



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Davies Rail & Mechanical Works Inc.

File: B-283911.2

Date: March 6, 2000

Angela Schnuerle for the protester.

Kenneth M. Homick, Esq., and Richard G. Welsh, Esq., Naval Facilities Engineering Command, for the agency.

Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that the agency failed to conduct meaningful discussions is denied where the record shows the agency posed questions in the areas in which it was concerned that the proposal needed amplification and improvement.

2. Agency's selection of the proposal of an offeror whose price was less than 1 percent higher than the protester's, in view of that firm's better past performance references, more extensive experience with applicable quality control program, and in-house design and fabrication capability, was reasonable where the solicitation provided for the award to the proposal that represented the best value to the government.

DECISION

Davies Rail & Mechanical Works Inc. protests the award of a contract to Ederer Inc. under request for proposals (RFP) No. N62472-98-R-1648, issued by the Navy Crane Center (NCC), Naval Facilities Engineering Command, for the purchase of four cranes and the refurbishment of another crane at the submarine base in Bangor, Washington. Davies contends that as the low priced offeror, it should have received the award, and that the decision that Ederer's proposal offered the best value, notwithstanding its higher price, was unreasonable.

We deny the protest.

The RFP was issued on April 6, 1999, and was amended five times. Contracting Officer's Statement at 1. Under the RFP, the proposal offering the best value to the government, as determined after proposals had been evaluated in accordance with the RFP evaluation criteria, would receive the award. The RFP also provided that award was not required to be made to the low-priced offeror. RFP § M.1, at M-1. Proposals were to be evaluated on the basis of two factors, price and technical, each of which was rated equally. RFP § M.5.A, at M-2. The technical factor consisted of three subfactors: technical approach, management plan, and offeror's capability/relevant past performance; each subfactor consisted of various elements and subelements. RFP § M.5.C, at M-3 to M-7. The three technical subfactors and the elements of these subfactors and their subelements were to be weighted equally with respect to each other. RFP § M.5.A, at M-2. Price for evaluation purposes was to include the prices of all items, including option items (unless determined not to be in the best interest of the government). RFP § M.1, at M-1.

Of relevance here, under the source selection procedures established for the RFP and followed by the agency, the technical evaluation team (TET) was to evaluate each offeror's technical proposal in accordance with the RFP evaluation criteria and to assign one of the following adjectival ratings: outstanding (O), acceptable (A), unacceptable/susceptible of being made acceptable (US), or unacceptable (U). A "U" or "US" in any sub-factor would render the rating for the entire factor "U" or "US." Agency Report, Tab 2, Source Selection Plan, at 11-12.

Four proposals were received by the submission deadline. After the agency's evaluation of the proposals, three proposals were included in the competitive range. Agency Report, Tab 7, Memorandum for File. The initial scoring, as relevant here, was as follows:

	Ederer	Davies
Technical Approach	US	US
Management Plan	US	US
Capability\Relevant Past Performance	O	US
Overall Technical	US	US

Agency Report, Tab 5, TET Presentation to SSA, at 12 and 40.

On the elements scored under the subfactors, Ederer received an "O" for its plan to access the building containing the 50-ton crane to be refurbished from a "hatch" on the roof, and an "O" for its quality control program because Ederer was not only compliant, as required by the RFP, with the applicable quality assurance program (ISO 9001), but also was certified under the program. It received an "O" on the capability/relevant past performance subfactor because previous customers had responded to its work extremely positively. *Id.* at 3-4. The TET found that Ederer's proposal provided the most detailed technical approach of all the proposals, with a

good demonstration of its understanding of the specifications. Id. at 41. The evaluators also rated Ederer “O” under one element of the management plan subfactor because all of the design, fabrication, and installation work would be done in-house, and the evaluators considered in-house performance the most desirable method of delivering a quality product. Id. at 8-9.

Davies received a “US” rating on the capability/relevant past performance subfactor because the past contracts it had submitted for evaluation did not demonstrate a high level of design experience and fabrication capabilities. The evaluators believed it was not clear whether a firm identified in the proposal would be a subcontractor for fabrication of the cranes; the evaluators also concluded that there was insufficient evidence of that firm’s experience working with Davies. The evaluators also noted that Davies had not fully implemented its quality system to be ISO 9001 compliant. Further, the evaluators noted that on a current contract with NCC, Davies missed the design completion date and projections indicated that the design release would be 75 days beyond the completion date in the contract. Id. at 38-39.

By letters of June 29, Ederer and Davies were advised to submit by July 9 written changes to their proposals in response to attached lists of deficiencies or weaknesses in their proposals. Agency Report, Tab 9, Letter from Contracting Officer to Ederer 2 (June 29, 1999) and Tab 10, Letter from Contracting Officer to Protester 2 (June 29, 1999).

The revised proposals were evaluated by the TET, with the following results:

	Ederer	Davies
Technical Approach	A	US
Management Plan	A	US
Capability\Relevant Past Performance	O	A
Overall Technical	A	US

Agency Report, Tab 13, Addendum to TET Presentation to SSA, Aug. 30, 1999, at 12, 32.

The TET again noted the favorable qualities of Ederer’s proposal that had been identified in the initial evaluation, and also noted Ederer’s innovative crane design philosophy, which would increase the firm’s certified fabrication capacity, promote compliance with safety requirements, and provide commonality of components. Id. at 2. The evaluators found that Ederer had used its ISO 9001 certified quality control system on prior NCC or NCC-monitored projects with exceptional success. Id. at 4. Ederer’s rating on the technical approach subfactor was raised to an “A.” Id. at 6. Ederer’s rating on the management plan subfactor was also raised to an “A,” with Ederer’s submission of required, but previously missing, resumes. Id. at 8-9.

Davies's rating on the capability/relevant past performance subfactor was raised to an "A," although Davies's proposal was considered marginal under this subfactor. Id. at 31-32. Davies's rating under the technical approach subfactor for drawings remained "US" because Davies remained deficient in its ability to furnish detailed drawing for the work. The firm's management plan subfactor rating also remained "US" because the evaluators were concerned that the schedule requirements would not be met for one crane. The evaluators were concerned that Davies was not clear whether its design team members were in-house employees, and whether Davies would be subcontracting work. The evaluators also were concerned that Davies's open-air facilities with only a corrugated metal roof might adversely affect the work since components would be exposed to the weather. Id. at 26-29. The evaluators also were concerned that Davies had difficulty meeting its design completion date on its current NCC contract, that its ISO 9001 quality assurance program was still subject to certain required revisions, and that Davies's past performance references primarily addressed Davies's repair capabilities and that only one reference showed fabrication and management capabilities that were equal to or greater than those required for this procurement. Id. at 31. The evaluators were greatly concerned in view of Davies's proposal that an exceptional level of effort would be required to ensure that Davies would be capable of completing a project of this magnitude and complexity on schedule. Id. at 34.

The reports of the TET and the price evaluation team (PET) were provided to the source selection board (SSB). The SSB reviewed the TET and PET findings and sent its report to the source selection authority (SSA). The SSA recommended that further discussions be conducted. The SSA specifically recommended that Davies be asked how and where its cranes would be manufactured because the agency was still not sure whether Davies or its subcontractor would be performing this work. Agency Report, Tab 15, Memorandum for File, Aug. 27, 1999. By letters of September 3, Ederer and Davies were requested to submit revised proposals, responding to changes in the RFP made by amendment No. 5 and to any attached deficiencies and/or omissions, and to submit a final price by September 14. Agency Report, Tab 18, Letter from Contracting Officer to Protester 1-2 (Sept. 3, 1999), and Letter from Contracting Officer to Ederer 1-2 (Sept. 3, 1999).

The revised proposals were evaluated by the TET, with the following results:

	Ederer	Davies
Technical Approach	A	A
Management Plan	A	A
Capability\Relevant Past Performance	O	A
Overall Technical	A	A

Agency Report, Tab 21, TET Presentation to the SSA, Revised Sept. 23, 1999, at 12, 31.

Ederer's technical proposal remained the highest ranked for basically the same reasons already noted in the previous TET evaluations. Id. at 32. While Davies's ratings for the technical approach and the management plan subfactors were raised to an "A," Id. at 25, 29, the TET found Davies's technical approach to be only minimally acceptable. The TET remained concerned as to whether Davies, or its subcontractor for fabrication, would be responsible for the design drawings, whether the subcontractor had a quality assurance program that was ISO 9001 compliant (it was noted that Davies's quality assurance program was now ISO 9001 compliant), whether the subcontractor would construct the cranes in accordance with RFP specifications and with components meeting those specifications, whether Davies or the subcontractor would be responsible for the certification reports required during fabrication, and whether the relationship existing between Davies and its subcontractor--which the TET believed had not been adequately explained by Davies--would create a risk that the government might not obtain an acceptable product and would require extensive oversight by the government during contract performance to ensure contract compliance. Id. at 25, 27, 29, 30. The TET noted again that Davies has minimal fabrication capability and also concluded that the drawings submitted did not demonstrate as high a level of detail as those submitted by the other offerors, a deficiency that could require a significant level of effort to correct. Id. at 33. The TET's concerns, primarily relating to the lack of a detailed explanation of Davies's relationship with its subcontractor, resulted in Davies's proposal receiving only a marginally acceptable rating on the capability/relevant past performance subfactor. Id. at 30. The TET expressed concern that the references did not show that Davies had a high level of design experience and fabrication capability. Id. at 33.

Ederer's final price was \$1,820,150; Davies's final price was \$1,816,776. Agency Report, Tab 22, Price Evaluation Summary to the SSB, Sept. 27, 1999, at 1. Based on the TET and the PET evaluations, the SSB recommended to the SSA that award be made to Ederer. In support of this recommendation, the SSB noted that Ederer submitted the most detailed proposal, that its proposal demonstrated a very good understanding of the specifications, that Ederer's proposal to design and manufacture the cranes in-house gave Ederer 100-percent control of the quality process, that Ederer's ISO 9001 certification provided a quality control program that exceeded the RFP requirements in a way beneficial to the government by ensuring a quality product, and that Ederer had an outstanding record of past performance with little or no reengineering or design problems and good to excellent work in compliance with the specifications.

In contrast, the SSB concluded that Davies's drawings would require a significant level of effort to provide an equally high level of detail; the Davies/subcontractor relationship would require increased government oversight to ensure successful contract completion; Davies, while ISO 9001 compliant, did not have sufficient experience using this quality control system; Davies's references did not show a high

level of design experience and fabrication capabilities; and, additionally, Davies had not timely completed design drawings for its current NCC contract.

The SSA basically adopted these evaluation findings in her determination. She noted that Ederer's price was "less than 1% higher" than that of Davies. She concluded that "that the technical competence, superior performance record and enhanced quality program of Ederer, Inc. far outweighs the minimal differential in price." Agency Report, Tab 24, Memorandum for File, Sept. 29, 1999, at 1-2. The agency awarded a contract to Ederer on September 30. Contracting Officers Statement at 6. Davies received a debriefing from the agency on October 7.

Davies contends that because both the Davies and Ederer proposals were rated acceptable overall, it should have received the award based on its lower price. Davies argues that the agency failed to conduct meaningful discussions and thus Davies did not have the opportunity to address areas in which it could have improved its proposal. Protester's Supplemental Comments at 1, 7. Davies also argues that the agency misevaluated Ederer's proposal, and questions the benefits that the evaluators found in Ederer's proposal. *Id.* at 1, 5.

We find without merit Davies's allegation that meaningful discussions were not conducted with the firm. Davies specifically contends that an NCC employee provided evaluators with misleading and untrue information regarding Davies's performance, in particular, that Davies had missed a design completion date and that Davies was late in furnishing a quality assurance manual being developed under its current NCC contract. Davies also complains that the NCC employee allegedly questioned Davies's capabilities, including its design and engineering staff. Davies asserts it was not asked to address these matters during discussions. *Id.* at 8-10.

The Federal Acquisition Regulation (FAR) requires that contracting officers discuss with each offeror being considered for award "significant weaknesses, deficiencies, and other aspects of its proposal . . . that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." FAR § 15.306(d)(3). The statutory and regulatory requirement for discussions with all competitive range offerors, 10 U.S.C. § 2305(b)(4)(A)(i) (1994); FAR § 13.306(d)(1), means that such discussions must be meaningful, equitable, and not misleading. For discussions to be meaningful, they must lead offerors into the areas of their proposals requiring amplification or revision. The Communities Group, B-283147, Oct. 12, 1999, 99-2 CPD ¶ __ at 4.

The record shows that the protester was led into the areas in which the agency was concerned that its proposal needed amplification and improvement. For example, in the contracting officer's June 29 letter requesting Davies to submit a revised proposal and to address the attached list of deficiencies, required clarifications, and/or omissions, Davies was asked to address how it would overcome the anticipated missing of the design completion date and asked to address the fact that it did not have an approved qualified assurance plan under its current NCC contract.

Agency Report, Tab 10, Letter from Contracting Officer to Protester 2 (June 29, 1999). The record shows that Davies responded to this question by stating that NCC had issued a change order, that two review meetings had occurred, and Davies did not believe that “any other problematic design issues could cause delay.” Agency Report, Tab 12, Davies Revised Proposal, July 8, 1999, at 8. Davies also responded to the concern regarding the quality assurance plan stating that the plan had been in the appropriate agency’s “hands for some time, and we have received ‘verbal’ approval contingent on the [July 30th] audit” *Id.* at 9. Thus, Davies had an opportunity to address both of these matters and, in fact, did address them.

Davies also complains that it was not given the opportunity to address concerns regarding its design and engineering staff. However, in the contracting officer’s June 29 letter, Davies was asked if it “staff[ed] in-house design personnel” who would perform the design tasks, and whether three specifically named persons were “full-time employees” and where they would be located during performance. Agency Report, Tab 10, Letter from Contracting Officer to Protester attach. 1, at 2 (June 29, 1999). Davies replied that it employed in-house design personnel, referred to resumes submitted with its proposal, noting that two of the three listed persons were full-time Davies employees and that one was a professional engineer under a contract to Davies. Agency Report, Tab 12, Letter from Protester to Contracting Officer 6 (July 8, 1999). Thus, Davies had the opportunity to, and did, address this issue.

Therefore, our review of the record shows that, during discussions, Davies was asked to address the very areas Davies now alleges were not discussed. Further, the record shows that the agency evaluators raised Davies’s proposal to an acceptable rating based on the discussion responses. Agency Report, Tab 21, TET Presentation to the SSA, Revised Sept. 23, 1999, at 12, 31.

Davies also challenges the agency’s determination that Ederer’s proposal represented the best value to the government, notwithstanding its higher price. Source selection officials are vested with a very broad degree of discretion to determine the manner and extent to which they will make use of evaluation results. Resource Management Int’l, Inc., B-278108, Dec. 22, 1997, 98-1 CPD ¶ 29 at 4; PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 7. In a negotiated procurement, whether the ratings of proposals indicate a significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency. Resource Management Int’l, Inc., *supra*, at 4. Thus, the determination of which proposal represents the best value is not necessarily controlled by price, but is made on the basis of the evaluation factors as set forth in the RFP with the source selection official often required to make a price/technical tradeoff to determine if the technical superiority of one proposal is worth the higher price that may be associated with that proposal. Nomura Enter., Inc., B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148 at 4.

The SSA's determination that Ederer's proposal represented the best value to the government was reasonable. Here, both the Davies and Ederer proposals were found acceptable overall; however, the SSA found that Ederer's proposal offered better value. The SSA noted that Ederer's experience included considerably more contracts that were valued in the range of the one being awarded here and that showed performance of the full range of services being obtained here. In contrast, Davies's references showed much less design experience and included its current NCC contract for which the firm's difficulties in meeting a design completion date were never satisfactorily addressed. Additionally, the SSA found that Ederer had been ISO 9001 certified since 1996, and Ederer's prior use of the applicable quality control program was reflected in the superior past performance ratings received by Ederer. Davies only became ISO 9001 compliant (but not yet certified) during discussions on this procurement. Finally, Ederer's approach called for the design and manufacture of cranes in-house. On the other hand, Davies proposed the use of a subcontractor that raised contract management issues that Davies did not address fully. Agency Report, Tab 24, Source Selection Memorandum. In our view, the SSA reasonably could conclude that these advantages justified the slight price premium.¹

The protest is denied.

Comptroller General
of the United States

¹ Davies challenges some of the other benefits that the TEP identified in Ederer's proposal. Thus, Davies objects to the TEP's favorable consideration of Ederer's proposal to gain access to the crane that needed to be refurbished through an opening in the roof, and its conclusion that this approach was better than Davies's approach, which did not use the roof access. Davies also questions why the evaluators credited Ederer with an "innovative crane design." Protester's Supplemental Comments at 6. As discussed above, the SSA decision to award to Ederer was based on other factors; neither roof access nor innovative design was a factor in that decision. Agency Report, Tab 24, Source Selection Memorandum. Under these circumstances, we need not resolve Davies's challenge to these agency's findings since the tradeoff decision was not based on these findings and, as we conclude above, was reasonable. As discussed above, while Davies's proposal was acceptable, it was not equal to Ederer's in the areas identified by the SSA.