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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-216589 **DATE:** August 1, 1985
MATTER OF: Del-Jen Inc.

DIGEST:

1. In the absence of a nonresponsibility determination, where a contract is to be awarded on a firm fixed-price basis, there is no legal basis to withhold a contract award solely because the offer is believed to be unreasonably low or even below cost.
2. A protest alleging that technical evaluation performed by contracting agency was improper is without merit where the record establishes that the agency's evaluation of proposals had a reasonable basis.
3. Past performance of an offeror cannot be considered unless this experience is demonstrated in a written proposal as a technical evaluation must be based upon the information submitted with the proposal.
4. GAO will not attribute bias to a member of a technical evaluation panel based on inference or supposition.

Del-Jen, Inc. protests the award of a contract to Ogden-HCI Services under request for proposals (RFP) N00406-84-R-2236, issued by the Naval Supply Center, Bremerton, Washington. The agency sought offers to operate the morale, welfare and recreation facilities of the Naval Submarine Base Bangor, Bremerton, Washington, and the Naval Undersea Warfare Engineering Station, Keyport, Washington.

Del-Jen contends that the Navy improperly evaluated Ogden's cost proposal, challenges the Navy's evaluation of its and Ogden's technical proposals, and contends that one member of the technical evaluation panel was biased.

We deny the protest.

BACKGROUND

The Navy issued the solicitation on February 10, 1984 for the management and operation of the officers', chiefs' and enlisted mens' clubs, a liquor store, and special service functions, including dependent day care centers, hobby centers, sports and athletic complexes, and a movie theater, for a 10-month period with two 1-year options. The RFP set forth, in descending order of importance, the following evaluation criteria: technical (understanding the required work and the feasibility of performance plans), price, resources (personnel and recruiting plans), and management (including experience and proposed organization and quality assurance plans). The solicitation provided for a fixed-price contract to be paid for with appropriated funds, and for the contractor to share in the revenue received for the services performed. For example, the contractor will receive a percentage of the price of each drink sold at the officers' club. The solicitation required each offeror to provide the detailed cost and revenue estimates that it used to calculate its offered price.

The agency received proposals from Del-Jen and Ogden-HCI Services, and after holding discussions with both firms, requested that best and final offers be submitted by August 10, 1984. The Navy rated Ogden's proposal higher for each technical criterion in both the initial and final evaluations of proposals. Ogden offered a lower price (\$4,304,581) than Del-Jen (\$4,880,200). On September 14, the Navy awarded a contract to Ogden.

Del-Jen's Protest

A. Evaluation of Price Proposals

Del-Jen first contends that Ogden offered a below-cost price proposal and that the Navy should not have accepted an unrealistically low offer. The protester alleges that Ogden will seek to increase its price through contract modifications during performance.

Under the RFP evaluation scheme, offerors were to estimate both the cost of performing and the revenue to be generated. The proposed contract price was to be the difference between the cost of performance and the percentage of generated revenue to be paid the contractor. Ogden's estimate of the total cost of performing the contract exceeded Del-Jen's by approximately \$350,000.

Nevertheless, Ogden was able to offer a price approximately \$575,000 less than Del-Jen's because its estimate of the revenues to be generated during the term of the contract was significantly higher than Del-Jen's revenue estimate. Del-Jen maintains that Ogden's revenue projection was inflated, and that this can be seen by comparing revenues generated during the previous 3 years when Del-Jen provided the required services. Del-Jen also states that the actual revenues generated during the first several months of Ogden's contract have been significantly lower than anticipated.

Del-Jen points out that while the Defense Contract Audit Agency (DCAA) audited both price proposals, it reviewed both cost and revenue estimates submitted by Del-Jen, but upon direction from the Navy, only reviewed Ogden's cost estimate. Del-Jen maintains that Ogden's inflated revenue estimate would have been discovered had Ogden's revenue estimate been audited.

The Navy responds that the review of cost proposals is ultimately the responsibility of the contracting officer. The agency maintains that he acted reasonably and could not have rejected Ogden's proposal even if it were determined to be a below-cost offer. Since Ogden's estimate of revenues was quite similar to its own, the Navy contends that a limited review was proper and that an audit of Ogden's revenue estimate by DCAA was not required.

A firm fixed-price contract is not subject to adjustment based on the contractor's cost experience during performance and thus places no obligation on the contracting agency to pay more than the price at which contract award is made. See Los Angeles Community College District, B-207096, Aug. 8, 1983, 83-2 CPD ¶ 175. Moreover, there are various legitimate reasons for a firm to offer a below-cost price. 50 Comp. Gen. 788 (1971). Accordingly, in the absence of a nonresponsibility determination, we are aware of no legal basis for an agency to withhold contract award merely because an offer is perceived to be unreasonably low, or even below cost, where the contract is not on a cost reimbursement basis. See Everhart Appraisal Service, Inc., B-213369, May 1, 1984, 84-1 CPD ¶ 485.

We note that Del-Jen is not challenging Ogden's capability of performing at the price it offered. In fact, the protester asserts that Ogden is sufficiently large to

be able to afford to provide services at less than their cost. Under the circumstances, we find no basis to object to the Navy's acceptance of an offer which may be unreasonably low. Del-Jen's concern, that Ogden may seek to modify its contract to increase the price, is not grounds for rejecting a proposal. Contracting officers are, however, required to insure that losses resulting from below-cost offers are not recovered through change orders or otherwise. Western Waste Management, B-216392, Sept. 24, 1984, 84-2 CPD ¶ 344.

We also do not believe that the contracting officer acted unreasonably in not requiring an audit of Ogden's revenue estimate. Comparison of proposed prices with an independently developed government estimate can be an acceptable price analysis technique. Defense Acquisition Regulation, § 3-807.2(a)(5), reprinted in 32 C.F.R. pts. 1-39 (1984).^{1/} The extent to which proposed costs are examined is generally a matter for an agency's discretion even when award of a cost-based contract is contemplated, Applied Financial Analysis, Ltd., B-194388.2, Aug. 10, 1979, 79-2 CPD ¶ 113, and we do not believe that the Navy acted unreasonably in relying upon its own revenue estimate as an analysis technique in this case.

B. Evaluation Of Technical Criteria

Del-Jen contends that the Navy improperly evaluated the technical proposals with respect to all three of the technical evaluation criteria. First, Del-Jen questions the superior rating given to Ogden on the management criterion because, based upon a review of submitted resumes, the Navy allegedly gave Ogden's top management personnel low individual ratings. Del-Jen also states that the Navy failed to verify the commitment of Ogden's proposed management personnel to work on the contract. Del-Jen next challenges the higher rating afforded Ogden on the resources criterion. Del-Jen maintains that it demonstrated the quality of its staffing and recruiting plans during its performance of the predecessor contract. Del-Jen states that, on the other hand, Ogden's recruiting plan could only be evaluated by reviewing the quality of

^{1/} The Defense Acquisition Regulation is applicable to this procurement because the RFP was issued before the April 1, 1984 effective date of the Federal Acquisition Regulation, 48 C.F.R. Chapter 1 (1984).

the top management personnel proposed for the contract. Using this approach, Del-Jen believes that Ogden should have been given a low score since all of its proposed personnel were either questioned or rejected. Finally, Del-Jen questions the rating afforded Ogden on the technical criterion because Ogden had no experience comparable to Del-Jen's previous performance of the work and, therefore, could not have a superior understanding of the contract requirements.

The evaluation of technical proposals is a matter within the discretion of the contracting activity. In reviewing an agency's technical evaluation, we will not evaluate the proposal de novo, but will only examine the agency's evaluation to ensure that it had a reasonable basis. Syscon Corp., B-208882, Mar. 31, 1983, 83-1 CPD ¶ 335. In addition, the protester bears the burden of showing that the agency's evaluation was unreasonable. Essex Electro Engineers, Inc., et al., B-211053.2, et al., Jan. 17, 1984, 84-1 CPD ¶ 74.

After examining the procurement record, including the technical evaluations upon which the source selection official relied, we do not conclude that the Navy's evaluation of the two proposals was unreasonable. In its entirety, the record demonstrates that the Navy conducted a comprehensive evaluation; all aspects of each offeror's proposal were considered and reviewed in detail.

Both offerors were rated quite high for the management criterion. Del-Jen's proposal was considered slightly inferior, however, because of a weakness in its local organizational structure and in the firm's quality assurance plan. The Navy recognized that Ogden did not have experience in providing recreational services for government personnel, but believed that this weakness was off-set by a superior management structure, supported by excellent quality assurance and training plans. We cannot conclude that a higher score for Ogden for the management area was unreasonable.

In evaluating the offerors' resources, the Navy did consider three of Ogden's management personnel to be unacceptable, primarily because insufficient information was provided about their education and experience. Although Del-Jen's management personnel were considered very good, the Navy found that two were not qualified for

the positions proposed. The Navy noted minor weaknesses in the experience of some Ogden managers, but found that its staffing and recruiting plans were superior to those of Del-Jen. Del-Jen's proposal was found to be deficient in its phase-in plan and the effort proposed below the management level. The latter weakness prevented an in-depth analysis of the adequacy of proposed staff.

We conclude that the Navy's rating of the two proposals for this criterion was reasonable. The record does not support Del-Jen's allegation that significant numbers of Ogden's senior management were considered unacceptable or marginally qualified. The Ogden staff generally lacked experience with governmental organizations, but this weakness was considered to be minor and outweighed by other strengths. We also do not agree with Del-Jen that low turnover experienced under the predecessor contract establishes Del-Jen's superior planning for staffing and recruiting. Notwithstanding this past performance, the Navy found that Del-Jen's proposal failed to adequately address the minimum staffing requirements specified in the solicitation and did not provide for a phase-in plan. There is no basis for favoring a firm with presumptions based upon prior performance--all offerors must demonstrate their capabilities in their proposals. The Management and Technical Services Company, a subsidiary of General Electric Company, B-209513, Dec. 13, 1982, 82-2 CPD ¶ 571. Additionally, there is no requirement that the Navy "verify" employment commitments for offerors' staff as alleged by Del-Jen. The RFP provided for offerors to submit signed statements of interest by key management personnel. In some cases in which Ogden neglected to do this, the Navy raised the matter during discussions. The agency was not obligated to verify such statements.

With regard to the technical criterion, under which the Navy measured the offerors' understanding of the work and the feasibility of their plans, Del-Jen again relies upon its past performance in claiming a superior understanding of the requirements of the solicitation. As previously discussed, no matter how capable an offeror may be, the offeror must demonstrate its capability in a written proposal. Evaluation of Del-Jen's understanding and proposed plan must depend upon its demonstrated, not presumed, capability. Moreover, the fact that Del-Jen disagrees with the Navy's technical judgment concerning the

merits of its plans to perform the work is insufficient to establish that the agency was unreasonable.

In evaluating Ogden's technical capability, the Navy found that the Ogden proposal was very strong, comprehensive and complete in details, and that it clearly established the firm's ability to meet all contract objectives. Del-Jen also established a high level of understanding with very good proposed methods and plans for providing the required services. Del-Jen's proposal, however, was not considered sufficiently innovative or imaginative, and it was too restrictive in the program development area. The firm did not address many requirements described in the RFP, including ones not included in the previous contract. Here, too, Ogden's proposal was considered superior, and we do not conclude that this finding had no reasonable basis.

C. Bias of Evaluation Board Member

Del-Jen's final contention is that the Navy improperly allowed a biased individual to participate as a member of the Source Recommendation Evaluation Board. This individual previously served as the contracting officer's technical representative with respect to Del-Jen's predecessor contract, and Del-Jen alleges that he expressed disdain towards the firm's management personnel. The protester also contends that the individual has a close personal relationship with a proposed member of Ogden's staff. Del-Jen thus concludes that this individual was a biased technical evaluator.

The composition of a technical evaluation panel is within the discretion of the contracting agency, and we will not object in the absence of evidence of fraud, bad faith, conflict of interest, or actual bias. Western Services, Inc., B-204871, Mar. 19, 1982, 82-1 CPD ¶ 257. The protester has the burden affirmatively proving the existence of bias, and unfair or prejudicial motives will not be attributed to a procurement official on the basis of inference or supposition. See Todd Logistics, Inc., B-203808, Aug. 19, 1982, 82-2 CPD ¶ 157. We find no evidence in the written record to suggest that the individual cited by Del-Jen acted unreasonably or arbitrarily in evaluating proposals. The individual's assessment of the two proposals was consistent with that of

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the other panel members. Accordingly, we regard Del-Jen's allegations as mere speculation.

We deny the protest.

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