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Comptroller General
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Decision

Matter of: Nations, Inc.

File: B-280048

Date: August 24, 1998

William H. Butterfield, Esq., and Christopher H. Jensen, Esq., Kilcullen, Wilson & Kilcullen, for the protester.

John A. Evans, Esq., Department of the Navy, for the agency.

Christine F. Davis, Esq. and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly eliminated a proposal from the competitive range, where the deficiencies ascribed to the proposal were either the result of miscalculation, or readily correctable, or similar to features in the proposals included in the competitive range.

DECISION

Nations, Inc. protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. N61339-97-R-0011, issued by the Department of the Navy, for life cycle contractor support of command, control, communications, computers and intelligence (C⁴I) devices located at 45 military installations worldwide.

We sustain the protest.

The RFP, issued May 9, 1997, was for the award of a fixed-price-award-fee, indefinite-quantity contract with some time-and-materials contract line items (CLIN). RFP Amendment 03 §§ B, L.2. The RFP consolidates the requirements of three contracts, one of which the protester is currently performing.

The solicitation advised, pursuant to Federal Acquisition Regulation (FAR) § 52.215-16, Alternate II (June 1997), that the government intended to award a contract based on initial proposals, unless the contracting officer later determined that discussions were necessary. RFP Amendment 03 § M.1. The solicitation

provided for award based on a price/technical tradeoff considering three evaluation factors: (1) price/administrative, (2) technical/management, and (3) past performance. Id. The technical/management factor was most important, and the past performance and price/administrative factors were "comparatively equal" to each other. RFP Amendment 03 § M.3. The solicitation advised that proposals would be evaluated in accordance with a source selection plan (SSP). RFP Amendment 03 § M.1. The SSP established adjectival ratings ("outstanding," "highly satisfactory," "satisfactory," "marginal," and "unsatisfactory") and risk assessment ratings ("high," "medium," and "low") for the technical/management evaluation.

The technical/management evaluation was to gauge the offeror's understanding of the requirements, its technical approach, and its ability to execute that technical approach. RFP Amendment 03 § M.3(b) (1), (2). The technical/management factor included a technical subfactor and a less important management subfactor, RFP Amendment 03 § M.3(b), with the following sub-subfactors:

Technical

1. Staffing
2. Organization
3. Types and Qualifications of Personnel

Management

1. Phase In Plan
2. Personnel Management
3. Time and Material Management
4. Configuration Management Plan

For the staffing sub-subfactor evaluation, offerors were asked to provide a staffing matrix showing the number of personnel proposed by labor category, site, and C⁴I device, along with the plans, assumptions, and rationale supporting the proposed staffing approach. RFP Amendment 03 § L.18(c)(1)(ii). To assist offerors in developing their staffing approaches, the RFP statement of work (SOW) provided workload information, including equipment inventories by site, the normal operating hours at each site, and the required response times for addressing various C⁴I device failures. SOW Amendment 05 §§ 3.3.1, 3.8.3.1.1, 3.8.3.2, 3.8.3.2.1, 3.8.3.3, and SOW Amendment 03, Appendices A to P. However, the RFP did not disclose a government staffing estimate. In addition, the RFP did not specify any labor categories that the offeror was required to propose; rather, offerors had discretion to propose labor categories appropriate to their technical approaches and were not precluded from proposing categories exempt from the Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. §§ 351-358 (1994), which applied to the procurement.¹

¹The SCA requires that non-exempt service employees be compensated at not less than the minimum wages and fringe benefits set forth in applicable Department of Labor (DOL) area wage determinations. 41 U.S.C. § 351. Persons employed in a

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RFP Amendment 03 § H.2; RFP Amendment 01, Response to Question 36. Whether the offeror's proposed labor categories comprised a "quality workforce with the proper mix of skills" was a consideration under the types and qualifications of personnel sub-subfactor of the technical subfactor. RFP Amendment 03 § M.3(b)(1)(iii).

Five firms, including Nations, submitted proposals, and the contracting officer ultimately established a competitive range of the proposals submitted by Hughes Technical Services Company and Pulau Electronics Corporation. The prices proposed by Hughes ([deleted]) and Pulau ([deleted]) were the highest submitted; Nations' proposed price of [deleted] was the third-lowest submitted. Cost Evaluation Report at 3. The inclusion of Pulau's proposal in the competitive range was contrary to the findings and recommendations of the technical evaluation team (TET). The TET rated all offerors' technical/management proposals "unsatisfactory/high risk"² overall, except for Hughes's proposal, which was rated "highly satisfactory/low risk" overall and was recommended for an initial proposal award. Initial Proposal Evaluation Report at 7.

Pulau's and Nations' "unsatisfactory/high risk" ratings stemmed from deficiencies under various sub-subfactors, including the staffing sub-subfactor. The TET judged all proposals "unsatisfactory/high risk" under the staffing sub-subfactor, except for Hughes's proposal, which earned a "highly satisfactory/low risk" rating. As part of its evaluation of the staffing sub-subfactor, the TET compared offerors' proposed staffing levels to an internal government staffing estimate of 268.5 employees, as distributed between several different systems. Id. Attachment A.

Hughes's proposed staff of 260 employees and Pulau's proposed staff of 265 employees closely approximated the government estimate, although both firms distributed their staff somewhat differently than the government estimate. Id. According to the record, including the testimony of the TET leader at a hearing held in this protest, the TET deemed Pulau's staffing proposal "unsatisfactory/high risk" because Pulau, unlike Hughes, did not present any staffing rationale to allow the government to determine the feasibility of its staffing distribution and approach. Hearing Transcript (Tr.) at 71-72, 74. The remaining three proposals, including Nations', proposed staffing levels much lower than the government estimate, *i.e.*, Nations proposed 209 employees, and the other two offerors proposed 194.5 and

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bona fide executive, administrative, or professional capacity are exempt from the requirements of the Act. 41 U.S.C. § 357(b).

²Under the SSP, an "unsatisfactory" rating meant that the "proposal fails to demonstrate an understanding of the scope of work necessary to perform the required tasks. Proposal deficiencies require a major rewrite to become acceptable."

181.55 employees, respectively. The TET concluded that none of these proposals had substantiated the offeror's ability to perform with the low staffing levels proposed, although the TET attributed different weaknesses to each proposal depending upon the particular staffing approach. Tr. at 102-08. With respect to Nations' proposal, the TET criticized Nations' proposed use of part-time personnel to augment its full-time staff during peak training periods, extended training efforts, and other surge requirements, since Nations did not ensure the availability of such personnel or state that they would be provided on a fixed-price basis. Tr. at 83, 107-08.

Nations' and Pulau's proposals also received "unsatisfactory/high risk" ratings under the time and material management sub-subfactor. Initial Proposal Evaluation Report at 7. With respect to Nations' proposal, the TET found that the protester's plan to procure spare and repair parts on a time-and-materials basis violated the RFP, which made such supply support part of the fixed-price maintenance effort, except in limited circumstances.³ Id. at 39. Pulau's proposal contained a similar deficiency under the time and material sub-subfactor, in that Pulau shifted responsibility to the government for certain fixed-price work, *i.e.*, the relocation of certain mobile devices between sites. Id. at 33.

In addition, Nations' proposal received two "unsatisfactory/high risk" ratings, which Pulau's proposal did not receive. Under the personnel management sub-subfactor, the TET again criticized Nations' proposed use of part-time personnel to augment its full-time staff, citing informational deficiencies, such as the protester's alleged failure to discuss how it would maintain a sizeable pool of part-time personnel with appropriate security clearances and current knowledge of military tactics and doctrine, or how it would use such personnel to supplement its full-time staff. Id. at 38. In addition, under the types and qualifications of personnel sub-subfactor, the TET found that Nations offered an overqualified staff because 33 of the 38 labor categories proposed by Nations were classified as SCA-exempt.⁴ Id. at 36-37.

On February 25, 1998, the TET, CET, and performance risk analysis group (PRAG) presented their findings and recommendations to the competitive award

³The protester is mistaken that the solicitation envisioned that all spare and repair parts be procured on a time-and-materials basis. The SOW generally required offerors to treat supply support and replacement of irreparable parts as part of their fixed-price maintenance effort. See SOW §§ 3.1, 3.8, 3.8.1. The SOW permitted time-and-materials supply support for only a limited number of devices, see SOW § 3.14.2, and for the repair of catastrophic failures, see RFP § C.14(a), CLIN 0119, SOW § 3.14.1.

⁴The cost evaluation team (CET) repeated similar concerns in its evaluation of the protester's employee compensation plan. Cost Evaluation Report at 7, 8.

panel (CAP), chaired by the contracting officer.⁵ The TET recommended that the agency eliminate the four "unsatisfactory/high risk" proposals from further consideration and make an initial proposal award to Hughes. The CAP did not accept this recommendation because all proposals, including Hughes's, contained pricing deficiencies preventing an initial proposal award. Determination of Competitive Range at 3. In addition, according to the testimony of the contracting officer and the CET leader, the CAP had concerns about limiting the competition to Hughes, whose proposal was much higher priced than any other proposal. Tr. at 151, 266.

Although she never reviewed the proposals, the contracting officer ultimately decided to include two proposals in the competitive range, Hughes's and Pulau's. Tr. at 270. In a March 24 competitive range determination, the contracting officer rejected the TET's determination that Pulau's proposal "would require a major rewrite . . . to correct" its evaluated deficiencies, *i.e.*, the firm's failure to explain its staffing distribution and approach, and its failure to include certain work in its fixed-price maintenance approach. Determination of Competitive Range at 1. In contrast, she accepted the TET's recommendation that Nations could not correct its proposal deficiencies without a major rewrite. In distinguishing Nations' and Pulau's proposals, she testified that Pulau simply needed to add "some minor detail" regarding its proposed staffing distribution, but had otherwise adequately explained its staffing approach. Tr. at 296. Nations' staffing proposal, on the other hand, assertedly lacked the detail necessary to support its ability to perform with the staff proposed. Tr. at 286-87. In addition, the contracting officer characterized Pulau's failure to assume responsibility for certain fixed-priced work as a "minor" weakness that Pulau could correct during discussions, whereas Nations' failure to include supply support as part of its fixed-price maintenance effort was a disqualifying weakness. Tr. at 310, 320. Nations' proposal contained two other deficiencies that the contracting officer viewed as not correctable through discussions--its alleged failure to describe a feasible approach to the use of part-time personnel, and its use of predominantly SCA-exempt labor categories. Tr. at 292-93, 312-13. The contracting officer accordingly rejected Nations' proposal, and this protest followed.

Nations protests the exclusion of its proposal from the competitive range. The protester argues that its proposal was comparable to Pulau's and that the decision to include Pulau's proposal in the competitive range, while excluding Nations', lacked a rational basis. Nations claims that the Navy improperly rejected its proposal simply because its proposed staffing levels did not approximate the government estimate.⁶

⁵The PRAG rated each offeror's past performance as "good/low risk." PRAG Report at 2.

⁶The protester characterizes the government estimate as an undisclosed minimum manning requirement that drove the competitive range determination, resulting in the inclusion of the two proposals that matched the estimate and the exclusion of
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Nations claims that its staffing approach was otherwise better explained than Pulau's and more susceptible to correction through discussions. As for the other deficiencies attributed to its proposal, Nations says that they were either the result of misevaluation, or readily correctable through discussions, or similar to features in Hughes's or Pulau's proposals.

A competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award. FAR § 15.609 (June 1997). When there is doubt as to whether a proposal is in the competitive range, the proposal should be included. Id. The evaluation of proposals and the determination of which proposals are in the competitive range are largely matters of agency judgment and discretion; this judgment and discretion is not unfettered, however, as evaluations and competitive range determinations must be reasonable and bear a rational relationship to the stated evaluation criteria. Trifax Corp., B-279561, June 29, 1998, 98-2 CPD ¶ ___ at 5-6. Furthermore, it is fundamental that the agency must treat offerors equally; it must evaluate offers evenhandedly against common requirements and evaluation criteria. U.S. Property Management Serv. Corp., B-278727, Mar. 6, 1998, 98-1 CPD ¶ 88 at 6.

The Navy denies, based on the contracting officer's testimony, that it rejected Nations' proposal because its staffing was too low. Tr. at 287; Agency Post-Hearing Comments at 10-11. Rather, the agency explains that it downgraded Nations' proposal under the staffing sub-subfactor because it did not present a rationale explaining how Nations could perform the contract with the number of personnel proposed, in contrast with Pulau's better explained staffing approach. Tr. at 287, 296; Agency Post-Hearing Comments at 2, 10-11. Furthermore, the agency denies that Nations' "unsatisfactory/high risk" rating under the staffing sub-subfactor was responsible for its proposal's elimination from the competitive range. Agency Post-Hearing Comments at 2. Instead, the agency argues, based on the contracting officer's testimony, that Nations' proposal "was ultimately disqualified from the competitive range based on its unsatisfactory ratings for the Types and Qualifications of Personnel, Personnel Management, and Time and Materials" sub-subfactors, i.e., the ratings stemming from Nations' proposed use of SCA-exempt labor categories; its proposed use of part-time labor to augment its full-time staff;

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the three proposals that did not. Based on our review of the record, including the TET report, underlying evaluator worksheets, and hearing testimony, it does not appear that the government estimate was mechanically applied to demarcate the competitive range, but was one of several techniques used to evaluate offerors' staffing levels. Tr. at 101-08, 287. See also Cobra Techs., Inc., B-246224, Feb. 24, 1992, 92-1 CPD ¶ 221 at 3-4.

and its time-and-materials approach to acquiring spare and repair parts. Agency Post-Hearing Comments at 2; Tr. at 311.

Based on our review, we agree with the protester that the three deficiencies in Nations' proposal cited by the agency for its elimination from the competitive range did not provide a reasonable basis to reject Nations' proposal, as they were either the result of miscalculation, or readily correctable, or similar to features in the competitive range proposals. Furthermore, although, as noted, the agency states that Nations' deficiency under the staffing sub-subfactor was less important than the other deficiencies, we find that the contracting officer could not reasonably conclude that Pulau's staffing approach was better justified and more detailed than Nations' as the stated basis for distinguishing the two proposals.

As a principal reason for rejecting Nations' proposal, the contracting officer testified that Nations proposed an overqualified staff under the types and qualifications of personnel sub-subfactor. Tr. at 279-80, 286-87. Her conclusion that Nations' staff was overqualified stemmed from the fact that Nations proposed primarily SCA-exempt labor categories, which led the contracting officer to assume that Nations may have proposed "a lot of professional categories . . . to perform the operation and maintenance" requirements of the solicitation. Tr. at 305. The contracting officer testified that this approach was unacceptable because "we don't need professionals to turn wrenches. But professionals may be out there turning wrenches, so we're paying more than what we need to in a fixed-price environment." *Id.* The contracting officer testified that she was unwilling to allow Nations to propose non-exempt categories in lieu of exempt categories during discussions because the protester should have "fixed [the labor categories] prior to submission of the proposal."⁷ Tr. at 313-14.

At the outset, the agency has not reasonably explained why Nations' alleged use of very highly qualified staff was a deficiency in its proposal, particularly since Hughes's proposed use of highly qualified staff was deemed a strength in its proposal. Initial Proposal Evaluation at 42-43. To the extent that the agency believed that Nations' staffing was causing the firm's proposed price to be higher

⁷The agency implies that Nations' proposed use of exempt labor categories somehow violated the RFP. We could not find, nor did the agency clearly identify, any RFP provision that precluded offerors from proposing exempt labor categories in response to the solicitation. Indeed, each of the five offerors responding to this solicitation proposed a combination of exempt and non-exempt labor. To the extent that the agency claims that 29 C.F.R. Part 4.6, as incorporated into the RFP, barred the use of exempt labor categories, the agency misinterprets the regulation, which concerns the minimum wages and fringe benefits due to non-exempt labor omitted from the DOL wage determination attached to an awarded contract. See Agency Report at 10; RFP Amendment 03 § H.2(g); 29 C.F.R. § 4.6(b)(2).

than the government wanted to pay, we note that Nations' proposed price was actually significantly lower than the prices of the two proposals included in the competitive range.

In any event, the contracting officer relied upon flawed evaluations by the TET and the CET in concluding that Nations' exempt labor categories were overpaid and overqualified for the jobs they were intended to perform. For example, the CET, which compared offerors' proposed exempt labor rates (and, separately, their proposed non-exempt labor rates), determined that Nations' exempt labor rates were "exceptionally high in comparison to the other offerors' rates." See Cost Evaluation Report at 7, Attachments H, I, J; see also Tr. at 183. Contrary to the CET's conclusions, the record evidences that there was no pattern of Nations' rates for the exempt categories being "exceptionally high" compared to the other firms' exempt rates, particularly in view of the limited number of exempt labor categories that the various proposals had in common. See Cost Evaluation Report Attachments I, J.

The TET, meanwhile, found that Nations' proposed use of exempt labor posed an unacceptable performance risk because Nations proposed "high level professionals to perform efforts that do not require this level of support." Initial Proposal Evaluation Report at 14. The record does not support this finding. The TET report specifically mentions only one exempt labor category in Nations' proposal, the field engineer, but the agency has not explained why this labor category was overqualified for the work or represented any performance risk. Indeed, the TET leader testified that the job description for the field engineer was very similar to a non-exempt category suitable for the work involved (the electronics technician), which suggests that the protester's use of the field engineer, rather than the electronics technician, made little difference. Tr. at 113, 118-19. Even assuming that the field engineer was overqualified, the record shows, contrary to the agency's premise, that the protester proposed to meet the RFP maintenance requirements primarily with non-exempt electronics technicians and a much smaller staff of exempt field engineers, which largely undermines the contracting officer's conclusion that Nations "proposed professionals to turn wrenches." See Nations' Technical/Management Proposal at 2-10 to 2-13, 2-17.

Finally, assuming that Nations should have proposed a compatible, non-exempt category rather than an exempt category for this or other job descriptions, we do not understand why this proposal weakness was of such magnitude that it could not be corrected during discussions. Indeed, the TET leader testified that Nations would not have needed to undertake a major rewrite of its proposal to propose non-exempt labor categories in lieu of exempt labor categories, had it been given the opportunity to do so during discussions. Tr. at 121.

Based on the above, we find that the contracting officer lacked a reasonable basis to reject Nations' proposal because of its alleged overuse of SCA-exempt labor categories.

The contracting officer also testified that Nations' proposed use of part-time personnel to supplement its full-time staff suffered from alleged informational deficiencies requiring the proposal's rejection. Tr. at 292-293. The evaluated deficiencies, as described by the contracting officer, the TET leader, and the TET report, included Nations' failure to discuss how it would ensure the availability of knowledgeable part-time personnel, how it would train these employees, where they would be assigned, which equipment they would support, how they would obtain and retain security clearances, and whether Nations would supply them on a fixed-price, rather than time-and-materials, basis. Tr. at 83, 292-293.

Although the agency's stated reasons for downgrading the protester's proposal are not objectionable per se, the record reflects that Hughes's proposal, which also offered a part-time solution to surge and extended training requirements, suffered from all the informational deficiencies attributed to the protester's proposal. Despite this fact, Hughes's proposed use of part-time personnel was deemed a strength, and the protester's, a deficiency. When questioned about this apparent discrepancy, the TET leader explained that Hughes's proposed approach was better explained than the protester's. Tr. at 87. Our review of the record does not support such a finding. To the contrary, a comparison of the two proposals reveals that the protester's proposal is actually more detailed than Hughes's in describing how the protester will draw upon part-time reserves, partly because the protester, as an incumbent contractor, already has procedures in place for augmenting its staff in this fashion. Compare Hughes's Technical/Management Proposal at 41, 43, 64 with Nations' Technical/Management Proposal at 2-10, 2-14, 2-29, 2-30. Under the circumstances, the record reflects a disparate evaluation of Hughes's and Nations' proposals and provides no basis for rejecting Nations' proposal owing to alleged deficiencies in its part-time labor approach. See Tidewater Homes Realty, Inc., B-274689, Dec. 26, 1996, 96-2 CPD ¶ 241 at 4-5.

A similar problem arises regarding the respective evaluation of Nations' and Pulau's proposals under the time and material management sub-subfactor. The TET deemed both proposals "unsatisfactory/high risk" under this sub-subfactor because the offerors failed to include certain work as part of their fixed-price approach, contrary to the RFP. In particular, Nations improperly adopted a time-and-materials approach to the acquisition of spare and repair parts, while Pulau improperly made the government responsible for the relocation of certain mobile devices between sites. In overriding the TET's recommendation to exclude Pulau's proposal from further consideration, the contracting officer decided that the deficiency in Pulau's proposal was minor and could have been corrected through discussions, but maintained that the deficiency in Nations' proposal was critical and required a major rewrite of its proposal. Tr. at 310, 320. However, the contracting officer's explanation as to why the protester's proposal deficiency was disqualifying--that the time-and-materials approach to supply support improperly shifted the cost risk to the government--applies equally to Pulau's proposal deficiency. Tr. at 310. Although the TET report and the TET leader's testimony support that the cost impact of the protester's proposal deficiency was greater than Pulau's proposal deficiency, Tr. at 111-12, the

agency has not explained why this difference was so significant as to justify including one proposal in the competitive range, but not the other.

Finally, although the Navy denies that Nations' deficiency under the staffing sub-subfactor was sufficient to disqualify its proposal from the competitive range, we find that the agency could not reasonably find that Pulau's staffing approach addressed the RFP requirements better than Nations' as the stated basis for discriminating between the two proposals. In overriding the TET's recommendation to reject Pulau's proposal from further consideration, the contracting officer found that Pulau's staffing approach addressed how the firm planned to accomplish each of the operation and maintenance requirements of the solicitation, but simply needed to add "some minor detail" to assure the Navy that the functional distribution of its staff was feasible. Tr. at 296. In contrast, the contracting officer found that Nations' staffing approach was unclear and lacked the detail necessary to demonstrate the acceptability of its approach. Tr. at 287.

The contracting officer's conclusions are without foundation. Pulau's staffing proposal consisted of a staffing matrix with virtually no supporting narrative, and did not describe an approach to any of the RFP requirements. See Pulau's Technical/Management Proposal at 4 to 13. Indeed, Pulau's failure to develop a staffing approach was the reason that the TET found its staffing proposal "unsatisfactory/high risk." Tr. at 72, 105. Nations' proposal, on the other hand, described a staffing approach to each of the RFP functional areas. See Nations' Technical/Management Proposal at 2-10, 2-14 to 2-15. While Nations' rationale did not persuade the TET that its staffing approach was acceptable, the agency has not reasonably explained why the deficiencies in Nations' staffing approach would be any harder to correct during discussions than Pulau's failure to present a staffing approach at all.

We sustain the protest. We recommend that the Navy establish a new competitive range and conduct discussions as appropriate. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1998). The protester'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).

The protest is sustained.

Comptroller General
of the United States