



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Beckman Coulter

File: B-281030; B-281030.2

Date: December 21, 1998

Alison L. Doyle, Esq., C. Stanley Dees, Esq., and Traci M. Vanek, Esq., McKenna & Cuneo, for the protester.

Richard L. Moorhouse, Esq., Holland & Knight, for Spectrofuge Corporation of North Carolina, Inc., an intervenor.

Michael Colvin, Department of Health & Human Services, for the agency.

Jacqueline Maeder, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Award is improper where awardee's proposal does not conform to material solicitation requirements regarding preventive maintenance services, contract termination, and submission of a fixed-price offer.

DECISION

Beckman Coulter, Inc. protests the award of a contract to Spectrofuge Corporation of North Carolina, Inc. under request for proposals (RFP) No. 273-98-P-0008, issued by the National Institute of Environmental Health Sciences (NIEHS), Department of Health and Human Services, for on-going preventive maintenance, rotor inspection and emergency repair of Beckman scientific instruments/equipment at NIEHS, Research Triangle Park, North Carolina. Beckman challenges the agency's evaluation of technical proposals and asserts that Spectrofuge submitted a technically noncompliant best and final offer (BAFO) which the agency attempted to cure by engaging in improper discussions.

We sustain the protest.

The RFP, issued as a commercial item solicitation on May 20, 1998, contemplated the award of a fixed-price contract for a 1-year base period with four 1-year options for the maintenance, repair and relocation¹ of certain scientific equipment

¹"Relocation" is described as the movement of an instrument from one location to another at the request of a user and returning the instrument to operational condition. RFP, Description and Specifications at 23-24.

manufactured by Beckman. RFP, Description and Specifications at 23. Offerors were to "furnish all necessary personnel, labor, equipment, tools, parts, materials and supplies to prepare and execute complete maintenance, repairs, and relocations to Government-owned Beckman [i]nstruments." RFP, Amendment 1, Supplies or Services and Prices, at 3. The RFP listed the Beckman instruments that were to be covered (providing model numbers and quantities), and stated that the contractor was to provide "trained personnel with experience in the repair and maintenance of the equipment types listed herein." RFP, Description and Specifications at 24. Offerors were required to provide pricing for one and two preventive maintenances (PM) per year, with the agency determining which of the PM schedules to award. RFP, Amendment 1, Supplies or Services and Prices at 3-22a. In the specifications section, the RFP provided that "[e]quipment shall be maintained by the contractor to 100% of original Beckman specifications and technical updates." RFP, Description and Specifications at 25.

The solicitation provided that award would be made "to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered" and that technical proposals would be scored on the basis of plan of operation (40 points), experience of offeror (30 points), and experience of key senior service and field engineers (30 points), for a possible technical score of 100 points. RFP at 42. Under plan of operation, offerors were advised that the agency would evaluate:

the offeror's specific plans for insuring that preventive maintenance and remedial repairs are performed at the highest possible level of quality and responsiveness and to 100% of original Beckman specifications and technical updates. Plan should include details on availability of senior service engineering staff, quality control, and availability of manufacturer's approved spare parts.

Id.

The RFP advised that under the experience factor offerors would be evaluated on their "experience in providing similar types of service in both the government and private sector," and under the experience of key senior service and field engineers factor, offerors would be evaluated on the "experience of [their] engineering staff in providing these types of services on this equipment in an operation of this size and type," and that "[p]roof of training must be provided." Id. For award purposes, the RFP stated that the agency would evaluate offers by adding the total price for all options to the total price for the basic requirement. The RFP provided that price would be point-scored, with the lowest priced proposal receiving the maximum 25 points. Other acceptable proposals would be:

awarded a proportional share of points with the lowest priced

acceptable offeror being the base. For example, points awarded an offer 25% higher than the lowest price will be reduced by 25%.

Id. Thus, there was a maximum possible 125 technical/price point score for each proposal.

Beckman and Spectrofuge were the only offerors to submit proposals by the amended June 10, 1998 closing date. The proposals were evaluated by a four-member technical evaluation committee and both proposals were included in the competitive range.

Written discussions were held with both offerors and the record shows that, among other things, the agency asked the awardee to address the supplemental terms and conditions that Spectrofuge had included in its proposal. Specifically, at Attachment B, page 56 of its proposal, Spectrofuge included "Supplemental Terms and Conditions" and at Attachment B, page 57, the awardee included its "Annual Maintenance Service Agreement." The awardee's "Supplemental Terms and Conditions" included, among other things, five "excluded services" listed as (a) through (e) and including at (b) "moving or re-installation of . . . instrument(s)."² The "Supplemental Terms and Conditions" also allowed either party to "terminate this agreement within 30 days written notice to the other party." Spectrofuge's Annual Maintenance Service Agreement specifically stated that its service "does not include rotors, chambers, consumable supply items, accessories, software, software related problems, and manufacturer-recommended modifications." The Agreement also stated that "[a]ny component or part determined by Spectrofuge to be defective shall be replaced (upon authorization by the Buyer) at Spectrofuge's then current price." The agency requested that Spectrofuge "[c]larify the supplemental terms that are inconsistent with stated contract requirements (i.e., relocation of instruments not covered by Spectrofuge - page 56 of your proposal). This page 56 in its entirety is not acceptable to the NIEHS." Opening of Discussions Letter, July 14, 1998, Question 2.

BAFOs were received from both offerors on or before the July 20 closing date. Contracting Officer's Statement, Paragraph 2. In its BAFO, Spectrofuge addressed the inconsistent supplemental terms on page 56 of its proposal, stating as follows:

The inclusion of the Supplemental Terms and Conditions (page 56) of the Spectrofuge Corporation standard maintenance contract was

²Spectrofuge also excluded services for damage from, among other things, fire, explosion, riot, lightning, windstorms, hail, flood or earthquake; decontamination due to spillage; interpretation of data; and installation of unauthorized Spectrofuge field modifications.

submitted **only to include Excluded Services** as so entitled, in order to address misuse and abuse of instrumentation by a user. This page was not meant to be included in its entirety. Since this RFP requires that reinstallation of instrumentation be included in this contract, (b) should be **discarded**. Spectrofuge Corporation would provide reinstallation of instrumentation as part of this contract and at no extra cost to the government.

Spectrofuge's BAFO, July 17, 1998, Paragraph 2.

Thus, in its BAFO, Spectrofuge stated that it would "discard" its reinstallation exception and provide relocation/reinstallation services as required by the solicitation.

Beckman's technical BAFO was awarded [deleted] points (out of a possible 100) and Spectrofuge's BAFO was awarded [deleted]. In its evaluation of BAFOs, however, the agency noted that the awardee's response concerning the inconsistent terms at page 56 of its proposal "is inadequate. The termination and other clauses still exist. These supplemental terms cannot be included as part of the NIEHS contract." Technical Evaluation Committee Memorandum (Aug. 6, 1998) at second unnumbered page.

Spectrofuge's total price for the base and option years was \$[deleted] for one PM per year and \$716,950 for two PMs per year. Beckman's total price for the base and option years was \$[deleted] for one PM per year and \$[deleted] for two PMs per year.³ As required by the solicitation, Spectrofuge received 25 points for the lowest acceptable price for both the one and the two PM per year requirements for a total technical/price point score of [deleted]. Agency Report at 1. Beckman received a portion of the 25 points based on the percentage of the price difference for each schedule, specifically [deleted] price points for the one PM schedule and [deleted] price points for the two PM schedule, resulting in total technical/price scores for the one and the two PM schedules of [deleted] and [deleted], respectively. *Id.* The agency noted that "[t]here are no further questions to either offeror. The award should be made based on price. Incompletely resolved issues listed under technical [concern] #2 . . . for Spectrofuge should be addressed in negotiations, if necessary." Technical Evaluation Committee Memorandum (Aug. 6, 1998) at third unnumbered page.

³The record shows that Beckman actually reduced its prices in its BAFO to \$[deleted] for one PM per year and \$1,241,534 for two PMs per year. The agency improperly failed to consider these price reductions in both its computation of final technical/price point scores and its award determination.

Subsequently, on August 13, a representative of Spectrofuge met with agency personnel to discuss "two questions that needed to be answered by Spectrofuge before award." Summary of Negotiations, Attachment A at 3. As relevant here, the agency again questioned Spectrofuge about the exclusions submitted in its proposal. The Spectrofuge representative indicated that while it was standard practice for Spectrofuge to submit the exclusions, "they could be excluded from the contract."⁴ Id. Based on this meeting, the contracting officer states that "[t]hese issues were resolved to the satisfaction of the Government." Contracting Officer's Statement, Paragraph 2. Because Spectrofuge received the higher score, it was awarded the contract for two PMs per year.⁵ An award notification, dated August 27, was sent to Beckman. After a September 9 debriefing, Beckman protested to our Office.

Beckman contends that Spectrofuge's BAFO was technically unacceptable and that the August 13 post-BAFO meeting between a Spectrofuge representative and agency personnel constituted improper discussions and unequal treatment because the agency was attempting to permit Spectrofuge to remedy its noncompliant BAFO. Supplemental Protest, Oct. 26, 1998, at 4; Protester's Supplemental Comments, Nov. 16, 1998, at 1-9. Beckman also argues that while the agency's memorandum concerning this meeting indicates that the awardee agreed to delete all exclusions from the contract, "Spectrofuge itself never put this response in writing." Supplemental Protest, Oct. 26, 1998, at 4-5. Thus, Beckman argues that, despite these attempts, the contracting officer actually made award without correcting the deficiencies. Moreover, Beckman notes that the agency never addressed the exclusions contained on page 57 of the Spectrofuge proposal. As noted above, this page excluded service of software-related problems and manufacturer-recommended modifications. According to the protester, many Beckman instruments under the solicitation are software driven, and manufacturer-recommended modifications "are

⁴The summary of negotiations goes on to say, in the next sentence, "They will be excluded." It is not clear from the document whether this is meant to be a statement of the government's intent or a paraphrase of a commitment by the Spectrofuge representative. In any event, the exclusions were not removed from the proposal (or from the contract).

⁵It is improper to rely, as the agency apparently did here, on a purely mathematical cost/technical tradeoff because, unless a solicitation specifically provides for award on the basis of highest total point scores, these scores are merely intended to be aids for source selection officials. See Teltara Inc., B-280922, Dec. 4, 1998, 98-2 CPD ¶ __; SEC, Inc., B-226978, July 13, 1987, 87-2 CPD ¶ 38 at 3. Here, while the solicitation explained the scoring of proposals, including price, it did not state that award would be based on the mere calculation of the highest combined technical and price scores. If the agency wants to use such a mechanical approach as the basis for its award, it should so provide in the RFP.

the type of information that is issued in Beckman's internal technical updates." Id. at 8. Since the RFP specified that the contractor was to maintain equipment to manufacturer specifications, including technical updates, Beckman argues that Spectrofuge had taken exceptions to solicitation requirements, and that these exceptions indicate that Spectrofuge "cannot offer its commercial customers software support or technical updates." Protester's Supplemental Comments, Nov. 24, 1998, at 9. The protester also argues that page 57 provided that replacement parts would be separately priced but, because the RFP called for a fixed price and specified that the contractor was to provide all necessary equipment, parts, materials and supplies, these services were required to be included in Spectrofuge's prices. Supplemental Protest, Oct. 26, 1998, at 7.

In negotiated procurements, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. Barents Group, L.L.C., B-276082, B-276082.2, May 9, 1997, 97-1 CPD ¶ 164 at 10; Martin Marietta Corp., B-233742.4, Jan. 31, 1990, 90-1 CPD ¶ 132 at 7. The agency argues in its response to Beckman's protest that the "clarifying language" from Spectrofuge's BAFO "eliminated any potential non-compliant language originally included on pages 56 and 57," and states that it "merely desired to confirm its understanding of what Spectrofuge had already proposed, with respect to re-installation of equipment," Supplemental Report, Nov. 6, 1998, at 1-2. However, as discussed below, it is clear from the record that Spectrofuge's proposal did not comply with the RFP requirements for maintenance services and included an unacceptable termination clause; moreover, Spectrofuge's pricing scheme deviated from that called for in the RFP with the result that its evaluated price understated the actual cost to the government because Spectrofuge was proposing to charge the government unspecified prices for replacement parts, in addition to its offered "fixed price."

The agency's representation in its response to the protest conflicts with the evaluators' contemporaneous assessment of the BAFOs. Specifically, the contemporaneous record reflects that after the evaluation of BAFOs, the evaluators recognized that there were remaining issues to be resolved regarding the Spectrofuge proposal. While Spectrofuge's position relating to relocation and reinstallation of equipment had been clarified in its BAFO, the evaluators believed that Spectrofuge's response to the discussion question concerning the exclusions was still "inadequate" because not all exclusions were deleted from the proposal. Technical Evaluation Committee Memorandum (Aug. 6, 1998) at second unnumbered page. The evaluators referred to the remaining exclusions as "incompletely resolved issues" which should "be addressed in negotiations if necessary." Id. at third unnumbered page. Moreover, as the protester correctly states, the exclusions on page 57 were never addressed in discussions. Thus, these exclusions, including responsibility for software-related problems and manufacturer-recommended modifications, which were clearly material RFP requirements, and the

addition of unspecified costs that the proposal allowed Spectrofuge to charge for replacement parts were never addressed or cured by Spectrofuge in its BAFO. Moreover, the unilateral termination clause, which the agency correctly noted was unacceptable, remained part of the proposal. See Gelco Payment Sys., Inc., B-234957, July 10, 1989, 89-2 CPD ¶ 27 at 2-3 (bid which attempts to limit government's rights and supplement bidder's rights under standard termination for convenience clause is nonresponsive).

The agency's record of the August 13 meeting indicates that the agency recognized that the exclusions in the Spectrofuge proposal were material and that they had not been resolved by Spectrofuge's BAFO. The record specifically states that agency personnel met with the Spectrofuge representative after the submission of BAFOs to discuss questions "that needed to be answered by Spectrofuge before award." Summary of Negotiations, Attachment A at 3. In spite of this, however, and as the agency, the protester, and the intervenor all point out, the Spectrofuge proposal was not modified during or after the August 13 meeting. Indeed, the agency's record of the meeting suggests that while it was standard practice for Spectrofuge to submit the exclusions, its representative only agreed that "they could be excluded from the contract." Id. However, the proposal was never changed, nor was a written agreement otherwise reached as a result of the August 13 meeting.⁶ Because Spectrofuge included noncompliant terms and conditions in its proposal, the proposal was technically unacceptable and could not properly form the basis of award. Accordingly, we sustain the protest.

Since we find that the agency improperly accepted for award a materially nonconforming proposal, we recommend that NIEHS reopen discussions with both offerors, call for another round of BAFOs and proceed with the source selection process.⁷ After reevaluating BAFOs, if Spectrofuge's proposal is no longer

⁶Contrary to the agency's position, it also appears that the communications which occurred at the August 13 meeting did constitute improper post-BAFO discussions. Specifically, these communications were directed at material terms of Spectrofuge's proposal and materially affected the proposal's potential for award. Federal Acquisition Regulation (FAR) § 15.306(d)(3) (FAC 97-02).

⁷Beckman raised additional protest issues, arguing, for example, that Spectrofuge's proposal was too highly rated because Spectrofuge cannot meet the requirement to maintain the instruments "to 100% of original Beckman specifications and technical updates" since Beckman does not make its technical updates publicly available and, thus, Spectrofuge has no access to the updates. RFP, Description and Specifications at 25. In its BAFO, Spectrofuge explained that the company keeps "abreast of new [original equipment manufacturer] models" through, among other
(continued...)

considered the most advantageous for the government, the agency should terminate Spectrofuge's contract for the convenience of the government and award the contract to Beckman. In addition, we recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorney fees. 4 C.F.R. § 21.8(d)(1) (1998). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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⁷(...continued)

things, national instrumentation shows, vendor conferences, and its membership in a service organization whose members exchange information on new developments in the field. Spectrofuge's BAFO, July 17, 1998, at Paragraph 3. While Beckman argues that this response is inadequate, we find reasonable the agency's conclusion that Spectrofuge could meet the solicitation requirements. Moreover, it is clear from the record that the agency was aware Spectrofuge had limited access to Beckman technical updates and that this weakness was one reason Spectrofuge's proposal was downgraded. While the protester believes Spectrofuge's scores are too high, mere disagreement with the agency evaluation does not render the evaluation unreasonable. Global Assocs., Ltd., B-275534, Mar. 3, 1997, 97-1 CPD ¶ 129 at 3. We have reviewed the other evaluation issues raised by Beckman and, based on the protest record, we conclude that they are without merit.