



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: American Lawn Service, Inc.

File: B-267715

Date: December 20, 1995

Eric Erickson for the protester.

Timothy H. Power, Esq., for Maintenance Engineers, an interested party.
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Department of the Navy, for the agency.

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Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly made award to an offeror submitting the lowest-priced, technically acceptable offer where the solicitation stated that award would be made on a best value basis and the agency, in lieu of considering the value to the government of higher-rated, higher-priced offers, awarded the contract based on the lowest-priced, technically acceptable offer.

DECISION

American Lawn Service, Inc., protests an award to Maintenance Engineers under request for proposals (RFP) No. N62755-94-R-2826, issued by the Department of the Navy, Naval Facilities Engineering Command, for grounds maintenance and tree trimming services for Central and West Oahu, Hawaii. American Lawn protests that the Navy's source selection decision deviated from the stated evaluation plan.

We sustain the protest.

The RFP, issued on December 19, 1994, was restricted to small business concerns and contemplated the award of a combination fixed-price (lump sum) and indefinite quantity (fixed unit prices) contract for 1 year with an option for up to 6 additional months. The RFP stated a best value evaluation plan with the price and technical proposals being of equal importance. The RFP listed five technical evaluation factors and their relative importance to each other. The RFP also stated the following evaluation consideration:

"[p]roposals unrealistic in price or in terms of technical or schedule commitments will be considered lacking in technical competence or comprehension of the complexity and risks of the contract requirements and their ratings lowered accordingly."

The Navy received initial proposals by January 31, 1995. Technical proposals were evaluated by the technical advisor on an adjectival scale of exceptional, acceptable, marginal, and unacceptable. The technical proposals of American Lawn and one other offeror were rated "exceptional" overall. Maintenance Engineers's initial technical proposal was rated "marginal" overall. The proposed prices of American Lawn and Maintenance Engineers, and the government estimate, were:

Offeror	Fixed Price	Indef. Qty.	Total
American Lawn	\$1,313,520	\$384,050	\$1,697,570
Maint. Eng.	1,114,800	56,015	1,170,815
Govt. Est.	1,788,653	210,930	1,999,583

By letter dated May 19, the Navy conducted discussions with all the offerors whose proposals were included in the competitive range, and amended the RFP requirements. The letter included technical concerns to be addressed by each offeror, as well as a list of those contract line item numbers (CLIN) for the indefinite quantity work where the proposed CLIN prices varied significantly from the government estimate; the list specifically identified whether the CLINs were high or low in comparison to the government estimate. In this letter, most offerors, including American Lawn and Maintenance Engineers, were also told that the lump sum fixed-price portion of their proposals "appear[ed] low in relation to the cost of the work required by the contract" and were advised to reevaluate their pricing. The Navy requested each offeror to provide a breakdown of the price for the fixed-price portion of its proposal "so [the agency could] confirm and analyze [the offeror's] understanding of the specification requirements."

Revised proposals were submitted by June 2. American Lawn's technical rating remained "exceptional." Maintenance Engineers's rating was upgraded to "acceptable," although it was still rated "marginal" on one technical factor--equipment--because the proposal did not demonstrate that the offeror could perform the contract requirements with the equipment proposed. The revised prices and revised government estimate were:

Offeror	Fixed Price	Indef. Qty.	Total
American Lawn	\$1,496,970	\$330,470	\$1,827,440
Maint. Eng.	1,254,000	56,015	1,310,015
Govt. Est.	1,745,728	210,930	1,956,659

American Lawn provided the requested breakdown of the lump sum fixed-price portion of its price and responded to the agency's concerns about its prices with an explanation for each CLIN in question. American Lawn changed some of its CLIN prices in response to the agency's price discussions and verified the prices of CLINs that were not revised. For the lump sum fixed-price portion of the proposal, American Lawn stated that it increased its price as a result of the amended requirements, and responded to the agency's concern about its low price with an explanation that the price was justified due to efficiencies based on its experience as the incumbent and its use of technologically advanced equipment.

Maintenance Engineers provided only the requested breakdown for the lump sum fixed-price portion of its price. It did not comment on the agency's concerns about its low lump sum fixed-price or its low indefinite quantity prices.

By letter of July 17, the Navy held additional discussions with Maintenance Engineers and one other offeror. The letter to Maintenance Engineers was primarily concerned with Maintenance Engineers's low prices and stated:

"[p]er our letter of 19 May 1995, we advised you we considered your prices for the items [on the enclosed list of indefinite quantity CLINs] low. Please explain how you will accomplish the work, if ordered, per the specification requirements, at the price proposed. Include a breakdown of your prices. Also advise us of any overall strategy that may explain how you will accomplish the work at the price proposed."

By letter of July 20, Maintenance Engineers provided a breakdown for the CLIN prices requested and the following explanation:

"[w]e have made a review of our prices for the work you indicated as low. Maintenance Engineers is confident we can do the job at our prices. Our pricing is in keeping with our normal price structure.

"Due to the contractual requirement for prompt response it is necessary for us to have personnel, supplies and equipment available. A portion of this cost is included in our fixed price."

By letter of July 25, the Navy requested best and final offers (BAFO) from the competitive range offerors. The letter to Maintenance Engineers referenced the offeror's breakdown of prices recently submitted, advised Maintenance Engineers to consider that "Hawaii's cost of living and labor market differ substantially from other areas," and identified specific local costs of concern. The letter also stated:

"[w]e noticed you did not attend the pre-proposal site visit. If you have not done so, you should verify the conditions, locations, and

accessibility of project sites since they may affect your production time."

The Navy received BAFOs by the due date of July 31. The technical ratings for American Lawn and Maintenance Engineers did not change. American Lawn revised its lump sum fixed-price to \$1,398,960 for a total BAFO price of \$1,729,430. Maintenance Engineers made no change to its previously proposed total price of \$1,310,015, which was the lowest BAFO price received, and did not comment further on the agency's price concerns.

In a Business Clearance Memorandum containing the award decision, the Navy compared the BAFO prices submitted and determined that Maintenance Engineers's price was "fair and reasonable." In this Memorandum, the agency concluded:

"[s]ince [Maintenance Engineers] offered the lowest price and received an overall [a]cceptable technical rating, this represents the best value to the [g]overnment. We will award the contract to [Maintenance Engineers]."

The Navy awarded the contract to Maintenance Engineers on August 2. This protest followed.

American Lawn alleges that, contrary to the stated best value evaluation plan, the Navy awarded this contract on a lowest-priced, technically acceptable basis. We agree. Although the RFP stated that the technical and price proposals were of equal importance and that this was a best value procurement, the Navy did not consider in its selection decision the higher-rated, higher-priced BAFOs, such as the protester's "exceptional" rated BAFO. The agency did not conduct a price/technical tradeoff analysis, but rather awarded the contract on the basis of the lowest-priced, technically acceptable BAFO and did not inform offerors of this changed evaluation scheme. Agencies do not have the discretion to announce in the solicitation that they will use one evaluation plan and then follow another without informing all offerors of any significant changes in the evaluation scheme. DynCorp, 71 Comp. Gen. 129 (1991), 91-2 CPD ¶ 575. Thus, the agency improperly departed from the stated best value evaluation plan and we sustain the protest on this basis. See Colonial Storage Co.; Paxton Van Lines, Inc., B-253501.5 et al., Oct. 19, 1993, 93-2 CPD ¶ 234.

Moreover, it is not clear from the record that the Navy evaluated price realism in accordance with the RFP provision stating that "[p]roposals unrealistic in price . . . will be considered lacking in technical competence or comprehension of the complexity and risks of the contract requirements and their ratings lowered

accordingly.¹ (Emphasis added.) During discussions, the Navy specifically identified for each offeror, including Maintenance Engineers, the prices it considered to be too low and requested justification. Most offerors either provided justification for their low prices or revised them. Maintenance Engineers, however, while asserting confidence in its pricing, never provided the Navy with justification for that pricing, even though the Navy, throughout discussions, continued to consider the pricing questionably low.

Notwithstanding the Navy's expressed concerns, the agency nevertheless determined that Maintenance Engineers's price was "fair and reasonable," and made award to that firm. The record does not evidence why the Navy's repeated concerns about the lowness of Maintenance Engineers's price were assuaged, nor discuss how this low price reflected on that firm's understanding of the scope and complexity of the requirements.² For example, although the agency noted that Maintenance Engineers's price for indefinite quantity work was only 27 percent of the government estimate and the next lowest price was 112 percent of the government estimate, the agency did not reasonably account for this discrepancy.³

Our concern in this area is two-fold: 1) the Navy may have failed to adhere to the RFP's price realism provision in its evaluation of proposals, and 2) the Navy's

¹Where the RFP provides for the assessment of price in order to evaluate an offeror's understanding of solicitation requirements, the agency must consider it in evaluating proposals. See PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381; Binghamton Simulator Co., Inc., B-244839, Nov. 5, 1991, 91-2 CPD ¶ 429.

²Neither the agency nor Maintenance Engineers points to any aspect of the awardee's proposal that indicates any special technical approach that accounts for Maintenance Engineers's low price. Moreover, the agency's evaluation of Maintenance Engineers's technical proposal included a marginal rating for the equipment factor because of concerns about the offeror's ability to perform with the equipment indicated in its proposal.

³While in its report on this protest the Navy states that Maintenance Engineers may have included a portion of its costs for prompt response capability in its lump sum fixed price, this does not explain why Maintenance Engineers's extremely low indefinite quantity price, much less its total price is realistic or reasonable. At best, this only explains Maintenance Engineers's allocation of some of the offeror's cost of performing indefinite quantity work from that portion of the price to the lump sum fixed price--a price which itself was of concern to the agency. It seems logical that this allocation should only increase that existing concern about the realism of the lump sum fixed price, rather than resolve price realism concerns about either the indefinite quantity or total prices.

apparent disregard of price realism, together with the agency's negotiation approach to what it viewed as questionably low prices, may have inhibited price competition in the revised proposals and BAFOs, which would have been particularly prejudicial to those offerors, such as the protester, whose initial prices, although higher than Maintenance Engineers's prices, were identified by the agency as being low, and who heeded the agency's suggestion in this regard.⁴ See Ameriko/Omserv-Recon, B-252879.4, May 25, 1994, 94-1 CPD ¶ 341.⁵

We recommend that the Navy either evaluate proposals based on the best value plan stated in the RFP, including the price realism provision, or, if the Navy determines that its needs require award to the lowest-priced, technically acceptable offeror, obtain revised proposals and make a new source selection decision. The agency should terminate the contract award to Maintenance Engineers if it is not the successful offeror. We also find that the protester is entitled to recover the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). The protester should submit its certified claim for protest costs directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

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⁴Although it is typical for offerors to lower their prices with the submission of BAFOs, see National Sys. Management Corp., 70 Comp. Gen. 443 (1991), 91-1 CPD ¶ 408; DTH Management Group, B-252879.2; B-252879.3, Oct. 15, 1993, 93-2 CPD ¶ 227, the agency's actions here induced price increases almost without exception. In comparing changes in the lump sum fixed price, all of the competitive range offerors receiving a "low price" advisement increased their lump sum prices. American Lawn credibly states that the circumstances here inhibited it from lowering its price in its BAFO.

⁵For these reasons, we disagree with the agency's contention that American Lawn is not an interested party to protest the agency's failure to follow the best value evaluation scheme because there was an intervening, lower-priced "exceptional offeror. See Rolen-Rolen-Roberts Int'l; Rathe Prods., Inc./Design Prod., Inc., B-218424 et al., Aug. 1, 1985, 85-2 CPD ¶ 113.