



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Valentec Systems, Inc.

File: B-270880; B-270880.2

Date: May 16, 1996

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GAO, participated in the preparation of the decision.

DIGEST

1. Protest that contracting agency improperly allowed a directed source subcontractor that was also competing as a prime contractor to obtain an unfair competitive advantage is denied where the record shows that the contracting agency met its responsibility in such situations to ensure that all offerors are competing on an equal basis, and where any prejudice that the protester may have suffered was a result of its decision to ignore the solicitation's explicit instructions for preparing its price.

2. Contracting agency was not required to conduct a cost analysis of offerors' proposals even though offerors were required to submit cost and pricing data where the contracting officer reasonably determined that there was adequate price competition, and where the solicitation specifically advised that award of the fixed-price contract would be on a "price-only" basis, with the only cost analysis to occur after award, pursuant to a reopener provision.

3. Protest that the contracting agency and the directed source subcontractor knew that the solicitation's surrogate price for the directed subcontract was unreasonably high is dismissed as untimely where the protester was provided information prior to submitting its best and final offer that triggered its duty to raise this issue at that time.

DECISION

Valentec Systems, Inc. protests the award of a contract to Lockheed Martin Ordnance Systems (LMOS) under request for proposals (RFP) No. DAAA09-95-R-0100, issued by the Department of the Army for the production of 120mm high-explosive cartridge M933 mortar rounds. Valentec primarily argues that the Army improperly allowed LMOS to obtain an unfair competitive advantage in this procurement.

We deny the protests in part and dismiss them in part.

The RFP, issued as a letter solicitation on June 29, 1995, used the terms and conditions, with significant modifications, of a previously issued solicitation that included requirements for these rounds. Pursuant to 10 U.S.C. § 2304(c)(1) (1994), the competition was restricted to Martin Marietta Ordnance Systems and Valentec, both of which have previously produced these rounds.¹ The solicitation anticipated award of a firm, fixed-price modification to either of the contracts currently held by these firms.

Award would be made "on price evaluation only" to the lowest-priced responsive and responsible offeror. To protect the Army's base of critical producers, the RFP provided that the load, assemble, and pack (LAP) of the cartridge would be accomplished by LMOS, the operator of the Milan Army Ammunition Plant. Hence, LMOS would perform the LAP effort as the prime contractor if it were the awardee, or as Valentec's directed subcontractor if Valentec were the awardee. To eliminate any possible competitive advantage that LMOS might have over Valentec as a result of its status as a directed subcontractor and operator of the plant, the RFP included a surrogate pricing clause for the LAP effort. Pursuant to this clause, offerors were to propose two sets of pricing.

¹Martin Marietta became LMOS after its merger with Lockheed Corporation. LMOS' M933 contract is known as "Buy III"; Valentec's M933 contract, with LMOS as a directed source subcontractor, is known as "Buy IV"; and this procurement is known as "Buy IVa."

First, each offeror was to construct a "proposed/offered" price utilizing a government-provided surrogate price for the LAP effort. Offerors were to support this price with cost and pricing data, which would be used to establish the costs and rates which constituted the baseline portion of the price—all elements of the price save the surrogate-priced directed subcontract. The proposed/offered price was the price that would be evaluated for purposes of award.

Second, each offeror was to submit a "not-to-exceed (NTE)" price utilizing an LMOS-provided NTE LAP price which was fully supported on a standard form (SF) 1411. This NTE LAP price would be used to determine the contract award price by substituting it for the surrogate LAP price in the offeror's proposed/offered pricing model. No other element of the proposed/offered price would be revised—the price would contain the identical overhead, general and administrative (G&A), cost of money, and profit rates, and the identical baseline proposal structure as used in the proposed/offered price.

After award, pursuant to the surrogate pricing clause's reopener provision, the prime contractor would negotiate the price of the directed LAP subcontract and submit a proposal for downward adjustment only, substituting the negotiated LAP price for the NTE LAP price in its pricing model.² Again, no other element of the proposed/offered price would be revised. At this point, the government would perform a cost analysis of the proposed subcontract price and conduct price negotiations with the prime contractor. These negotiations would result in the establishment of the final contract price.

Section M-2, "Special Standards of Responsibility," stated that an offeror's responsibility would be determined, in part, on the basis of three "special standards of responsibility," discussed in further detail below.

Amendment No. 0002, issued August 2, provided both offerors with the surrogate LAP price of \$117. Prior to submitting initial proposals, LMOS provided Valentec with its NTE LAP subcontract pricing, which was higher than the surrogate price. Both Valentec and LMOS submitted initial proposals to the Army on August 29. After reviewing the proposals, the Army conducted discussions with both offerors and requested, among other things, the submission of range pricing in their best and final offers (BAFO). LMOS provided Valentec with its revised NTE LAP subcontract pricing on December 11. That pricing was significantly lower than both its previous NTE LAP subcontract price and the surrogate price. Both Valentec and LMOS submitted BAFOs to the Army on December 12.

²Due to the competitive position of the parties, the government, not Valentec, would negotiate the LAP price with LMOS.

The contracting officer's price analysis of the two offers showed that LMOS' proposed/offered price was the lowest received, and that there had been adequate price competition. After LMOS was determined to be responsible, the Army awarded the firm the contract on December 22. Valentec filed its initial protest following its debriefing, and its supplemental protest following its receipt of the initial agency report.

DISCUSSION

Valentec primarily argues that the Army improperly allowed LMOS to obtain an unfair competitive advantage by providing Valentec with NTE LAP subcontract pricing that was not the same as the NTE LAP prime contract pricing that LMOS provided to the Army. Valentec contends that the divergence in price is due to the fact that LMOS provided the firm with "false" and "materially overstated" SF 1411s, and that the Army should have been on notice of this impropriety.

When an agency requires contractors to use directed source subcontractors, it must ensure that all offerors are competing on an equal basis. Engineered Sys., Inc., B-184098, Mar. 2, 1976, 76-1 CPD ¶ 144. In recognition of this requirement, the RFP included the surrogate pricing clause. Offerors were required to construct their proposed/offered pricing model utilizing this government-provided surrogate price for the LAP effort. The offeror submitting the lowest proposed/offered price would be awarded the contract. Thus, both Valentec and LMOS were required to construct the only price that mattered in this evaluation—including the baseline portion of the price—under the assumption that the LAP effort component of that price would be \$117.

We do not agree with Valentec that the Army's duty to level the competitive playing field extended to ensuring that the NTE LAP subcontract price that LMOS provided to Valentec was identical to the NTE LAP prime contract price that LMOS provided to the Army. There is no such requirement; indeed, if these prices were identical there would be no need for the surrogate price. The protester's interpretation of the provision that LMOS submit its "best estimate" of the LAP cost to both Valentec and the Army as a requirement that these "best estimates" be identical ignores the surrogate pricing mechanism, as well as the obvious fact, discussed further below, that the best estimate for a subcontract price will not be the same as the best estimate for a prime contract. Moreover, the RFP explicitly excluded the NTE LAP price from playing any role in this competition—its sole use is to determine the contract award price, after award.

Valentec's position that the NTE LAP prices are required to be equal actually springs from the fact that the firm failed to follow the RFP's explicit instructions. Valentec asserts that it made its pricing decisions, such as where to set its amounts for profit, G&A , and labor, on the basis of the NTE LAP subcontract price it

received from LMOS—it tied its proposed/offered price to the LMOS' NTE LAP subcontract price. However, as noted above, the RFP explicitly required offerors to construct the proposed/offered price using the surrogate price—not the NTE LAP price. Hence, Valentec's decision to rely upon LMOS' NTE LAP subcontract price to structure its proposed/offered price was at its peril. A contracting agency cannot be expected to protect an offeror from the consequences of its refusal to comply with an RFP's unambiguous instructions.

In any event, there is no evidence that the divergence in price between LMOS' NTE LAP subcontract price to Valentec and its NTE LAP prime contract price to the Army is attributable to any impropriety. As LMOS explains, the considerations involved in pricing a subcontract differ from those involved in pricing a component of a prime contract, resulting in different costs and, hence, a different price. The subcontract price to Valentec reflects all of LMOS' costs, including fee/profit, G&A, and restructuring costs, but the prime contract to the Army reflects an internal effort and does not include these costs. LMOS explains that the difference in price is also attributable to different competitive strategies. For example, LMOS' NTE LAP subcontract price to Valentec was based upon the scrap rate and number of production lots listed in Valentec's request for quotations (RFQ). LMOS' NTE LAP prime contract to the Army used a lower scrap rate and number of production lots which lowered the costs and, as a result, the price.³ We see nothing unreasonable with this explanation.

Valentec next argues that the Army improperly failed to conduct a cost analysis of the proposals in view of the fact that the solicitation required the submission of cost and pricing data.

Where, as here, a fixed-price contract is to be awarded and the agency concludes that adequate price competition has been obtained, the agency generally is not obliged to perform a cost analysis on the proposals even if offerors submit cost and pricing data. Research Management Corp., 69 Comp. Gen. 368 (1990), 90-1 CPD ¶ 352; Northern Virginia Serv. Corp., B-258036.2; B-258036.3, Jan. 23, 1995, 95-1 CPD ¶ 36. Moreover, the RFP specifically advised offerors that award would be based "on price evaluation only," and that the only proposals in contention would be submitted by two experienced providers of these items. The only RFP reference to a cost analysis is in the context of the reopener provision, under which the Army

³While Valentec may not have intended its RFQ to bind LMOS to the scrap rate and number of production lots it listed, we cannot conclude from the contemporaneous record that LMOS should have been on notice of Valentec's intention.

would conduct a cost analysis of the subcontract prices after award of the contract, during negotiations for the final price. Under the circumstances, we see no basis to conclude that the agency was required to conduct a cost analysis here. Id.

Valentec also argues that both the Army and LMOS knew that the surrogate price was unreasonably high, but improperly failed to inform Valentec or adjust that price. Among other bases for this allegation, Valentec asserts that the difference in price between LMOS' NTE LAP price and the surrogate LAP price was sufficient to have put the Army on notice that the surrogate price was unreasonably high.

Protests based upon alleged improprieties in a solicitation--such as the allegedly erroneous surrogate price term here--which are apparent prior to the time set for submission of BAFOs, must be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (1996); ASI Personnel Serv., Inc., B-258537.7, June 14, 1995, 95-2 CPD ¶ 44. LMOS provided Valentec with its NTE LAP subcontract pricing on December 11, the day before BAFOs were submitted. These prices were significantly lower than the surrogate price. If Valentec believed that such a price discrepancy showed that the surrogate price was unreasonably high, it should have protested on this basis before the time set for receipt of BAFOs. See Astrosystems, Inc., B-260399.2, July 11, 1995, 95-2 CPD ¶ 18. Notwithstanding anything the protester may have learned after award, the price discrepancy triggered its duty to seek further information regarding the substantiation of the surrogate price. East Carolina Builders, B-243926, June 10, 1991, 91-1 CPD ¶ 559; Horizon Trading Co., Inc.; Drexel Heritage Furnishings, Inc., B-231177; B-231177.2, July 26, 1988, 88-2 CPD ¶ 86.

Valentec finally argues that the Army failed to consider the RFP's "Special Standards of Responsibility." As noted above, section M-2 of the RFP stated that an offeror's responsibility would be determined, in part, on the basis of three "special standards of responsibility": demonstrated competence in system ammunition manufacture, assembly, inspection and test; demonstrated competence to produce and inspect ammunition metal parts; and demonstrated knowledge in the implementation of a quality control plan in compliance with the technical data package and specification.

The Army disputes the protester's position that these standards are definitive responsibility criteria subject to our review. See 4 C.F.R. § 21.5(c) (1996) (an affirmative determination of responsibility will not be reviewed absent a showing that, among other things, definitive responsibility criteria were not met). However, even assuming they are, our review is limited to ascertaining whether the contracting officer had sufficient evidence of compliance to reasonably conclude that the criteria had been met. D.H. Kim Enters., Inc., B-255124, Feb. 8, 1994, 94-1 CPD ¶ 86. In her responsibility determination, the contracting officer states that she reviewed various aspects of the procurement and concluded that LMOS had a satisfactory record of performance and the necessary organization, experience,

operational controls, and technical skills to perform the work required. In a statement to this Office, the contracting officer explains that her determination included a consideration of the fact that, in a previous procurement for these rounds, LMOS demonstrated its competence in the areas covered by the standards. Thus the record does not support Valentec's contention that the Army failed to apply the "Special Standards of Responsibility" in making its award decision. We deny the protests.

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