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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: A&D Fire Protection Inc.

File: B-288852

Date: December 12, 2001

Andrew R. Otero, for the protester.
Phillipa L. Anderson, Esq., Department of Veterans Affairs, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's "best value" selection, which was to consider both technical factors and price, is sustained where the agency failed to consider the technically acceptable protester's lower proposed price.

DECISION

A&D Fire Protection Inc. protests the award of a contract to Stronghold Engineering, Inc. under request for proposals (RFP) No. 101-AC-0189, issued by the Department of Veterans Affairs (VA), for design and construction services at the National Cemetery, San Diego, California. A&D contends that its low price was not considered in the award selection.

We sustain the protest.

The RFP was restricted to firms certified under the Small Business Administration's section 8(a) set-aside program and provided for the award of a fixed-price contract for the design and construction of columbarium niches at the National Cemetery in San Diego, California.¹ The solicitation stated that award would be made "on the basis of both cost and technical considerations most advantageous to the government." The RFP listed the following evaluation factors, in descending order of importance: (1) price, (2) construction management including experience, (3) past performance with projects of similar scale and scope, and (4) schedule. Offerors were further informed that all technical factors combined were

¹ Columbarium niches are recesses designed to contain urns of ashes.

approximately equal in importance to price. RFP at 5. Offerors were also informed that the agency intended to make award without conducting discussions. RFP at 00101-4.

The VA received six proposals, including those of A&D and Stronghold, which were evaluated as follows:

| Offeror | Overall Technical Score (of 100 maximum points) | Price |
|------------|--|-------------|
| A | 73.6 | \$3,675,000 |
| Stronghold | 72.4 | \$3,398,124 |
| B | 72.4 | \$4,660,605 |
| A&D | 66.2 | \$3,250,000 |
| C | 56.4 | \$4,122,249 |
| D | 40.8 | \$3,563,063 |

Agency Report, Tab I, Technical Proposal Evaluation Memorandum (July 9, 2001), at 1; Tab J, Price Proposal Evaluation Memorandum (July 9, 2001), at 1.

Under the construction management/experience technical factor (which the RFP stated had a weight of 50 points), the proposals of Stronghold and A&D received identical scores of 35.8 points. The VA noted that both firms proposed to use the same design firm, which had considerable experience in cemetery work with the VA. Neither firm had direct experience performing cemetery work for VA, but Stronghold's construction experience was found to more closely relate to cemetery construction than did A&D's. Agency Report, Tab M, Memorandum of Evaluation Team Leader (Oct. 16, 2001), at 1-2.

Under the past performance factor (which had a weight of 25 points), the proposals of Stronghold and A&D received scores of 17.8 and 14.8 points, respectively. Stronghold's 3-point advantage reflected the evaluators' judgment that although each firm had demonstrated client satisfaction, Stronghold had provided "[s]everal highly innovative examples of past partnering and communication with both the client and the community" while A&D's "information presented . . . standard practices." *Id.*

Under the scheduling factor (which had a weight of 25 points), the proposals of Stronghold and A&D received scores of 18.8 and 15.6 points respectively. Each firm demonstrated its understanding of the required schedule and the agency's needs. Stronghold's 3.2-point higher score reflected Stronghold's offer to accelerate the performance schedule. *Id.*

The results of the technical evaluation were presented to the contracting officer with the team's recommendation that the proposals of A&D and offerors C and D be eliminated from further consideration on the basis of those firms' proposals' lower technical scores. The evaluation team also stated that the proposals of Stronghold

and offerors A and B were technically equivalent, and recommended that these firms' proposals be retained in the competition. Agency Report, Tab I, Technical Proposal Evaluation Memorandum (July 9, 2001), at 2.

Subsequently, the evaluation team leader reported to the contracting officer that Stronghold's proposal had offered the lowest overall price of the proposals retained in the competition, and recommended that award therefore be made to Stronghold. Agency Report, Tab K, Memorandum of Evaluation Team Leader (July 11, 2001), at 1. The contracting officer accepted the evaluation team leader's recommendation, and award was made to Stronghold on the basis of initial proposals, without conducting discussions. Agency Report at 8. This protest followed.

A&D complains that although the RFP stated that price was "the most important factor," its overall low price was not considered by the agency in the source selection. Protester's Comments at 1.

Cost or price to the government must be included in every RFP as an evaluation factor, and agencies must consider cost or price to the government in evaluating competitive proposals. 10 U.S.C. § 2305(a)(3)(A)(ii) (2000); FAR § 15-304(c)(1); S.J. Thomas Co., Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73 at 3. This requirement means that an agency cannot eliminate a technically acceptable proposal from consideration for award without taking into account the relative cost of that proposal to the government. Beacon Auto Parts, B-287483, June 13, 2001, 2001 CPD ¶ 116 at 6-7.

In its report, VA states that it eliminated, without any consideration of price, the offers of those proposals, including A&D's, that the agency judged to be not "sufficiently technically capable to perform the project." Agency Report at 9-10. The agency states that it could first eliminate the lower technically related proposals and consider the prices of only the more highly rated offerors. Id. The elimination of technically acceptable proposals without meaningful consideration of price is inconsistent with the agency's obligation to evaluate proposals under all of the solicitation's criteria, including price.² See Kathpal Tech., Inc.; Computer & Hi-Tech Mgmt., Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6 at 9, 12.

² The VA appears to suggest (but does not explicitly state) in its report that the proposal of A&D was not technically acceptable. This suggestion is belied by the contemporaneous evaluation record that does not report that A&D's proposal was technically unacceptable, but indicates only that A&D's proposal was eliminated from the competition because the proposal was viewed as being not "technically competitive." See Agency Report, Tab J, Memorandum of Technical Team Leader (July 9, 2001), at 2. Indeed, from our review of the record, it does not appear that A&D's proposal could be reasonably viewed as technically unacceptable.

VA provides with the agency report a memorandum of the evaluation team leader that, in addition to explaining the contemporaneous evaluation, suggests that Stronghold's proposal would have been selected over A&D's proposal, even if the firm's low overall price had been considered. As indicated above, the record shows that the selection official (who is not the author of the memorandum) did not consider A&D's low overall price during the source selection. We give no weight to this part of the evaluation team leader's memorandum, which at best represents a post hoc cost/technical tradeoff, since such post-protest judgments prepared in the heat of the adversarial process may not reflect the fair and considered judgment of the agency. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

The protest is sustained.

We recommend that the agency perform a cost/technical tradeoff in accordance with the terms of the RFP. If a firm other than Stronghold is selected for award, the agency should terminate Stronghold's contract and make award to that firm. We also recommend that the VA reimburse A&D the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2001). A&D's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel