



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

REDACTED DECISION

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Matter of: Battelle Memorial Institute

File: B-259571.3

Date: December 8, 1995

Michael T. Janik, Esq., Melvina Ford, Esq., and Alison L. Doyle, Esq., McKenna & Cuneo, for the protester.

William A. Roberts III, Esq., Lee Curtis, Esq., and Karen L. Manos, Esq., Howrey & Simon, for Fibertek, Inc., an interested party.

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DIGEST

1. Protest that agency engaged in prohibited technical leveling is denied where record shows that agency needed to conduct an additional round of technical/management discussions in order to clarify uncertainties either still existing or created by firms' responses to initial discussion questions.
2. Protest that agency failed to perform an adequate cost realism evaluation is denied where record shows that each prime and subcontractor proposal was reviewed for reasonableness and realism by either the contracting agency or the Defense Contract Audit Agency, proposed costs were adjusted to account for any shortfall or overstatement in the number of proposed labor hours, and none of the protester's challenges to the cost realism evaluation bears on cost elements that could have significantly affected the competitive standing of the offerors or the agency's source selection decision since the amounts in question are insignificant or the record indicates that any error did not otherwise prejudice the protester.
3. Protest that agency improperly elevated the importance of cost in its source selection decision is denied where record shows that agency reasonably found proposals from protester and awardee relatively equal under the technical and management evaluation factors and, consistent with the solicitation's evaluation

scheme, made award to the firm submitting the proposal reflecting a significant cost advantage.

DECISION

Battelle Memorial Institute protests the Department of the Army's award of a contract to Fibertek, Inc., under request for proposals (RFP) No. DAAA15-93-R-0156, for the design and fabrication of two prototype short range biological standoff detection systems (BSDS). Battelle contends that the Army engaged in technical leveling during its conduct of discussions and improperly evaluated proposals in numerous respects.

We dismiss the protest in part and deny it in part.

The RFP contemplated the award of a cost-plus-award-fee contract to the offeror submitting the proposal offering the best overall value to the government. The solicitation provided for the evaluation of proposals based on the following four evaluation factors, in descending order of importance: (1) technical merit; (2) management, including related experience, management plan and tools, personnel, facilities and socioeconomic commitment; (3) cost, including an evaluation of the offerors' proposed costs for realism and reasonableness; and (4) performance risk, evaluated on the basis of a review of prior contracts. The RFP stated that the agency was most concerned with technical and management merit, but would consider cost, followed by performance risk, as dispositive for source selection purposes where proposals were found to offer comparable merit in the other two areas.

The Army received four proposals, including those of Battelle and Fibertek. Following discussions with all offerors, the Army solicited best and final offers (BAFO). Based on the evaluation of BAFOs, the Army found that Battelle and Fibertek both had submitted proposals meriting a perfect technical/management score of 100 points. The Army then made award to Fibertek on the basis that, given the perfect technical/management scores for Battelle and Fibertek, Fibertek's lower evaluated cost of [deleted] offered the best overall value to the government when compared to the Battelle proposal (with an evaluated cost of [deleted]). While both firms were assigned low performance risk ratings, these were not considered a discriminator in the Army's source selection given Fibertek's significantly lower evaluated cost. Battelle thereupon filed this protest with our Office.

ABANDONED ISSUES

Battelle's initial protest raised a number of allegations which it abandoned after receiving the agency report. Battelle alleged that the Army had conducted improper

post-BAFO discussions with Fibertek and improperly permitted the firm to submit a second BAFO; the Army's report, however, showed that no post-BAFO communication had occurred between the Army and Fibertek, and Fibertek did not further comment on this issue. Battelle also initially speculated that the cost disparity between Fibertek and the protester was such that Fibertek's proposal must have been based on a significant understatement of the level of effort required to perform the contract; the Army's report, however, showed that both Fibertek's and Battelle's cost proposals were evaluated based on similar levels of effort, and Battelle did not reiterate its contention in this regard. Likewise, while Battelle's initial protest focused on the allegedly unproven nature of Fibertek's offered technology, maintaining that the firm could not reasonably have been given a perfect score in light of its proposed approach, Battelle's comments focus on the allegedly unresolved deficiencies in Fibertek's proposal without reference to its earlier broad allegation concerning the unproven nature of Fibertek's technology. Given Battelle's failure to respond to the report in these areas, we consider the issues in question to have been abandoned by Battelle. Birch & Davis Assocs., Inc.-- Protest and Request for Recon., B-246120.3; B-246120.4, Apr. 20, 1992, 92-1 CPD ¶ 372.

UNTIMELY ISSUES

Battelle first protested to our Office on June 2, 1995, and then supplemented its protest on July 31, 12 working days after its receipt of the agency's administrative report. The allegations first raised in Battelle's July 31 supplemental letter of protest fail to independently satisfy the timeliness requirements of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1995), because they were not raised within 10 working days of the protester's receipt of the Army's administrative report. Where a firm files a timely initial protest, and later supplements that protest with new allegations, each new allegation must independently satisfy our timeliness requirements. QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94. Even where the new bases for protest may be considered merely examples supporting an earlier general allegation, these examples must independently satisfy our timeliness requirements where they involve different factual circumstances and require a separate explanation from the contracting agency. Id.

For example, Battelle's initial protest letter states that Fibertek's proposal "is based upon technology that is unproven . . . [and therefore] Fibertek's proposal did not satisfy the solicitation, or at best should have been substantially downgraded in comparison to the proven technology offered by Battelle." Battelle's initial letter of protest also contended that Fibertek was improperly given a perfect score in the management area because the firm allegedly lacked the financial resources and personnel necessary to perform the contract. In contrast, Battelle in its comments contends that the Army increased Fibertek's scoring without stating its rationale for the increase, and without stating whether the originally identified deficiencies and

disadvantages had been resolved; Battelle maintains that there were "at least 37 occasions where the Army did not document at all its evaluation of Fibertek's responses to government questions."¹

These new allegations are distinct from Battelle's original basis for protest. Battelle's new contentions make no mention of the allegedly unproven nature of Fibertek's proposed technology or its alleged lack of financial or personnel resources. The allegations focus instead on the alleged inadequacy of the Army's evaluation documentation,² and refer to specific deficiencies and disadvantages—not related to the unproven nature of Fibertek's product or its lack of resources—that Battelle contends were not resolved by Fibertek's proposal revisions. As these contentions involve different facts from those surrounding the original allegations and require a separate explanation by the Army, they must independently satisfy our timeliness requirements. QualMed, Inc., *supra*. Since these allegations were filed more than 10 working days after receipt of the report which provided the basis for these contentions, we therefore dismiss the allegations as untimely. TRW, Inc., B-243450.2, Aug. 16, 1991, 91-2 CPD ¶ 160.³

¹The record shows that, in documenting its evaluation, the Army consistently did not discuss earlier deficiencies that were resolved by proposal revisions, but instead only discussed the effect of the proposal revisions as they related to deficiencies or disadvantages that had been reduced but not eliminated. For example, the agency identified a total of [deleted] deficiencies and [deleted] disadvantages in the initial Battelle offer; after the first round of discussions, the evaluators only discussed [deleted] of Battelle's disadvantages/deficiencies, and as to these [deleted], only the effect that Battelle's proposal revisions had on the originally identified concern (for example, that Battelle's response reduced a deficiency to a disadvantage).

²Battelle asserts that its arguments relating to the rescoring of Fibertek's proposal were timely because it was unable to ascertain the initial evaluation scores from the first agency report (which did not include the agency's initial scoring sheet). The report did however contain a memorandum from the contracting officer to the technical evaluation committee dated June 16, 1994, from which Fibertek's original scores can be ascertained.

³Battelle also alleged in its comments filed 12 working days after receipt of the agency report that the contracting officer had improperly directed the technical evaluation committee to rescore proposals after its review of the offerors' first proposal revisions, and that the agency improperly gave consideration to an offer by Fibertek to reduce its price for this requirement in the event that it becomes a successful subcontractor under a related procurement for a [deleted] system. For the reasons discussed above, we also dismiss these aspects of Battelle's protest as untimely.

TECHNICAL LEVELING

Battelle maintains that the Army engaged in technical leveling during its discussions with Fibertek. According to the protester, the Army's questions to Fibertek were designed to obtain information missing from Fibertek's proposal as a result of that firm's lack of diligence, competence, and inventiveness in preparing its offer.

Technical leveling occurs where an agency, through successive rounds of discussions, helps to bring a proposal up to the level of another proposal by pointing out weaknesses that remain in a proposal due to an offeror's lack of diligence, competence, or inventiveness after having been given an opportunity to correct them. Federal Acquisition Regulation (FAR) § 15.610(d); SAIC Computer Sys., B-258431.2, Mar. 13, 1995, 95-1 CPD ¶ 156. We have reviewed the record of discussions here and conclude that, rather than amounting to technical leveling, the Army's negotiations were consistent with its obligation to conduct meaningful discussions. FAR § 15.610(c); SAIC Computer Sys., supra.

All of the initial proposals submitted were found technically unacceptable but susceptible to being made acceptable. The Army then conducted two rounds of technical and management discussions and one round of cost discussions with the offerors. After the first round of technical/management discussions, the agency determined that, while some deficiencies and disadvantages had been resolved by the offerors' responses, some of the original deficiencies/disadvantages remained and some new ones had been created by the responses.

For example, both Battelle and Fibertek had difficulty conforming their respective designs to [deleted] the specifications. Battelle was initially questioned about the [deleted] for its [deleted] (one of the components of the overall system); the agency was concerned that the firm's proposed [deleted] might be insufficient to [deleted] and also all necessary peripheral hardware associated with this component such as disc drives and data acquisition cards. (Failure of the [deleted] would result in overall system failure.) Battelle's response to the agency's first discussion question resolved the original deficiency but gave rise to numerous additional concerns such as whether there was [deleted] and other components (such as the [deleted]) that were being [deleted] by the same source, and whether Battelle's design had an adequate safety margin of [deleted] to preclude system failure. The Army therefore asked Battelle additional questions in this area during the second round of discussions and, ultimately, Battelle was able to resolve these issues to the agency's satisfaction.

Likewise, although the Army initially found no deficiencies or disadvantages with the Fibertek design from a power consumption standpoint, after reviewing Fibertek's first proposal revisions, the agency noted a new disadvantage in the Fibertek design with respect to power consumption. As with the Battelle design,

the Army was concerned that Fibertek's [deleted] was such that if problems were encountered in the development of other system components, the available [deleted] could be insufficient to meet total system requirements, thus degrading performance. Accordingly, the Army pointed out to Fibertek during the second round of discussions that while Fibertek's design nominally allowed [deleted]for its chosen [deleted], the design did not provide for a margin of [deoleted] sufficient to reduce overall program risk. Fibertek's response adequately met the agency's concerns.

In other instances, the agency was simply not satisfied with the offerors' responses presented in the first round of proposal revisions. For example, the Army initially noted Battelle's lack of direct experience in the area of [deleted]. Battelle responded that [deleted] responsibility would be borne primarily by [deleted] and one of its [deleted]. The agency simply expressed continued concern during the second round of discussions about the allocation of [deleted]for the [deleted].

In our view, the agency's discussions did not amount to "coaching" one or another of the offerors, and did not solicit information that was missing as a result of a lack of diligence, competence, or inventiveness on the part of the competing firms. Rather, the record shows simply that it was necessary for the agency to engage in more than one round of discussions in order to resolve all of the technical issues and informational deficiencies in the offerors' proposals. There is nothing legally objectionable in conducting more than one round of discussions where it is necessary to eliminate all deficiencies and disadvantages, provided that the agency does not convey information relating to another firm's approach or otherwise provide a firm with a technical approach not originally contemplated by its proposal. SAIC Computer Sys., supra. We view the agency's actions here as no more than a reasonable attempt to lead offerors, through specific questions, into the areas of their proposals needing clarification, amplification or correction, and thereby afford them an opportunity to completely satisfy the government's requirements. Since this is precisely what discussions are designed to accomplish, FAR § 15.610, we have no basis to object to the Army's actions. See American Dev. Corp., B-251876.4, July 12, 1993, 93-2 CPD ¶ 49.

COST REALISM EVALUATION

Battelle challenges the adequacy of the agency's cost realism evaluation in numerous particular respects, but principally contends that the agency's cost realism evaluation is not sufficiently detailed.

When an agency evaluates proposals for the award of a cost reimbursement contract, an offeror's proposed costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual, allowable costs. FAR § 15.605(d). Consequently, a cost realism evaluation must be performed

by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. CACI, Inc--Fed., 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. Contracting agencies are required to adequately document this evaluation, and when properly documented, our review is limited to determining whether the agency's evaluation was reasonably based and not arbitrary. Ogden Logistics Servs., B-257731.5, Apr. 13, 1995, 95-1 CPD ¶ 194.

We have reviewed all of Battelle's challenges to the Army's cost realism evaluation and find no basis to question the agency's overall conclusions regarding the probable cost of contracting with one versus another of the competing offerors. The record indicates that each proposal was subject to a detailed review by the Defence Contract Audit Agency (DCAA), which found no basis to question either the compensation rates or the indirect rates presented for the prime contractors and their subcontractors. Those cost elements not reviewed by DCAA were reviewed by the Army, which generally found the costs reasonable. To the extent that the agency did make adjustments to offerors' proposed costs, these occurred where an offeror's proposed labor hours differed from the agency's estimate of the number of hours necessary for performance; the agency adjusted the firm's cost to reflect the cost of performance using the agency's estimate of the number of labor hours required for the firm's technical approach. Overall, the Army adjusted Fibertek's proposed costs [deleted] and Battelle's proposed costs [deleted] to account for a difference between the agency's estimate of the labor hours necessary and the proposed hours in each firm's offer.

None of Battelle's specific challenges to the agency's cost realism evaluation bears on cost elements that could have significantly affected the competitive standing of the offerors or the agency's source selection decision since the amounts in question are insignificant or the record indicates that any error did not otherwise prejudice Battelle. For example, the Army found that one of Fibertek's subcontractors had understated the number of hours necessary to perform the contract. In order to arrive at the probable cost for this shortfall, the Army ascertained the average rate of compensation for the subcontractor's employees, multiplied this rate by the shortfall in the number of hours, and then added this amount to the Fibertek offer for purposes of evaluation. Although Battelle contends that the Army's calculations in this regard were erroneous because the Army arrived at the average rate of compensation through the use of a simple average rather than a weighted average that accounted for differing levels of effort from differently-compensated employees, when the agency (in response to this allegation) recalculated the adjustment to Fibertek's proposal in this area using a weighted average, the results showed that the agency had originally overstated the probable cost of the required adjustment by [deleted]. Based on our review of the record, we have no basis to conclude that the Army's cost realism evaluation was unreasonable in any

significant way that was prejudicial to Battelle. See IT Corp., B-258636 et al., Feb. 10, 1995, 95-1 CPD ¶ 78.

PERFORMANCE RISK ASSESSMENT

Battelle argues that the agency's performance risk assessment was flawed because it failed to take into consideration Fibertek's performance under one of the prior contracts listed in its proposal. The Army considered this contract, but did not include the rating for this contract in its overall performance risk rating calculation because it concluded that it was not relevant to an assessment of Fibertek's performance risk for this acquisition. Battelle essentially disputes the Army's conclusion in this regard.

The RFP provided that the offerors would be evaluated for performance risk (based on past performance) to determine each firm's "likelihood of success in performing the solicitation requirements. . . ." Essentially the object of this assessment was to judge each firm's ability to meet the developmental challenges associated with building these prototype devices based on prior contracts. Thus, the agency's primary concern here was the offerors' performance on contracts requiring similar developmental efforts. (For example, the agency was interested in Fibertek's performance on a previous Air Force contract for the construction of a different developmental laser.)

We find that the agency had a reasonable basis for concluding that Fibertek's performance on the contract at issue did not warrant downgrading its overall performance risk rating because the contract was for the production of a device that was not relevant to the work requirements of this contract. In particular, the contract was for the fabrication of [deleted]. The Army found this contract irrelevant because the current requirement is for lasers operating in the ultraviolet portion of the spectrum rather than the visible portion of the spectrum; radiation in the ultraviolet portion of the spectrum can be successfully blocked using transparent plastics. Accordingly, resort to [deleted] was not necessary for this requirement, and Fibertek's ability to successfully fabricate the [deleted] components thus was irrelevant to its performance here.

RELATIVE WEIGHT OF THE EVALUATION FACTORS

Battelle contends that the Army improperly gave undue weight to cost in its source selection decision, and correspondingly failed to give adequate weight to the technical/management considerations, which the RFP stated would be more important in the evaluation and source selection. According to Battelle, the RFP required the agency to consider any perceived advantages associated with a particular offer, but the Army, rather than assign a higher score where it found a proposal to be particularly advantageous, instead improperly assigned perfect

technical scores to proposals that were merely without any deficiencies or disadvantages. Battelle concludes that, because of this error, both its proposal and Fibertek's proposal received perfect scores even though the agency considered Battelle's proposal to be more advantageous; as a consequence, according to Battelle, the Army made an improper award to Fibertek based solely on that firm's cost advantage.

Battelle's argument amounts to a challenge to the agency's cost/technical trade-off. Agency officials have broad discretion in determining the manner in which cost and technical evaluation results will be used in making an award decision; agencies are permitted to make cost/technical trade-offs, and the extent to which one may be sacrificed in favor of the other is governed only by the test of rationality and consistency with the RFP's stated evaluation criteria. BMAR & Assocs., Inc., B-252273, June 16, 1993, 93-1 CPD ¶ 465.

While Battelle contends that its proposal was found superior to Fibertek's, the record shows that, in fact, the agency considered both offers to be compliant with the RFP requirements and to offer comparable, albeit different, advantages with respect to configuration and design, software and hardware development capabilities, and performance capabilities. For example, the agency found Fibertek's [deleted] advantageous because it offered [deleted] greater than required under the terms of the RFP, whereas Battelle's [deleted] was viewed as preferable to the other designs offered. In our view, the record shows that the agency did precisely what the RFP stated it would do; because it found the two proposals essentially equal with respect to the technical and management criteria (although offering different benefits), it considered cost to be the discriminating factor for source selection purposes. Because Fibertek's evaluated cost was approximately [deleted] less than Battelle's, it made award to Fibertek as the firm submitting the most advantageous proposal overall. Given Battelle's failure to establish that the Army improperly evaluated proposals, and given Fibertek's clear cost advantage, we have no basis to object to the agency's source selection decision.

The protest is dismissed in part and denied in part.

Comptroller General
of the United States