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2002 CPD ¶ 79

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Priority One Services, Inc.

File: B-288836; B-288836.2

Date: December 17, 2001

Kevin P. Mullen, Esq., Piper Marbury Rudnick & Wolfe, for the protester.
Scott A. Ford, Esq., for SoBran Incorporated, an intervenor.
Michael Colvin, Department of Health & Human Services, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency failed to perform a proper cost realism evaluation in awarding a cost reimbursement contract where the agency made no probable cost adjustments even where it identified costs that it believed were unrealistic and did not consider the proposed costs in light of the offeror's proposed technical proposals.
2. Agency's communications after submission of final proposal revisions with one offeror constituted discussions where the agency required the offeror to replace unacceptable personnel, and solicited other proposal revisions from that offeror, which entailed an increase in its proposed costs; thus, the agency was required to conduct discussions with all offerors whose proposals had been determined to be in the competitive range.

DECISION

Priority One Services, Inc. protests the award of a contract to SoBran Incorporated under request for proposals (RFP) No. NIAID-DIR-01-56, a small business set-aside, issued by the National Institute of Allergy and Infectious Diseases (NIAID), National Institutes of Health, Department of Health & Human Services, for the care, use, and humane treatment of laboratory animals, and technical skills related to the scientific study and manipulation of animals and animal products. Priority One contends, among other things, that NIAID performed an unreasonable cost evaluation and conducted improper discussions with SoBran.

We sustain the protest.

The solicited services are to be provided under a cost-plus-fixed-fee contract for a base year with four 12-month option periods.¹ Award was to be made to the offeror whose proposal provided the “best overall value to the Government,” considering the following evaluation factors: past performance (worth 800 points), technical approach and general understanding of requirements (worth 700 points), corporate resources (worth 350 points), small disadvantaged business (SDB) participation (not scored), and cost (not scored). Although past performance was said to be “of paramount consideration,” cost and SDB participation were “also important” to the award decision. All evaluation factors other than cost, when combined, were significantly more important than cost. Under the past performance factor, the RFP listed 12 variously weighted subfactors, including whether proposed “personnel have necessary knowledge, skills and abilities to successfully complete” the contract (worth 100 points) and “adequate past performance of [s]ubcontractors” (worth 50 points).² One of the seven subfactors of the technical approach and general understanding of requirements factor was “work force recruitment/retention plan” (worth 100 points).

Four proposals were received by the closing date. Only Priority One’s and SoBran’s proposals were included in the competitive range. A four-member technical evaluation panel evaluated and point-scored the technical proposals. The proposals underwent a technical and cost evaluation. Following written discussions, the final revised offers were received and evaluated as follows:

Offeror	Score	Cost
SoBran	1,606.25	\$33,927,775
Priority One	1,394.25	\$36,092,283

Based on this evaluation, the technical evaluators “acknowledged” that the award should be made to SoBran, but requested “further clarification/information from SoBran prior to completing the written recommendation for award.” Agency Report, Tab XIII, Source Selection Determination, at 2. After receiving SoBran’s response, the agency made award to that firm. This protest followed.

Priority One argues that NIAID failed to perform a reasonable cost-realism analysis. Priority One specifically contends that the SoBran proposal understated its costs for

¹ Priority One is the incumbent contractor for these services.

² Some of the past performance subfactors by their terms consider matters not directly related to past performance, such as the personnel subfactor quoted above.

the other direct cost (ODC) cost element,³ where Priority One proposed [DELETED] more in ODCs than did SoBran.⁴ Priority One alleges that this discrepancy was caused by SoBran's failure to propose adequate quantities of required laboratory material and equipment.⁵ Priority One argues that had NIAID properly adjusted SoBran's proposal to account for these understated costs, Priority One would have had the lowest cost proposal.

NIAID's cost evaluation compared the cost elements of each proposal to each other and to the independent government cost estimate.⁶ Agency Report, Tab XIV, Summary of Negotiations, attach. A. NIAID found SoBran's ODC cost element was close to the independent government cost estimate for this element and was thus considered realistic, whereas Priority One's proposed ODCs reflected that the protester misunderstood the requirements. In any case, no probable cost adjustments were made to the proposals.

When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated costs of contract performance should not be considered controlling since, regardless of the costs proposed by an offeror, the government is bound to pay the contractor its actual and allowable costs. Consequently, the agency must perform a cost-realism analysis to determine the realism of the offeror's proposed costs and to determine what the cost are likely to be under the offeror's technical approach, assuming reasonable economy and efficiency. Tidewater Constr. Corp., B-278360, Jan. 20, 1998, 98-1 CPD ¶ 103 at 4.

Thus, The Federal Acquisition Regulation (FAR) requires an agency to perform a cost-realism analysis when a cost-reimbursement contract is anticipated to determine the probable cost of performance for each offeror. The regulation advises

³ The costs for certain laboratory equipment and material specified by the agency such as, for example, lab coats, coveralls, head covers, face masks, gloves, shoe covers, incidental travel, training, and uniform laundry services are to be included in the ODC cost element. Supplemental Protest, exh. 1, Questions from Pre-Proposal Conference, at 5.

⁴ Priority One proposed [DELETED] in ODCs and SoBran and its subcontractor proposed [DELETED] in ODCs. Supplemental Protest, exh. 4.

⁵ Priority One asserts that SoBran's costs were miscalculated because it misinterpreted the specified quantities for these items to be individual quantities instead of cases. Priority One argues that given the disposable nature of the materials and equipment, SoBran cannot meet the requirements at its proposed costs. SoBran, however, argues that the quantities and costs it proposed were correct.

⁶ The independent cost estimate was \$41,295,261.

that the probable cost may differ from the proposed costs and should reflect the government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal. The probable cost of a proposal is to be used for purposes of evaluation to determine the best value. The probable cost is determined by adjusting each offeror's proposed cost and fee when appropriate to reflect any additions or reductions in cost elements to realistic levels based on the results of the cost-realism analysis. A cost-realism analysis is the process of independently reviewing and evaluating the specific elements of each offeror's proposed cost proposal to determine whether the elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's technical proposal. FAR §§ 15.404-1(d)(1), (2).

As discussed above, the agency's cost analysis simply compared the individual cost elements of each proposal to the elements in the other proposals and to the independent government cost estimate. No probable cost adjustments, either upwards or downwards, as contemplated by FAR § 15.404-1(d)(2), were made, even where Priority One's ODCs were found to be significantly overstated and unrealistic. While the agency claims that Priority One's ODC costs reflected a misunderstanding of the requirements, it was required in such circumstances to downwardly adjust Priority One's ODC costs in the cost-realism analysis.⁷

Moreover, simply comparing various cost elements in an independent government estimate to offerors' cost elements for the same items does not suffice as a sufficient analysis of cost realism where the agency has not considered the offerors' individual technical approaches or determined whether the offeror's proposals are consistent with the technical and cost parameters that were reflected in the government estimate. See Tidewater Constr. Corp., *supra*, at 5. The record here is devoid of any evidence that NIAID made any attempt to adjust offerors' proposed cost or to develop most probable costs estimates based on the offerors' technical approaches. Nor is there any reason evident from the record why the probable costs for the two offerors' ODC cost element should materially differ, which suggests that, had NIAID made an appropriate cost-realism adjustment, Priority One's proposal would have displaced SoBran's as the lowest cost proposal. In any event, because the record shows that NIAID did not perform a reasonable cost-realism analysis, the conclusion that SoBran's proposal was the best value lacks a reasonable basis, and we sustain the protest on this basis. See The Futures Group Int'l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 at 8.

⁷ We need not decide whether Priority One's ODCs are overstated or SoBran's were understated, nor what the appropriate ODC figure under a proper cost-realism analysis should be for either proposal.

Priority One also protests that the communications with SoBran after that firm's tentative selection constituted discussions, requiring discussions with all competitive range offerors. Priority One alleges that it could have improved its technical proposal in several material respects if it had been provided further discussions.

The communications in question were made by telephone on July 12 and the source selection document characterizes them as follows:

Clarification was requested about SoBran's intent with regard to some key personnel proposed in the FRO [final revised offer]. A couple of people had become unavailable since the FRO submission and a couple of those proposed were unacceptable. Further clarification was also requested with regard to the proposed salaries for the Q/A [quality assurance] Trainer, the Veterinarian and the Administrative Managers as well as how the overtime proposed was calculated. It was unclear whether these positions would be compensated at a level equivalent to that of the current contract or better, given the key role that these personnel are to hold in the new contract.

Agency Report, Tab XIII, Source Selection Determination, at 2. In response to these communications, SoBran revised its technical and cost proposal by July 20. This proposal revision identified various new personnel (including replacements for personnel found unacceptable by the agency), raised the salaries of some positions to help ensure employee retention as suggested by the agency, responded to the agency's various other questions (relating to such matters as quality assurance implementation, the relationship with its proposed subcontractor, and the strategy to attract incumbent employees), and increased its proposed costs by \$156,992.

Discussions occur when the government communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal or provides the offeror with an opportunity to revise or modify its proposal. In contrast, clarifications are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal and do not give an offeror the opportunity to revise or modify its proposal. If a procuring agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range, whereas clarifications may be requested from just one offeror. See FAR §§ 15.306(a), (d); Global Assocs. Ltd., B-271693, B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100 at 4. It is the actions of the parties that determine whether discussions have been held and not merely the characterization of the communications by the agency. The acid test for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. Raytheon Co., B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37 at 11.

Here, the communications in question clearly constituted discussions. The agency found that certain proposed personnel were “unacceptable” and required SoBran to replace these personnel. In addition, the agency found that SoBran may not be able to retain personnel in certain “key positions” at the proposed salaries and requested SoBran to address this concern, which SoBran did by raising the salary levels of these positions. A variety of other concerns about the technical and cost proposal were raised and SoBran amended its technical and cost proposal to address these concerns, including raising its proposed cost by \$156,992.⁸

The protest is sustained.⁹

We recommend that consistent with this decision the agency reopen discussions with the competitive range offerors, request revised offers, reevaluate proposals,

⁸ NIAID argues that Health and Human Services Acquisition Regulations, 48 C.F.R. § 315.670 (2000), permitted the agency to conduct “limited negotiation” with the selected offeror. That regulation specifically limits such negotiations to matters that would have no impact on the award decision and which do not prejudice the competitive interests or right of the other offerors. The negotiations are restricted to “definitizing the final agreement on terms and conditions” on such topics, for example, as “payment provisions, patent rights, rights in data, property provisions, labor rates, indirect cost rates, and fees.” Thus, by its terms, this regulation provides no authority for the kind of discussions here conducted after receipt of final proposal revisions with only one of the competitive range offerors.

⁹ Priority One also raised several other arguments against the evaluation and the conduct of discussions. We have reviewed the arguments and find that they are without merit, with two exceptions. First, the agency downgraded Priority One’s proposal under the “adequate past performance of subcontractors” subfactor because of the agency’s concerns regarding the availability of a consultant proposed by Priority One. Since this alleged weakness did not reflect inadequate past performance, we question how Priority One’s proposal can be downgraded under this subfactor.

Priority One also alleged that one of the evaluators had a conflict of interest because she was married to an individual that SoBran was offering a job under this contract. Since, as noted by the agency, SoBran did not propose this individual in its proposal and there is no evidence that SoBran had some other understanding in this regard during the proposal evaluation process, and given that Priority One actually did offer and price this individual in its proposal, we find this alleged conflict provides no basis to sustain the protest. Nevertheless, given the present circumstances and recommendation, NIAID should consider whether it is appropriate to continue to use this evaluator for this acquisition.

including performing a proper cost-realism analysis, and make a new best-value determination. We also recommend that Priority One be reimbursed the cost of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2001). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

Anthony H. Gamboa
General Counsel