

DECISION

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

FILE: B-220066 **DATE:** December 16, 1985
MATTER OF: Polaris, Inc.

DIGEST:

1. There is no merit to a contention that the contracting agency improperly adjusted the protester's proposed indirect costs for cost realism based on Defense Contract Audit Agency (DCAA) recommended rates where the protester was given a copy of the DCAA audit report and had an opportunity either to change or justify its proposed rates in its best and final offer, but did not do so, and the agency reasonably concluded that the proposed rates remained unrealistic.
2. Where a contracting officer recommends that a technical score given to an offeror be increased and also determines that the protester's cost proposal should be upwardly adjusted to reflect cost realism, the source selection authority's concurrence in those recommended changes to form the basis for his award decision is not subject to challenge where the decision is both reasonable and consistent with the solicitation's established evaluation scheme.
3. Generally, it is within a contracting officer's discretion not to conduct a preaward survey, and such a decision will not be reviewed absent a showing of possible fraud or bad faith.

Polaris, Inc. protests the proposed award of a contract to John M. Cockerham and Associates, Inc. (JMCA) under request for proposals (RFP) No. DASG60-85-R-0039, issued by

034059/128670

the Department of the Army, Ballistic Missile Defense Systems Command. The procurement is for the acquisition of automatic data processing services to support the activity's management information system, and contemplates the award of a cost-plus-fixed-fee contract for a one-year period, with an option to renew the contract for two additional two-year periods. Polaris complains that the proposals were not evaluated properly and that the Army's source selection decision was unreasonable. We deny the protest.

Background

The RFP provided that the award would be made to that responsible offeror whose proposal was determined to be most advantageous to the government, technical, management, total evaluated cost, and other factors considered. The RFP also stated that the cost evaluation would include both the basic performance period and the option periods and advised that evaluated cost was of secondary importance relative to technical considerations, but could become dominant if technical proposals were found to be generally comparable.

Nine proposals were received in response to the RFP. Upon initial evaluation by the activity's proposal evaluation team, only the proposals of Polaris and JMCA were determined to be within the competitive range. The Polaris proposals^{1/} received identical technical scores that were some 8 percent higher than JMCA's score. Discussions were held, and best and final offers were then requested and submitted.

After evaluating the best and final offers, the proposal evaluation team determined that Polaris' proposals should retain the same technical score. JMCA's score was slightly increased because the firm had provided a requested clarification in one area of its offer. The proposal evaluation team then concluded that selection of Polaris would be most advantageous because Polaris was the incumbent contractor for a portion of the work included in the RFP and award to Polaris thus would ensure continuity of service.

However, the contracting officer did not agree with the evaluation team's conclusions for several reasons. Pertinent here, the contracting officer determined that the evaluation

^{1/}Polaris submitted two alternate proposals, "A" and "B", respectively offering on-site and off-site performance of the required services.

team had erroneously scored JMCA's proposal in the area of personnel experience by downgrading the proposal for not providing specific identification of and resumes for the programmer data base technician and operator/data entry positions. The contracting officer determined that the RFP did not require the submission of this information for other than key personnel. Accordingly, he recommended that the firm's total technical score be raised so that it then became some two percent lower than Polaris' score for proposals "A" and "B".^{2/}

In addition, the contracting officer considered Polaris' best and final total proposed costs unrealistically low because the firm had not based its indirect costs (labor, overhead and general and administrative (G&A) expense) on the recommended Defense Contract Audit Agency (DCAA) rates that were provided to both Polaris and JMCA during discussions. The contracting officer noted that JMCA had utilized those rates whereas Polaris had not. JMCA's best and final offer was some \$2,000 less than Polaris' best and final proposal "A" and some \$63,000 less than the best and final proposal "B". After Polaris' proposed costs for Proposals "A" and "B" were upwardly adjusted for cost realism purposes to reflect the DCAA rates, Polaris' offers became some \$150,000 and \$200,000 higher, respectively, than JMCA's best and final offer.

The contracting officer recommended that JMCA be awarded the contract as it was the low evaluated total cost offeror, and because the two percent difference in technical point scores was considered to be insignificant. The source selection authority concurred with the contracting officer's recommendation and selected JMCA for the award.

^{2/}Because this is still a preaward situation, the Army has furnished the source selection documents to this Office for our in camera review, and has not provided the precise technical scores to Polaris. Instead, in the administrative report as furnished to both this Office and Polaris, the Army has expressed the difference in technical scores in terms of percentages. Although the Army has not informed Polaris as to JMCA's total best and final proposed cost, the Army has clearly indicated in its report the monetary difference between JMCA's proposed cost and Polaris' proposed costs as subsequently adjusted for cost realism purposes.

Polaris primarily challenges the source selection decision on the grounds that: (1) the Army improperly adjusted the firm's best and final offer for cost realism purposes without affording the firm the opportunity to correct any deficiencies through discussions and (2) that the source selection authority's recommendation to award to JMCA was improper because it was based on the contracting officer's unilateral decision to increase JMCA's technical score and upwardly adjust Polaris' best and final proposed costs as the result of the cost realism analysis. Polaris also contends as a corollary issue that the contracting officer erred in deciding to waive a preaward survey of JMCA.

Analysis

(1) Cost Realism Adjustment

The Federal Acquisition Regulation, 48 C.F.R. § 15.605(d) (1984), recognizes that in awarding a cost-type contract such as contemplated here, an offeror's proposed costs should not be controlling. Accordingly, evaluated costs rather than proposed costs provide a sounder basis for determining the most advantageous proposal to the government, Teledyne Ryan Aeronautical, 56 Comp. Gen. 635 (1977), 77-1 CPD ¶ 352, and contracting agencies must perform a cost realism analysis before awarding a cost-type contract. Dynamic Science, Inc., B-214111, Oct. 12, 1984, 84-2 CPD ¶ 402. Because the agency clearly is in the best position to make determinations as to the realism of proposed costs, this Office will not question those determinations unless they are shown to be unreasonable. Management Services, Inc., B-206364, Aug. 23, 1982, 82-2 CPD ¶ 164.

Here, the Army upwardly adjusted the indirect cost rates in Polaris' best and final offer for cost realism purposes based on DCAA's recommended rates. The Army states that, during the course of discussions, Polaris was advised that DCAA's projected labor overhead and G&A rates had been relied upon by the Army in evaluating Polaris' initial offer, and that Polaris was furnished with a copy of DCAA's audit report prior to submitting its best and final offer. However, Polaris notes that the audit report stated that DCAA's findings were "qualified" by the absence of a 5-year budget, since DCAA could not precisely determine what effect the existence of such a budget would have had on its findings. Polaris states that it then developed a 5-year budget and that the indirect costs rates contained in its best and final offer reflected that budget. Polaris points out that it informed the Army of this prior to submitting

its best and final offer, and that it advised the Army that it completely disagreed with DCAA's "qualified" projected rates. Accordingly, in Polaris view, the cost realism analysis which resulted in an upward adjustment to the firm's best and final offer was flawed because it was based upon DCAA's "qualified" projected rates which had been computed in the absence of the 5-year budget.

Polaris also asserts that the Army improperly did not advise Polaris that DCAA's "qualified" rates would be utilized in the cost realism analysis of best and final offers and did not afford the firm the opportunity to refute or rebut the DCAA report through further discussions. Polaris asserts in this regard that the contracting officer expressly reopened discussions after the receipt of best and final offers, but never made any reference to the continued use of the DCAA "qualified" rates in evaluating the firm's best and final cost offer.

We find no basis to object to the use of DCAA's indirect rates in evaluating Polaris' best and final offer for cost realism purposes. The Army states that when it reviewed Polaris' best and final offer, which contained indirect rates reflecting the firm's new 5-year budget, the firm's indirect rates were still considered to be unrealistically low, especially in the last two option years (the only years showing any cost savings over JMCA's proposal). For example, the agency states that Polaris' G&A rate in its original proposal (absent a 5-year budget) was 16 percent, whereas the DCAA recommended rate was 20 percent. In its best and final offer, Polaris' G&A rate for the five contract years was, respectively, 16 percent, 15.9 percent, 13.6 percent, 13.6 percent, and 12.1 percent. Since these rates were found to remain unrealistically low notwithstanding Polaris' new 5-year budget, we see no basis upon which to question the reasonableness of the determination to adjust Polaris' best and final offer to reflect cost realism. See Management Services, Inc., B-206364, supra.

To the extent that Polaris contends that the Army was required to conduct further discussions so that the firm could explain or refute the findings in the DCAA audit report, we find that the contention is without merit because Polaris clearly had the opportunity to do so in its best and final offer. In this regard, the contracting officer's letter to Polaris requesting the submission of its best and final offer specifically stated that:

"Following is a summary of cost and fee amounts discussed. The contractor was provided a copy of the DCAA Audit Report after negotiations."

We believe that the only reasonable assumption to be drawn from this language is that the Army expected that the indirect rates recommended by DCAA would be used by Polaris in preparing its best and final offer, and that those rates would form the basis for any subsequent cost realism analysis, unless Polaris demonstrated in its best and final offer that any alternative rates proposed by the firm were reasonable.

Thus, Polaris had the opportunity to demonstrate that its best and final indirect rates were reasonable and realistic, and the firm could have taken specific objection to the rates recommended in the audit report by explaining how its new 5-year budget obviated the DCAA's original findings. However, the firm simply stated in the cover letter to its best and final offer that the indirect rates proposed were now "reflective" of its new budget. Under these circumstances, we find that the Army met its obligation to conduct meaningful discussions by advising the firm of the unrealistic cost elements noted in its initial proposal, and by affording the firm the opportunity to explain or correct those perceived deficiencies through submission of a best and final offer. See ATI Industries, B-215933, Nov. 19, 1984, 84-2 CPD ¶ 540.

Polaris also relies upon a recent decision by the United States Court of Appeals for the District of Columbia Circuit. In Delta Data Systems Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984), the court held that although an agency is not required to discuss with an offeror every new piece of information that comes to the agency's attention, it is an abuse of the agency's discretion to act on the basis of information which is of uncertain effect, is critical to the source selection decision, and which the offeror is likely to be able to interpret or explain through discussions, without affording the offeror the opportunity to do so. Hence, Polaris contends that because the allegedly flawed cost realism analysis was crucial to the source selection decision, the holding in Delta Data Systems is applicable here. We do not agree.

Unlike the situation in Delta Data Systems, where the offeror was not given an opportunity to refute the negative financial information that was critical to the agency's source selection decision, Polaris had an opportunity to

explain or refute the DCAA audit report in its best and final offer. As previously discussed, we find nothing in the record to support the firm's assertion that it was unaware that the report would be utilized by the Army in evaluating its best and final offer.

To the extent Polaris alleges that the Army improperly reopened discussions after the receipt of best and final offers without advising it of the continued utilization of DCAA's "qualified" rates, and without giving it an opportunity to revise its proposal, the Army categorically denies that discussions were reopened. The Army states that a contracting specialist contacted Polaris by telephone after the best and final closing date only to request Polaris to verify that the cost of acquiring another computer system was not included in Polaris' direct costs for Proposal "B." We note that Polaris' own letter responding to the contracting specialist's request confirms this as the purpose of the contracting specialist's telephone call and specifically refers to the call as a "clarification request." Accordingly, we find Polaris' allegation without foundation.

(2) Propriety of Source Selection Decision

Polaris argues that the source selection authority's recommendation to award to JMCA was improper because it was reached only after the contracting officer had unilaterally increased JMCA's technical score and upwardly adjusted Polaris' proposal as the result of the cost realism analysis. Polaris emphasizes that the Army's proposal evaluation team recommended Polaris for the award, but that the recommendation was changed by the contracting officer before the matter reached the level of the source selection authority. In Polaris' view, since the evaluation results were altered before the source selection authority made his decision, that decision was not valid.

The record does not support Polaris' allegation that the contracting officer unilaterally rescored Polaris' proposal. Rather, the contracting officer's alleged changes to the technical evaluation results actually were couched in terms of a recommendation to the source selection official. The record shows that before concurring with this recommendation, the source selection authority made an independent determination that JMCA's technical score should be increased.

In this connection, the source selection authority's decision memorandum states that after consulting with two members of the proposal evaluation team to ascertain their scoring rationale, the source selection authority agreed with the contracting officer that JMCA's proposal in the area of personnel experience had been given too low a score by the evaluators. The memorandum goes on to state "As Source Selection Authority, I hereby rescore personnel" The source selection authority then determined that the proposals were technically equal, and that award should be made to JMCA as the low cost offeror.

It is well-settled that, in a negotiated procurement, source selection officials are generally bound neither by the technical scores nor by the recommendations of technical evaluators. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. The only limitation on this broad discretion is that the selection authority's use of the results of technical and cost evaluations must be reasonable and consistent with the RFP's stated evaluation factors. See New Mexico State University/Physical Science Laboratory, B-215348, Nov. 6, 1984, 84-2 CPD ¶ 504. On the basis of the record before us, we find no impropriety in the source selection authority's decision to rescore JMCA's proposal. Furthermore, as previously discussed, we find nothing objectionable in the determination to adjust Polaris' best and final offer to reflect DCAA's recommended indirect rates.

Regarding the decision to select JMCA for award, we have consistently held that source selection officials may reasonably determine that competing proposals are essentially equal in technical terms although there may be a percentage difference in the technical point scores. In Grey Advertising, Inc., 55 Comp. Gen. 1111, supra, we found a determination of technical equality to be reasonable where the point difference was 15.8 percent, and we have reached the same conclusion where there was a 14.4 percentage difference. Harrison Systems Ltd., 63 Comp. Gen. 379 (1984), 84-1 CPD ¶ 572. We see no basis to question the determination here that the 2 percent difference in technical scores was insignificant. Therefore, since the RFP specifically provided that evaluated cost might become dominant when a finding of essential technical equality was made, and JMCA's total evaluated cost was low, we believe that selection of JMCA for the award was reasonable. See Systematics General Corp., B-214171, Jan. 22, 1985, 85-1 CPD ¶ 73.

(3) Waiver of Preaward Survey

As to the contracting officer's decision to waive a preaward survey on JMCA, we have held that a preaward survey is not a legal prerequisite to an affirmative determination of responsibility. Accordingly, it is within the contracting officer's discretion not to conduct a preaward survey, and we will not review such a decision absent a showing that the contracting officer may have acted fraudulently or in bad faith. Freund Precision, Inc., B-216620, Oct. 23, 1984, 84-2 CPD ¶ 456. No such showing has been made here.

The protest is denied.

for Seymour E. Gross
Harry R. Van Cleve
General Counsel