

DECISION



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

FILE: B-219423 **DATE:** *September 23, 1985*
MATTER OF: Southwest Marine, Inc.

DIGEST:

1. Where the solicitation provided that the basis for award would be "price and other factors," and the agency later clarified this provision by informing all offerors that technical considerations, that is, "other factors" were of paramount importance, the protester cannot successfully argue that the agency improperly deviated from the evaluation scheme by awarding the contract to a higher priced, but technically superior, offeror.
2. Prejudice is not shown where the protester asserts that the contract award should have been made to the low offeror in accordance with the solicitation's evaluation scheme since, even if the protester is correct, the firm is not in fact the low offeror and therefore not entitled to receive the award.
3. Alleged solicitation improprieties apparent prior to the closing date for receipt of initial proposals must be protested prior to the closing date in order to be considered.

Southwest Marine, Inc. protests the award of a contract to Todd Pacific Shipyards Corporation under request for proposals (RFP) No. DTCG23-84-R-31014, issued by the United States Coast Guard, Department of Transportation. The procurement is for the modernization of 12 Coast Guard vessels. Southwest contends that the award was improper because the Coast Guard failed to apply the solicitation's stated evaluation criteria during the source selection process. The firm also asserts that the contract is unlawful in that the Coast Guard lacked the statutory authority to negotiate the procurement. We deny the protest in part and dismiss it in part.

The procurement contemplated the award of a multi-year firm fixed-price contract with economic price adjustment after the first year of performance. The scope of work involved the modernization of 12 Coast Guard cutters, 4 stationed on the East Coast and 8 on the West Coast. An offeror could compete for the work to be performed on the coast where its shipyard was located, and/or could combine with an offeror on the other coast in a joint effort for the modernization of all 12 vessels.

The solicitation requested the submission of both technical and price proposals. Section M of the RFP provided that technical proposals would be evaluated on the basis of Management Capability, Technical Approach, Resource Availability, and Experience, and that each of these criteria would be weighed equally. Section M further provided that:

"Any contract resulting from this solicitation will be awarded to that responsible offeror or those responsible offerors, whose offer(s), conforming to this solicitation, will be most advantageous to the Government price and other factors considered."

The Coast Guard conducted a preproposal conference, and responded at that time to numerous questions asked by the prospective offerors. One question concerned the relative importance of offered price to the listed evaluation criteria. The contracting officer responded that:

"Cost Proposals will not be accorded any specific numerical rating. Technical considerations are primary. If there are no significant technical or financial and management differences, cost or price alone may be the determining factor for Source Selection. A higher offeror may be accepted if technical considerations make the offer most advantageous to the Government. . . ."

The particular question and the contracting officer's response, among others, was issued as part of Amendment 0009 to the RFP.

The Coast Guard determined that all technical proposals were within the competitive range, and accordingly conducted discussions with the firms and

requested best and final offers. See the Federal Acquisition Regulation, 48 C.F.R. § 15.610(b) and (c) (1984). Prior to conducting discussions, the Coast Guard had issued a final amendment, 0013, to provide replacement pages to the solicitation reflecting most of the changes made by earlier amendments. The replacement page for section M restated that the award would be made on the basis of "price and other factors."

According to the Coast Guard, all offerors were reminded during discussions that, as provided by Amendment 0009, technical considerations were paramount over price, and that a higher price offer could be accepted if its technical superiority made it the most advantageous selection for the government.

The result of the Coast Guard's evaluation of best and final offers for the West Coast portion of the requirement was as follows:

	<u>Technical Ranking</u>	<u>Total Proposed Price</u>
National Steel and Shipbuilding Co.	1	\$250,637,821
Todd Pacific Shipyards Corp.	2	\$236,332,478
Southwest Marine, Inc.	3	\$225,342,143
Marine Power and Equipment Co.	4	\$297,097,367
Northwest Marine Iron Works	5	\$216,882,098

The Coast Guard awarded the contract for the West Coast portion of the procurement to Todd Pacific Shipyards as the firm whose offer was most advantageous to the government from a technical/price standpoint.^{1/} The Coast Guard's source selection documents, which have been furnished to this Office for our in camera review^{2/}, show

^{1/} Todd Pacific received the West Coast award, and Bath Iron Works Corporation the East Coast award. No combined offer for the entire requirement was accepted.

^{2/} Although Southwest objects to the Coast Guard's refusal to provide the firm with access to the source selection documents, it is the contracting agency's primary responsibility for determining which documents are subject to release under 31 U.S.C. § 3553(f), as added by section 2741(a) of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, 1199. Therefore, since there has been no showing of fraud or bad faith relative to the Coast Guard's determination here, we will not question that determination. Employment Perspectives, B-218338, June 24, 1985, 85-1 CPD ¶ 715.

that the Coast Guard's evaluators determined that Todd Pacific's technical proposal was superior to Southwest's, demonstrating 38 strengths, 26 of which were in major evaluation areas, and demonstrating 5 weaknesses, all of which were major. In comparison, the evaluators determined that Southwest's proposal had 16 strengths, 11 of which were in major areas, and 10 weaknesses, 9 of them major.

Southwest contends that the award to Todd Pacific was improper because the Coast Guard failed to follow its own stated evaluation criteria during the source selection process. The firm urges that it was clear from the language of the solicitation that offered price was more important than technical considerations since section M stated that award would be based on "price and other factors." Southwest asserts, therefore, that price was determinative, and that the award should have been made to that firm whose proposal was technically acceptable and which offered the lowest price.

To the extent that the Coast Guard ostensibly informed offerors that technical considerations rather than price were of primary importance, Southwest asserts that the particular question and the Coast Guard's response in this matter generated at the preproposal conference, which were made part of Amendment 0009, were effectively hidden in an amendment comprising over 1,000 pages, and, in any event, that this amendment was superseded by Amendment 0013 which confirmed that the basis for award would be price. Further, Southwest relates that its representatives who participated in discussions with the Coast Guard prior to the submission of best and final offers have no recollection that the Coast Guard ever reminded them of Amendment 0009's clarification of the relative importance of price.

Analysis

It is well-settled that, in a negotiated procurement, the contract award need not be made to the low offeror unless the RFP so indicates. Price Waterhouse & Co., B-203642, Feb. 8, 1982, 82-1 CPD ¶ 103. Where the RFP states that award will be based on "price and other factors," without explicitly stating the relative importance of price to technical considerations, offerors must presume that price and technical factors will be considered approximately equal. Gardner Machinery Corp., B-211474.2, et al., Oct. 11, 1983, 83-2 CPD ¶ 433. Such language not only establishes that source selection

officials cannot disregard price, but also that price alone is not determinative, since the reference to "other factors" includes consideration of those factors which are listed. See Storage Technology Corp., et al., B-215336, et al., Aug. 17, 1984, 84-2 CPD ¶ 190.

Therefore, even if we discount the effect of Amendment 0009 as incorporated into the subject RFP, Southwest is simply incorrect in urging that section M's provision that the award would be based on "price and other factors" necessitated that price be determinative. In our view, the firm has placed undue stress upon the word "price" to the exclusion of those "other factors" related to the technical acceptability of proposals which were clearly delineated in the RFP: Management Capability, Technical Approach, Resource Availability, and Experience. Apart from any clarifications issued by the Coast Guard, Southwest reasonably should have concluded from the language of section M that price might not be controlling as between technically acceptable proposals, and that technical superiority would be considered along with offered prices. See Gardner Machinery Corp., B-211474.2, et al., supra.

In any event, we believe that the Coast Guard sufficiently advised offerors through Amendment 0009 that technical considerations would be paramount over price in the source selection process. Although Southwest asserts that the clarification as to the relative importance of price was hidden in a voluminous amount of written material, the firm in fact acknowledges that it received the amendment and was aware of the clarification. Hence, Southwest cannot successfully argue that it was prejudiced by the emphasis placed upon technical considerations in the evaluation of proposals.

In the same vein, the Coast Guard states that it reminded the firm during the discussions preceding the submission of best and final offers that technical considerations were paramount. Although Southwest contends that the Coast Guard did not in fact do so, we must accept the agency's statement, since there is an irreconcilable conflict between the agency's and the protester's version of the facts, and no probative evidence in the matter other than the statements from each side. Joint Action In Community Service, Inc., B-214564, Aug. 27, 1984, 84-2 CPD ¶ 228.

We do not agree that the clarification provided by Amendment 0009 was somehow negated by the later issuance of Amendment 0013. Although Amendment 0013 did in fact restate section M's "price and other factors" basis for award, it neither expressly nor implicitly notified offerors that the provisions of Amendment 0009 had been superseded. We believe that the Coast Guard may be criticized to a certain extent for not reemphasizing in Amendment 0013 that technical considerations would be paramount, where the agency had the opportunity to do so, but we cannot conclude that this omission was prejudicial to Southwest. The firm was informed, both from Amendment 0009 and from the Coast Guard's statement during discussions, of the relative importance of price, and an offeror may not disregard information provided by the agency even though it may be absent from, or not clearly stated in, the solicitation. See Centennial Computer Products, Inc., B-212979, Sept. 17, 1984, 84-2 CPD ¶ 295.

As a final point, even if we were to accept Southwest's assertion that the Coast Guard deviated from the RFP's evaluation scheme by making technical considerations paramount over price, and that the contract award properly should have gone to the low offeror, Southwest was not prejudiced by the agency's action. The firm in fact was not the low offeror, and, therefore, absent a finding that the low offeror was not responsible, it would not otherwise be entitled to receive the award under its own stated protest position.

Southwest also alleges that the contract is unlawful because the Coast Guard improperly relied upon 10 U.S.C. § 2304(a)(16) (1982) as its authority to negotiate the procurement. Southwest asserts that section 2304(a)(16) is inapplicable to the cutter modernization effort, and, in any event, that the Commandant of the Coast Guard was not empowered to make the Determination and Findings (D&F) authorizing negotiation under that section. Although Southwest may be technically correct as to the Commandant's lack of authority to make the D&F under section 2304(a)(16), we do not believe that this provides a legal basis for sustaining the protest.

Section 2304(a)(16) provided for an exception to the use of formal advertising when the head of a specified agency, in this case the Secretary of Transportation, determines that:

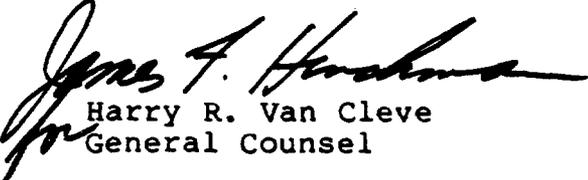
"(A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or

other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved. . . ."

To the extent that Southwest contends that this section is inapplicable to the subject procurement because the Coast Guard was not seeking to negotiate with a particular shipyard, but rather was imposing a geographic restriction upon the competition, the issue is clearly untimely. Section L-38 of the RFP stated that the Coast Guard was relying upon the authority of section 2304(a)(16) to negotiate with only those firms whose shipyards were located on the respective coasts where the particular portions of the cutter modernization effort were to be performed. Therefore, any basis for protest on this issue was apparent from the face of the solicitation, and the matter should have been raised as an alleged solicitation impropriety prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1985); see also Freedom Industries, Inc., B-212371, Nov. 28, 1983, 83-2 CPD ¶ 617.

With respect to the Commandant's authority, it is clear that under 10 U.S.C. § 2311, the Commandant could not have had the authority to execute the D&F because this authority was not delegable by the Secretary of Transportation.^{3/} We point out, however, that a D&F improperly executed may later be reexecuted by an official authorized to do so. Norton Co., Safety Products Division, 60 Comp. Gen. 341 (1981), 81-1 CPD ¶ 250. Accordingly, by separate letter of today, we are informing the Secretary of Transportation of our decision in anticipation that she will reexecute the D&F if she agrees that the procurement should have been negotiated under section 2304(a)(16).

The protest is denied in part and dismissed in part.


Harry R. Van Cleve
General Counsel

^{3/} we note that this procurement was conducted prior to the enactment of the Competition in Contracting Act, supra n.2. Under the Act, there is no longer a requirement for the type of D&F needed here or for the agency head to authorize such a procurement.