

DECISION

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

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FILE: B-183156

DATE: June 3, 1975

MATTER OF: Systematics General Corporation

DIGEST:

In negotiated procurement for installation, maintenance and lease with option to purchase of optical character readers, award to offeror who failed to quote fixed price for certain testing as required by RFP was improper for this reason. However, award is not disturbed since foregoing defect was not prejudicial to protester whose proposal was properly determined technically unacceptable, termination costs would be significant, such defect has been corrected by contract modification, and total contract price is still significantly lower than price offered by only other offeror whose proposal had been determined technically acceptable.

Request for proposals (RFP) DCA 200-R-070 was issued June 28, 1974, by the Defense Communications Agency (DECCO), Special Services Division, Scott Air Force Base, Illinois, to fulfill a U.S. Air Force requirement for the installation, maintenance, and lease with option to purchase of five single font optical character readers. Offerors were required by the solicitation to include in their proposals prices for various categories pertaining to the equipment and ancillary services.

Upon receipt of proposals from six offerors, technical proposals were submitted for evaluation by the technical review panel while prices were analyzed and compared by cost analysts. Subsequent to the review of technical proposals by the technical review panel, questions regarding each proposal were returned to DECCO. These queries were transmitted to the respective offerors for clarification or for correction of designated deficiencies. Offeror responses thereto were received by DECCO and submitted to the technical review panel for further review. Upon the conclusion of such review, only Lundy-Farrington Division (of Lundy Electronics and Systems, Incorporated) and Optical Scanning Corporation (Op-Scan) were determined to be technically "responsive." Thereafter an award was consummated with Lundy-Farrington, which had submitted an evaluated price proposal of \$403,675, compared to Op-Scan's evaluated price proposal of \$491,615.

After receipt of notification of the award, including a copy of Lundy-Farrington's proposal, Systematics General protested the award, claiming that Lundy had been permitted to propose a cost for "Tempest" testing and certification to be determined after award and after such costs became known, whereas the protester's offer included a firm fixed price for such testing as required by the RFP. The protester contended that because the Tempest portion of the contract had not been priced, it was impossible to estimate the price which the Government would be requested to pay therefor, and such cost might be substantial.

Upon receipt of the protest, the contracting agency acknowledged the error and immediately evaluated the cost of contract termination as of February 28, 1975, and computed such costs at \$138,375 exclusive of profit. This figure was subsequently revised to \$83,875 as of April 29, 1975. By report of March 11, 1975, the agency advised our Office that it had obtained a fixed-price modification from Lundy-Farrington for Tempest testing requirements at a cost not to exceed \$45,000. Inasmuch as Lundy's modified price was still approximately \$43,000 lower than Op-Scan's offered price (which also excluded Tempest testing), the agency proposes to continue the contract in force as modified.

Systematics General subsequently alleged that the \$45,000 modification for Tempest testing does not include Tempest compliance, while the RFP required that the Tempest price must necessarily entail the cost of making the item Tempest compliant. The protester also pointed out that Lundy's price proposal for "Maintenance" failed to set out a firm fixed price since its \$200 per month figure pertained only to preventive maintenance, while for remedial maintenance Lundy quoted hourly figures contingent upon various specified circumstances, with no ceiling in terms of hours or ultimate cost.

Concerning the determinations of proposal "responsiveness", the protester also questions why it failed to receive further requests for clarification of its proposal after submitting its initial revisions.

Concerning the usage by the contracting agency of the term "responsive" with regard to technical proposals, our review of the record indicates that such term was used in the sense of "technical adequacy" or "acceptability." In this regard, the record indicates that the protester's proposal was rejected for, inter alia, the reason that it was "not responsive to the 10 KVA

power limitation" and its response to other questions posed by the technical panel was not adequate. Although it is the protester's position that the reasons given for the determination that its proposal was technically "nonresponsive", and hence unacceptable "were trivial," the determination whether a proposal is technically acceptable is a matter of administrative judgment which we will not disturb absent a clear showing that the agency acted arbitrarily or unreasonably. 52 Comp. Gen. 382, 385 (1972). Inasmuch as the agency has documented the deficiencies in the protester's proposal, and there has been no showing of arbitrariness or unreasonableness, there is no basis for our Office to object to the determination. Concerning the agency's failure to request further clarification of the protester's proposal, we have held that where it has been determined that a proposal is technically unacceptable after initial written or oral discussion, as in the instant case, there is no requirement that further discussions be conducted with an offeror whose revised proposal continues to be deficient. See 52 Comp. Gen. 198, 208 (1972).

Of the two proposals determined to be technically acceptable, the protester points out that the price proposals of both Lundy-Farrington and Op-Scan failed to include a price for Tempest certification as required.

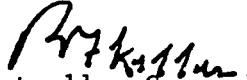
The record indicates that the contracting agency was aware before award was made of the omission of a price for Tempest testing in both of these proposals. It is not clear from the record, however, why a fixed price was not obtained prior to the award. Such failure may have been due simply to oversight on the part of the agency. Possibly the contracting officer decided to forego this requirement in view of the fact that the two remaining offerors had omitted a price for the item and therefore were on an equal footing in this respect. In any event, the contracting agency admits that its procuring office made a mistake in awarding the contract without obtaining a firm fixed price for Tempest testing as required in the solicitation. Furthermore, the protester correctly points out that Lundy's proposal was also deficient with regard to remedial maintenance pricing. In these circumstances, the award was improperly made to Lundy.

However, since there existed a spread of approximately \$88,000 between the only two offers determined technically acceptable (neither of which submitted a price for Tempest certification) but where this cost element was later negotiated with the lower-priced of the two at a ceiling of \$45,000, obligating the contractor to

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comply with the requirement for Tempest certification, not merely testing, we do not believe it would be in the Government's interest to terminate the contract, particularly in view of the substantial termination costs involved and the fact that the protester was not prejudiced as its proposal had been rejected as technically unacceptable. 53 Comp. Gen. 320, 327 (1973); B-177285, April 6, 1973. However, we are bringing these defects, including the necessity of correcting the remedial maintenance provision, in the procurement to the attention of the contracting agency by separate letter to prevent their recurrence in future procurements.

In these circumstances, the protest is denied.


Deputy Comptroller General
of the United States