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

B-179171

November 30, 1973 40236

Chemical Technology, Inc.
Suite 217
910 17th Street, NW.
Washington, D. C. 20006

Attention: Mr. William L. Devries
President

Gentlemen:

We refer to your letter of September 28, 1973, and prior correspondence, relative to the protest of the Checkers Division of Chemical Technology, Inc. (Checkers), against the award of a contract under request for proposals (RFP) N00189-73-R-0166, as amended, to Military Base Management of New Jersey, Inc. (MBM). The RFP, issued by the Naval Supply Center, Norfolk, Virginia, on April 2, 1973, sought offers to provide mess attendant services at the Naval Weapons Station, Yorktown, Virginia.

Section D1(a) of the RFP, set forth the Government's estimate of the total number of man-hours required--127 hours for weekdays and 88 hours for weekends--for satisfactory performance, and provided as a part of the evaluation factors for award that:

"* * * Submission of manning charts whose total hours fall more than 5% below these estimates may result in rejection of the offer without further negotiations unless the offeror clearly substantiates the manning difference with specific documentation demonstrating that the offeror can perform the required services satisfactorily with such fewer hours."

Eleven offers were received under the RFP. After evaluating the respective manning charts, it was determined that meaningful negotiations could be conducted with all offerors. This conclusion was reached even though some offerors proposed manning levels outside the 5 percent acceptable deviation and had not, at that time, substantiated their lower figures.

In its best and final offer, Checkers offered 36,544 man-hours at a price of $103,019.28. Other prices were:

MBM	$106,204.16
Federal Food Service	106,650.00
Jet Services	107,352.00

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[Contract Award Protest]

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In view of these prices, the procuring activity determined that the initial cost estimate of $80,000 submitted by the Food Service Officer at the Naval Weapons Station, Yorktown, was unrealistic. It sought and received additional funds, and the cost figure listed on the initial requisition was modified to read $115,540, rather than $80,000.

Checkers contends that it should have received the award since its manning level was very close to the acceptable range and that it was obvious that Checkers had budgeted enough money to adequately perform the services and was still the low offeror. Moreover, Checkers contends that MDM's price did not cover the man-hours which it had submitted.

Notwithstanding Checkers' low price, the contracting officer rejected its offer because its man-hour figure was outside the 5 percent acceptable man-hour deviation and because Checkers did not submit any substantiation which would have demonstrated that satisfactory performance could be accomplished at that level. Award was made to MDM on June 29, 1973.

Checkers also contends that this rejection of its competitive range offer constituted a determination of nonresponsibility without the benefit of a Small Business Administration Certificate of Competency (COC) review. While it is true that the determination to reject Checkers' offer was based in part on considerations usually going to questions of responsibility (51 Comp. Gen. 204 (1972); 309 id.), we do not agree that in this negotiated procurement such rejection was, in essence, a determination of nonresponsibility. Rather, the failure of Checkers' final offer to be considered for negotiation was due to its deficiencies in the area of compliance with the Government's expressed requirements. Cf., 46 Comp. Gen. 893 (1967).

In 52 Comp. Gen. 198, 208 (1972), our Office concurred in an agency's exclusion from the competitive range of an initially acceptable offer, where:

> "* * * after the revised proposals were examined * * * serious misgivings arose concerning * * * [that offeror's] ability to perform the contract successfully. * * *"

Under such circumstances, we stated:

> "* * * Whether a proposal is initially determined to be within the competitive range or whether the proposal is initially rejected, the contracting agency should not be required to hold discussions with an offeror once it it [sic] determined that his proposal is outside the acceptable range. See B-174436, April 19, 1972, and B-173967, February 10, 1972,

where we upheld administrative determinations to exclude firms initially determined to be within the competitive range from further award consideration after their revised proposals were found to be technically unacceptable and no longer within the competitive range."

Section Dl(c) of the RFP states that:

"Award will be made to the responsible offeror whose proposal, meeting the criteria set forth in (a) [manning] and (b) [dollars/hours] above, offers the lowest evaluated price."

Checkers contends that its offer meets the requirement that the manning chart reflect a sufficient manning level to insure adequate performance of the contract. (Checkers offered 87 per cent of the Government's estimate.) However, we believe that the language of section Dl(a), quoted above, gives the contracting officer discretion to eliminate unsubstantiated sub-95 per cent offers from consideration at any time before award. See 52 Comp. Gen., supra, and B-178707, October 2, 1973 (53 Comp. Gen. ___). Since we have not been presented, nor do we find, any evidence which would indicate that the present action constitutes an abuse of that discretion, we do not question the rejection of Checker's offer. Moreover, since the Government has set out seemingly elaborate procedures to assure that award will be made to an offeror who will guarantee an adequate level of performance at its offered price, it would seem inconsistent to require that an agency circumvent these procedures and accept an unsubstantiated low-hour offeror's proposal because of the offeror's mere assertions that it can perform adequately.

Checkers additionally contends that MBM's offer, with regard to the number of man-hours is not supported by its price since the MBM dollar/hour ratio is alleged to be insufficient to cover the basic labor expenses as required by section Dl(b)(2) of the RFP. The basic labor expense, excluding applicable holiday and vacation benefits, we calculate vis-a-vis MBM's offer to be $2.67 per hour (basic wage--$2.33; Health and Welfare--$0.12; FICA--$0.14; unemployment--$0.06; Workmen's Compensation--$0.02). Vacation and Holiday benefits which are usually calculated at about 5 per cent of the basic wage would add an additional $0.12 to the total basic labor expense which would then be $2.79 per hour. However, MBM's offer of 39,549.5 hours at a price of $106,204.16, which it indicated included holiday and vacation benefits, indicates a dollar/hour ratio of only $2.69 per hour.

In 51 Comp. Gen. 308, 311 (1971), in which we affirmed our decision at 51 Comp. Gen. 204, we stated that:

"* * * the requirement that offeror's manhours be consistent with offered prices connotes a test of reasonableness, rather than an exact requirement to quote a certain minimum price per manhour. Even if ABC's calculations are accepted, we cannot say that a 5 percent or a 10 percent discrepancy should automatically oust an offeror from consideration because its offer did not approximate the Government's estimated range. On the other hand, we have held that a 30 percent discrepancy was sufficient to justify the contracting officer's refusal to negotiate with the offeror there involved. B-173628, September 9, 1971. Since we do not think that manning charts can properly be used as an exact formula in the exercise of the discretionary authority given the contracting agencies in this area, unless there is a clear abuse of such authority we would not be justified in interposing any objection to the determinations of which offerors are properly considered to be within the competitive range."

However, this statement by our Office was made with reference to language in a prior solicitation which stated the following:

"* * * For the purpose of establishing a competitive range, evaluation of the offerors manning charts will be based on the following factors:

"1. The cost of the number of manhours per year shown on the manning chart including wage rates; if applicable, fringe benefits (health and welfare; vacation, and holidays); and other employee-related expenses (for example, FICA), will be compared with the offeror's price to verify that offeror's manhours are consistent with offered price. * * *"

Since the date of our 51 Comp. Gen. decisions, the language employed by the Navy in regard to procurements of this type has been substantially modified so as to read at section D1(b)(2):

"the hours shown in the manning charts must be supported by the price offered when compared as follows. The total hours reflected in the manning charts for the contract period (i.e., based on a contract year containing 252 weekdays and 113 weekend days/holidays will be divided into the total offered price (less any evaluated prompt payment discount) to assure that this dollar/hour ratio is at least sufficient to cover the following basic labor expenses:

"(i) the basic wage rate;

"(ii) if applicable, fringe benefits, (health and welfare, vacation, and holidays); and

"(iii) other employee-related expenses as follows:

"(A) FICA (including Hospital Insurance) at the rate of 5.85%

"(B) Unemployment Insurance at the rate set forth by the offeror in the provision in Section B of this solicitation entitled 'Offeror's Statement as to Unemployment Insurance Rate and Workman's Compensation Insurance Rate Applicable to His Company'; and

"(C) Workman's Compensation Insurance at the rate set forth by the offeror in the provision referred to in (B) above.

"Failure of the price offered to thus support the offeror's manning chart may result in rejection of the proposal without further negotiations.

"(c) Award will be made to the responsible offeror whose proposal, meeting the criteria set forth in (a) and (b) above, offers the lowest evaluated total price.

"Note to Offeror: The purpose of the above price-to-hours evaluation is to assure:

"(i) that manning charts submitted are not unrealistically inflated in hopes of securing a more favorable proposal evaluation; and

"(ii) that award is not made at a price so low in relation to basic payroll and related expenses established by law as to jeopardize satisfactory performance.

"Nothing in this Section D shall be construed as limiting the contractor's responsibility for fulfilling all of the requirements set forth in this contract."

MBM's dollar/hour ratio ($2.69) covers its calculated basic labor expense less vacation and holiday benefits ($2.67). However, unless vacation and holiday benefits were figured at or less than .86 per cent of the minimum wage rate, MBM's dollar/hour ratio would not cover its total basic labor expense as required by the RFP. As noted above, it is customary to compute vacation and holiday benefits at approximately 5 per cent of the minimum wage. While the application of this 5 per cent figure is in no way mandatory in computing these expenses, we think some realistic figure should have been stated in the RFP to advise offerors of the factor that would be used to compute each offeror's basic labor expense. We have been advised that in this instance no labor expense computation has been made utilizing any figure for vacation and holiday benefits.

We believe that this procurement was defective for the reasons indicated above. However, we are unable to determine whether or not MBM's dollar/hour ratio really covered its total basic labor expense. Therefore, we cannot conclude that its basic labor expense would have exceeded its dollar/hour ratio if a percentage factor had been stated in the RFP and had been applied to the MBM offer. Parenthetically, we observe that all offerors were treated alike with respect to the failure to apply any figure. Further, we note that the purpose of the evaluation criteria is to prevent unrealistically inflated manning charts and an award at a price so low that satisfactory performance would be jeopardized. In this connection, although the criteria were not strictly applied, it would appear that the purpose of the criteria has been met in that MBM apparently is performing the contract satisfactorily at its offered price.

For the reasons noted above, Checkers' protest is denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States