



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: BE, Inc.; PAI Corporation

File: B-277978; B-277978.2

Date: December 16, 1997

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Gena Cadieux, Esq., Department of Energy, for the agency.
David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably determined that awardee's proposed labor rates were realistic is denied where agency determination was supported by (1) a comparison of the awardee's rates to those of the other offerors and to wage survey information furnished by offerors, and (2) the fact that all of the awardee's proposed key employees were currently employed and proposal included evidence of ability to retain staff.
2. Protest that questions posed by agency at oral presentations constituted discussions such that the agency was required to advise offerors of weaknesses in their offers and request best and final offers is without merit where the information solicited was not substantial, but merely clarified information already presented in proposal; information was not necessary to find proposal acceptable; and no proposal revision opportunity was provided.

DECISION

BE, Inc. (BEI) and PAI Corporation protest the Department of Energy's (DOE) award of a contract to Systematic Management Services, Inc. (SMS), under request for proposals No. DE-RP04-97AL76614, for technical support services. BEI and PAI challenge DOE's cost/price evaluation and cost/technical tradeoff decision; PAI challenges DOE's determination not to request best and final offers (BAFO).

The solicitation contemplated award of an indefinite delivery/indefinite quantity task order contract, for a base year with 4 option years, to a small business to furnish

technical support services in support of DOE's nuclear weapons activities. Offerors were required to submit ceiling labor rates for 38 categories--6 key and 32 other--of personnel, each with its own specified minimum educational and experience qualifications. Although the solicitation required offerors to submit written cost/price proposals, resumes for key personnel, employment letters of intent for key personnel and written past performance information, it required offerors to make oral presentations in lieu of written technical/management proposals. Offerors were cautioned to be "fully responsive" in their written proposals and oral presentations since "DOE intends to make a selection and award a contract based on the initial written proposal and the oral presentation." (DOE elsewhere in the solicitation reserved the right to conduct written or oral discussions with offerors.)

Award was to be made to the responsible offeror whose proposal was "most advantageous (best value)" under the following three criteria (listed in descending order of importance): (1) technical/management; (2) past performance; and (3) cost/price. Cost/price was to be evaluated for reasonableness, realism, and completeness. The solicitation provided that "Technical/Management and Past Performance are of greater importance than Cost/Price. Cost/Price may become increasingly more important, or even the determining factor, when two or more competing offerors are considered to be substantially equal."

Ten proposals--including BEI's, PAI's, and SMS'--were received by the closing time. Following oral presentations to the agency, DOE determined that SMS' offer was most advantageous. SMS' evaluation score (89.2 of 100 possible points/very good) under the technical/management and past performance factors was slightly higher than PAI's (88.9/very good), and SMS' cost/price (\$[DELETED]) was [DELETED] lower than PAI's (\$[DELETED]). Although BEI's proposal received a higher score and adjectival rating (93.8/excellent) under the technical/management and past performance factors than SMS', its cost/price (\$[DELETED]) was [DELETED] higher, and DOE determined that the higher rating of BEI's proposal did not warrant its approximately [DELETED] percent higher cost/price. Upon learning of the resulting award to SMS, BEI, and PAI filed these protests with our Office.

BEI PROTEST

BEI, the incumbent contractor, generally argues that its proposal was "far superior, technically" to SMS'. In addition, BEI specifically challenges the evaluation of SMS' proposed professional compensation. In this regard, although a protective order was issued by our Office to protect proposal and detailed evaluation information that might afford a competitive advantage in the event our decision led to a reopening of negotiations or a recompetition, BEI did not retain counsel and, as a result, did not avail itself of the opportunity available under our Regulations to have counsel obtain detailed information concerning SMS' proposal, including SMS'

professional compensation plan, and its evaluation. 4 C.F.R. § 21.4(c) (1997). Instead, BEI infers from the fact that SMS' overall cost/price was substantially lower than its own that SMS "cannot obtain 'substantially equal' technical talent to that of" BEI.¹

The solicitation incorporated by reference the standard "Evaluation of Compensation for Professional Employees" clause, Federal Acquisition Regulation § 52.222-46, which provides in part that the agency will evaluate proposed compensation plans to assure that they reflect "a sound management approach and understanding of the contract requirements"; assess "the offeror's ability to provide uninterrupted high-quality work"; and consider proposed compensation "in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation." DOE determined that SMS' proposed compensation plan reflected a clear understanding of the work to be performed and concluded that SMS had the capability to hire and retain suitably qualified personnel.

DOE's determination was reasonable. DOE reports that, as part of its evaluation of SMS' compensation plan, it compared SMS' unloaded labor rates as set forth in its proposal to those of the other offerors, and concluded that this comparison demonstrated that SMS' direct labor rates were reasonable and realistic. In this regard, the record indicates that SMS' overall weighted, average base labor rate [DELETED].² In addition, the agency determined that SMS' fringe benefits were comparable to those of the other offerors, and also reviewed the wage survey information furnished by offerors. Regarding these surveys, one offeror, for example, reported the composite results of 11 wage surveys it had consulted; the record indicates that SMS' base labor rates [DELETED], the IGCE rates were based on BEI's rates under the prior contract, and BEI itself recognized in its proposal

¹BEI also questions SMS' self-certification as a small business. However, the Small Business Act, 15 U.S.C. § 637(b)(6) (1994), gives the Small Business Administration (SBA), not our Office, conclusive authority to determine matters of small business size status for federal procurements. Survive Eng'g Co., B-235958, July 20, 1989, 89-2 CPD ¶ 71 at 2. Thus, we will not review a protester's challenge to another company's size status, nor will we review a decision by the SBA that a company is, or is not, a small business for purposes of federal procurements. 4 C.F.R. § 21.5(b)(1); Antenna Prods. Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297 at 2.

²It was not possible to calculate a composite labor rate for one of the offerors because a proposed subcontractor only listed burdened rates. Another proposal was unacceptable.

that "the staff currently provided to [DOE] exceeds minimum requirements." (While SMS' proposal was rated very good under the evaluation subfactor for qualifications and experience of proposed personnel, BEI's proposal was rated excellent in this regard.) [DELETED] VSE Corp., B-247610.2, Aug. 6, 1992, 92-2 CPD ¶ 81 at 6-7.

SMS' proposal also included evidence of its ability to retain staff; [DELETED] and the proposal stated that the firm had retained between [DELETED] percent and [DELETED] percent of its staff in the period 1992-1996 (with [DELETED] percent retained in 1996). Furthermore, although the Defense Contract Audit Agency reported that it did not possess current rate information for SMS, SMS' proposal indicated that its labor rates [DELETED], thus suggesting that SMS would be able to continue to retain a high proportion of its staff. We conclude that the agency reasonably determined that the awardee's proposed labor rates were realistic.

As for BEI's challenge to the source selection decision itself, we note that source selection officials in a negotiated procurement have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results; cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed by the test of rationality and consistency with the established evaluation factors. Family Realty, B-247772, July 6, 1992, 92-2 CPD ¶ 6 at 7-8. Even where cost or price is the least important evaluation factor, an agency may make award to an offeror with a lower-cost, lower-scored proposal if it determines that the cost premium involved in awarding to a higher-rated, higher-priced offeror is not justified. Southern Research, B-266360, Feb. 12, 1996, 96-1 CPD ¶ 65 at 3; Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321 at 4-5.

The tradeoff here was reasonable. As discussed, the agency recognized that BEI's proposal was more advantageous than SMS' under the technical/management and past performance factors and assigned it an excellent rating. However, SMS' proposal was rated as very good under the technical/management and past performance factors, receiving the same score as BEI's under the technical/management approach subfactor of the technical/management factor and the quality/timeliness and customer satisfaction subfactors of the past performance factor, and a higher score under the cost control subfactor of the past performance factor, and had a significantly lower cost/price. Given the evaluated quality of SMS' proposal, there is no basis to object to DOE's determination that the superiority of BEI's proposal simply was not worth a [DELETED] percent higher proposed cost/price.

PAI PROTEST

PAI primarily challenges DOE's conduct of the oral presentations. According to the protester, DOE posed questions that exceeded the scope of the oral presentations as set forth in the solicitation, elicited answers that "impacted the scoring of" the proposals, and constituted discussions, not clarifications, such that DOE was required to advise offerors of weaknesses in their offers and request BAFOs.

PAI's argument is without merit. As set forth in FAR § 15.601 (June 1997), discussion "means any oral or written communication between the Government and an offeror, (other than communications conducted for the purpose of minor clarification) whether or not initiated by the Government, that (a) involves information essential for determining the acceptability of a proposal; or (b) provides the offeror an opportunity to revise or modify its proposal." The acid test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. New Hampshire-Vermont Health Serv., 57 Comp. Gen. 347, 353 (1978), 78-1 CPD ¶ 202 at 9; 51 Comp. Gen. 479, 481 (1972).

PAI cites questions to SMS related to a contract that was referenced in an excerpt from SMS' past performance matrix included in SMS' slides for use at the oral presentation--"Please identify the DP [Defense Programs] organization you currently support (i.e., due to a DOE reorganization, the routing symbol may have changed from DP 50)"--and that was discussed in more detail in PAI's written proposal--"Please clarify the relationship between the assistance to the on-site [Defense Nuclear Facilities Safety Board] Staff observations and the reported quality of the Pantex Plant [Management and Operations] contractor's Recommendation 95-2 presentation (Aug 1996)." These questions were in the nature of clarifications--they merely sought additional detail concerning past performance information already presented in SMS' proposal. The information was not substantial--the first question merely sought the identity of a defense programs organization, and the second sought information on only one presentation out of the several contract tasks. The information requested in no way can be said to have been necessary to establish the acceptability of SMS' proposal.³

PAI also cites a question posed by DOE to SMS concerning its proposed Performance Assessment Division (PAD) Task Manager: "Slide 2.2.4-Please clarify [DELETED] years in DOE Programs . . ." as it pertains to the required experience." However, the record indicates that DOE's question did not involve information

³Indeed, we note that the current version of the FAR considers an opportunity to address "the relevance of an offeror's past performance information" to be in the same category as an opportunity "to resolve minor or clerical errors"; both are suitable for undertaking during clarifications. FAR § 15.306(a)(2) (FAC 97-02).

essential for determining the acceptability of SMS' proposal or otherwise afford SMS an opportunity to revise its proposal. As noted by the agency, while DOE's question cited a brief entry on a chart in SMS' slides which listed its proposed key personnel, SMS' written proposal included a detailed 2-page resume for SMS' proposed PAD task manager; according to the agency, this detailed resume clearly established the compliance of the proposed PAD task manager with the solicitation's minimum experience requirements for that position.⁴

PAI argues that DOE erred in taking SMS' low cost/price into account in a cost/technical tradeoff and in the ultimate source selection. According to the protester, the solicitation provided that cost/price would only become the deciding factor if two proposals were substantially equal; here, as noted by the protester, BEI's proposal received a higher rating than SMS'.⁵ However, PAI is not an interested party to argue that BEI, rather than SMS, should have received the award. 4 C.F.R. § 21.0(a).

The protests are denied.

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⁴PAI asserts that certain questions it was asked by DOE constituted discussions. However, to the extent that these questions afforded PAI an opportunity to improve its score, such questions could not have resulted in prejudice to PAI. These questions thus furnish no basis for sustaining the protest. General Physics Fed. Sys., Inc., B-275934, Apr. 21, 1997, 97-1 CPD ¶ 171 at 4-6.

⁵Although PAI also generally asserts that SMS' cost/price was unrealistically low, the agency's evaluation of SMS' personnel costs was reasonable, as discussed above, and PAI has not shown how SMS' cost/price was otherwise unrealistic. As we already concluded, the mere fact that SMS' offer was [DELETED] below the IGCE does not demonstrate that its cost/price was unrealistic.