 28, 1981, 81-1 CPD 326; Automated Systems Corporation, B-184835, February 23, 1976, 76-1 CPD 124. Offerors are entitled to know whether a procurement is intended to achieve a minimum standard at lowest cost, whether cost is secondary to technical quality, or whether the two are equally important. See Iroquois Research Institute, 55 Comp. Gen. 787, 790-791 (1976) 76-1 CPD 123.

Here, the RFP's evaluation factors as set out in the mailgram did not mention cost at all. The only mentions of cost or price in the RFP were in the standard language in paragraph 10 of Standard Form 33-A, Solicitation Instructions and Conditions, that the contract would be awarded to the responsible offeror whose proposal conforming to the RFP "will be most advantageous to the Government, price and other factors considered"; the RFP's "Special Notice to Offerors"; and RFP section 203, "Cost Proposal."

However, we have frequently stated that a reference to "price and other factors" such as in paragraph 10 of Standard Form 33-A (or in FPR § 1-3.805-1(a), supra.) without more does not inform offerors of the relative importance of price in relation to technical factors. See Iroquois Research Institute, supra.

Also, we have found that language substantially similar to that in the RFP's "Special Notice to Offerors," quoted above, is not adequate to advise responding firms of the relative importance of cost and technical factors. A.R.&S. Enterprises, Inc., B-196518, March 12, 1980, 80-1 CPD 193.

Finally, we do not view RFP section 203, also quoted above, as relevant to the issue, since it essentially is merely a caution that the proposed cost must be realistic. In this regard, FPR § 1-3.805-2 advises that in cost-reimbursement type contracts proposed costs should not be considered controlling since they may be unrealistically low, and FPR § 1-3.807-2 requires a price or cost analysis in every negotiated procurement.

Thus, BIA's solicitation lacked the requisite statement of the relative values of price and technical factors. As a result, offerors were left to guess at how the agency

was going to weigh their technical and cost proposals. Law's interpretation of the RFP's evaluation scheme was, in effect, a bad guess.

The further result of the RFP deficiency was that the evaluators lacked proper guidance as to the basis on which to select the awardee. The evaluation record is devoid of any consideration of the value of a cost/technical trade-off. Rather, the evaluators simply noted all firms' proposed costs and the fact that the proposed cost of the highest rated technical offeror (Fox) was within the Government's estimate. In this respect, we also note that there is no suggestion in the record that BIA ever analyzed the realism of Fox's cost proposal; as indicated above, in a cost-type contract an agency must do more than merely accept the offeror's proposed costs as realistic since the Government will be obligated to reimburse the contractor all allowable costs notwithstanding whether they exceed those proposed during the competition. See Moshman Associates, Inc., B-192008, January 16, 1979, 79-1 CPD 23.

We note here that the RFP cites 41 U.S.C. § 252 (c)(4) (1976) as the authority to negotiate a contract in lieu of using the formal advertising method of procurement. That statute allows negotiation "for personal or professional services."

However, the RFP description of the services sought--an engineering geology feasibility study--suggests that BIA may have been purchasing professional engineering services, which should have been effected under the Brooks Act, 40 U.S.C. § 541 et seq. The Brooks Act states the Federal Government's policy in the procurement of architectural and engineering (A-E) services.

The Brooks Act prescribes procedures different from those ordinarily followed in negotiated procurements. For example after publicly announcing a requirement for A-E services, an agency must evaluate A-E statements of qualifications and performance data on file and statements submitted in response to the announcement. Discussions then are held with at least three firms regarding "anticipated concepts and the relative utility of alternative methods of approach" for providing the services. Based on established and published criteria, which are not to relate

either directly or indirectly to the fee to be paid the firm, the contracting agency then ranks in order of preference no less than three firms deemed most highly qualified. Negotiations are held with the A-E firm ranked first. Only if the agency is unable to agree with the first-ranked firm as to a fair and reasonable price are negotiations terminated and the second-ranked firm invited to submit its proposed fee.

In fact, the record suggests that the procuring activity actually had the Brooks Act procedures in mind during the conduct of the procurement. For example, the mailgram sent by BIA to set out the RFP evaluation factors also requested interested firms to submit Standard Form 254, which is the A-E qualification statement that an agency reviews when initiating a Brooks Act procurement. Also, the first three of the RFP's four evaluation criteria are three of the four criteria set out at FPR § 1-4.1004-3 to evaluate and rank A-E firms after the discussions in a Brooks Act procurement. Further, the technical evaluation was done by BIA's A-E Selection Board. We suspect, therefore, that certain of the evaluators assumed that the procurement was a Brooks Act one, with the RFP essentially a substitute for the required oral discussions with at least three firms, and cost thus not relevant in the comparative evaluation of proposals.

In any case, the issue is not raised in the protest, and the record shows that the services have been fully performed. Under the circumstances, however, we are advising the Secretary of the Interior of our observations in this respect.

In view of the above, we conclude that the RFP was defective so that the award under it was improper. Therefore, it is not necessary to consider the other issues raised by the protester. The protest is sustained.

As stated above, Fox's performance under the contract has been completed. Thus, there is no relief available with respect to this procurement. However, by separate letter we are advising the Secretary of the Interior of the noted procurement deficiencies.

In addition, we are concerned with the length of time that it took for the Bureau of Indian Affairs, through the Department of the Interior, to furnish to our Office a report responsive to Law's protest. On October 16, 1980, we requested Interior to submit a report on the protest

within 25 working days, in accordance with section 20.3 of our Bid Protest Procedures, 4 C.F.R. part 20 (1980). That provision reflects both what we consider to be a sufficient period for the preparation of a report, and our view that the expeditious handling of bid protests is indispensable to the protection of protesters and other parties. Wheeler Industries, Inc., B-193883, July 20, 1979, 79-2 CPD 41.

However, a complete report was not submitted until more than seven months later (May 28, 1981). Accordingly, we are also bringing this matter to the attention of the Secretary of the Interior. See Vallie Enterprises, B-200339, May 29, 1981, 81-1 CPD 423.

Milton J. Socolar

Acting Comptroller General
of the United States