

DECISION



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

FILE: B-221058 **DATE:** March 20, 1986
MATTER OF: E. H. Pechan & Associates, Inc.

DIGEST:

Where contracting agency advised one offeror of specific weaknesses in its proposal but gave the protester "clarifying questions" which did not reasonably advise protester of specific weakness in its initial offer, discussions were unequal and not meaningful.

E. H. Pechan & Associates, Inc. (Pechan), protests the award of a contract to Charles River Associates, Inc. (CRA), under task area "A" of request for proposals (RFP) No. DE-RP01-85IE10448, a small business set-aside, issued by the Department of Energy (DOE) for the procurement of technical and analytical support services for the Office of Energy Emergencies (OEE).

We sustain the protest.

The RFP for a cost plus fixed-fee contract was issued on June 6, 1985, and provided for a 12-month performance period with two 1-year options. OEE's mission is to develop scenarios of potential energy emergencies and to prepare projections based on alternative responses to such disruptions. In order to carry out this objective, OEE needs a range of methodologies and models which it can apply in developing its projections. The contractor assists in the enhancement and/or application of relevant models and methodologies which are used to assess the consequences of hypothetical energy emergencies and the effect of alternative response strategies. Thus, the RFP required an understanding and familiarity with the domestic and international economic markets and their relationship to 12 specific sample tasks described in the statement of work such as analyzing impediments to the operation of the petroleum

market during an oil supply disruption and analyzing defense energy mobilization requirements to support military emergencies.^{1/}

Offerors were invited to submit proposals on one or both of two separate task areas (task area "A" and/or task area "B"). The RFP limited presentations to 50 pages, whether the firm submitted proposals for task "A" or task "B" or both. Pechan submitted its proposal for both tasks. CRA only offered to perform task "A." Six proposals were received under task area "A," the subject of this protest. Four firms including Pechan were included in the competitive range and all were asked to clarify certain aspects of their proposals and to submit best and final offers (BAFO's). Award was made to CRA on September 7, 1985, based on its highest technically scored proposal.

The RFP at section "M" provided that award would be made to the responsible offeror whose offer conforms to the RFP and is considered most advantageous to the government considering the stated evaluation criteria. Section "M" further provided for a tradeoff between technical and cost considerations as follows:

^{1/} The following are examples of the sample tasks outlined in the statement of work for which the selected contractor may have to conduct model enhancement or impact assessment work:

"3. Explore and apply methodologies for estimating the distributive consequences [of a petroleum supply interruption] for major socio-economic groups;

"4. Examine the size, timing, distribution, and operational mechanisms for measures to alleviate extreme hardship including the role of Federal, state and local governments;

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"7. Analyze U.S. allies fuel needs as they relate to IFA and NATO energy emergency preparedness programs;

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"12. Adapt and apply game-theoretic techniques that can be used to examine behavior of a producer cartel and/or of the IFA."

"The technical proposal is of greater importance than the cost proposal. However, if, after evaluation of the technical and cost proposals, two or more competing overall proposals are within the competitive range, evaluated probable cost to the government may be the deciding factor for selection, depending on whether the most acceptable overall proposal (excluding cost consideration) is determined to be worth the cost differential, if any."

Offerors were required to submit technical and cost proposals. Technical proposals were point-scored by a technical evaluation committee (TEC) based on three main technical criteria and listed subcriteria worth a total of 1,000 points. Cost proposals were reviewed by a cost/price analyst who did not score the cost proposals but instead evaluated the reasonableness and appropriateness of the proposed costs and estimated the probable costs and fees to the government.

Four firms submitted proposals which were considered by the source selection officials to have a reasonable chance for award and were therefore included in the competitive range. The technical scores of those in the competitive range based on a maximum of 1,000 points were: CRA - 654 points, Pechan - 516 points, offeror "C" - 503 points, and offeror "D" - 583 points.

Offerors in the competitive range were each sent a set of "clarifying questions" relating to both the technical and cost aspects of their proposals. Offerors responded to these questions and submitted their BAFO's. BAFO's were evaluated by the TEC, and the technical scores and evaluated prices of the four offerors were as follows:

	<u>Technical Score</u>	<u>Probable Cost</u>
CRA	960	\$1,048,629
Pechan	607	\$ 630,341
Offeror "C"	610	\$1,046,055
Offeror "D"	564	\$ 686,734

With the concurrence of the source selection official, the contract specialist determined that, since the RFP stated that technical proposals were of greater importance than cost proposals and there was significant (over 50 percent) technical point difference between CRA and all other offerors, award should be made to CRA.

Pechan contends that its proposal was technically acceptable and therefore it was improper for DOE to award a contract for task area "A" to CRA at a price of over 60 percent higher than Pechan's. Pechan also argues that DOE failed to conduct adequate discussions with it because the "clarifying questions" which it responded to in submitting its BAFO did not relate to the deficiencies which DOE found in Pechan's proposal. In addition, Pechan contends that, although the RFP states that technical proposals are of greater importance than the cost proposals, the source selection officials completely failed to consider cost in the award decision.

Initially, we note that Pechan has not been provided with DOE's documents dealing with the evaluation of proposals, but instead, they were provided only to GAO for our in camera review. Because GAO may not disclose information provided to it strictly for in camera review, GAO will review the documents supplied in light of the protest issues raised, but our discussion of the documents is necessarily limited. See Raytheon Support Services Co., B-219389.2, Oct. 31, 1985, 85-2 C.P.D. ¶ 495; Heckler & Koch, Inc., B-216484.2, Mar. 12, 1985, 85-1 C.P.D. ¶ 303.

When an agency acquires goods or services by means of negotiation, Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610 (1984), generally requires the agency to conduct written or oral discussions with all responsible offerors who submit proposals within the competitive range. This requirement can be satisfied only when discussions are meaningful, TRS Design & Consulting Services, B-214011, May 29, 1984, 84-1 C.P.D. ¶ 578, which means that negotiators should be as specific as practical considerations will permit. Tracor Marine Inc., B-207285, June 6, 1983, 83-1 C.P.D. ¶ 604. Negotiators must furnish information to all offerors within the competitive range as to the areas in which their proposals are believed to be deficient so that competitive offerors are given an opportunity to fully satisfy the government's requirements. Arthur D. Little, Inc., B-213686, Aug. 3, 1984, 84-2 C.P.D. ¶ 149. Consistent with this rule, it is not necessary for an agency to furnish information in any particular form or manner, provided that

it finds some means which reasonably communicates the nature and gravity of its concerns. Cosmodyne, Inc., et al., B-216258, et al., Sept. 19, 1985, 85-2 C.P.D. ¶ 304.

Here, apparently because of the proposal page limitation, Pechan, in order to address both task "A" and "B," provided one general approach for task "A," discussed this approach and explained that it would be applied to the 12 specific tasks during contract performance. CRA, which submitted an offer only on task "A," discussed all specific tasks since it could use all 50 pages to discuss task "A." We believe that the 50-page total proposal presentation limitation is unfair to offerors, like Pechan, who decide to offer under both task areas and therefore have only an average of 25 pages to present the offer for each task area, as compared to those who offer under only one task area and can therefore devote all 50 pages to presenting its offer under that single task area.

The TEC found Pechan, CRA and two other offerors within the competitive range. However, only CRA received clarifying questions which specifically addressed weaknesses in its technical proposal. For example, CRA was asked questions concerning key personnel and management, tailored to its proposal. In contrast, the other three offerors in the competitive range all received the same questions which did not specifically address the weaknesses in their proposals, but, according to the agency, were intended to lead the offerors into the areas of weaknesses in their offers. In Pechan's case the essential weakness was the failure to adequately discuss the application of energy models to sample tasks.

DOE claims that all offerors had a fair opportunity to clarify their proposals and that the questions asked by DOE should have enabled Pechan to respond to the agency's concern that Pechan's approach failed to demonstrate an understanding of the relevant task issues. We disagree. Based on the record, we conclude that the offerors were not treated fairly and equally, and that Pechan was not apprised of the deficiencies that DOE found in Pechan's proposal.

DOE in fact agrees that there is some merit to Pechan's complaint that the clarification questions were not sufficiently specific. DOE contends that the same questions were asked to all offerors other than CRA in order to avoid technical leveling as proscribed by FAR, 48 C.F.R. § 15.610(d)(1) (1984). However, DOE does not explain how discussing the offerors' weaknesses would have constituted leveling. Simply, DOE did not advise Pechan that, although

its approach was apparently acceptable, it had not addressed in adequate detail the 12 specific example tasks outlined in the statement of work.

The five questions asked of Pechan and the other offerors besides CRA were:

- "1) What models exist that could be used immediately if a crisis were to occur today? Of these models, which would you select that would meet the needs and requirements of this office? Why have you selected these models?
- "2) If you have three to six months to enhance models within the context of the suggested tasks in the statement of work, which areas for model enhancement or improvement need to have the highest priority? What model enhancements would you recommend? Why?
- "3) What is the offeror's approach to assessing the impact of an oil supply disruption on the oil and energy markets and the U.S. and foreign countries? How would the offeror's approach meet the needs and requirements of this office?
- "4) What structural resiliencies exist within the present energy economy? How would they affect the selection and application of feasible shortfall response policy choices?
- "5) Discuss your understanding of the inter-regional and intersectoral effects of oil supply disruptions and how the various data bases and models can be used to form useful response policies."

In our opinion these questions appear to presume the acceptability of the offeror's approach and call for a discussion beyond the sample tasks. These questions do not suggest dissatisfaction with Pechan's proposal for failure to provide detailed approaches to sample tasks and therefore do not adequately communicate the nature and gravity of DOE's concerns. See Cosmodyne, Inc., et al., B-216258, et al., supra.

On the other hand, as noted above, the record indicates that virtually all of the weaknesses of the awardee, CRA, were discussed in great detail thereby helping CRA improve its technical score by approximately 50 percent. For example, the 11 specific technical questions asked of CRA, relating to deficiencies in CRA's proposal included:

- "2. The proposed yearly DLMHs (manhours) . . . are extremely limited given the relationship of their experience and background to the complexity of the issues associated with Task Area A. The involvement of these key personnel at a substantially higher level is of critical importance to the success of this project. Define the areas of involvement these key personnel will provide to each of the example task issues noted in the statement of work and their DLMH commitment.
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- "6. Discuss CRA's capability to complete project planning, project management and reporting requirements in a timely manner. Relate this discussion to the management reports specified in the RFP under 'Reporting Requirements Checklist.'
- "7. Describe the procedures CRA will use to ensure control and responsiveness of the proposed subcontractors.
- "8. Provide the names of key personnel by labor category by committed DLMHs for BAH. Define the areas of involvement each of these key personnel will provide to the example task issues noted in the statement of work."

In our view, DOE failed to hold meaningful discussions with Pechan since it did not reasonably notify Pechan of the central weakness in its offer. See Price Waterhouse, B-220049, Jan. 16, 1986, 65 Comp. Gen. _____, 86-1 C.P.D. ¶ _____. We note that this problem with discussions is further exacerbated by the fact, that since the proposal page limitation applied only to initial offers, Pechan, had it been advised of DOE's concern as to its generic approach, could have elaborated on its approach without concern for a page restriction.

Pechan also argues that DOE failed to consider cost in making the award to CRA. In this connection, Pechan asserts that the cost difference between Pechan's and CRA's offers of over \$400,000 or approximately 66 percent exceeded the difference in technical scores, 353 points or 58 percent. Since we have sustained Pechan's protest, we need not consider this issue. We find that award was improper without consideration of the cost issue because discussions were inadequate.

Generally, where discussions are inadequate, the appropriate remedy is to reopen discussions. However, here, this is not practical. Pechan's protest was filed 29 days after award. The agency made a determination as permitted under the FAR to continue contract performance during the pendency of the protest. Under these circumstances, we think that the appropriate relief here is to recommend that DOE not negotiate an additional 1-year contract based on the exercise of the first option year, but rather resolicit after the initial contract term expires.

We find that Pechan is entitled to costs of preparing its proposal and the costs of filing and pursuing its protest. We will allow a protester to recover its proposal preparation costs only where (1) the protester had a substantial chance of receiving the award but was unreasonably excluded from the competition, and (2) the remedy recommended is not one delineated in 4 C.F.R. §§ 21.6(a)(2-5). In light of the recommendation here, and since Pechan was determined to be in the competitive range and offered the lowest evaluated cost, we believe it had a substantial chance for receiving the award had adequate discussions been held. Therefore, the recovery of proposal preparation costs is granted. 4 C.F.R. § 21.6(e).

Our Regulations limit the recovery of the costs of filing and pursuing a protest to situations where the protester unreasonably is excluded from the procurement, except where this Office recommends that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e). We have construed this to mean that where the protester is given an opportunity to compete for the award under a corrected solicitation, the recovery of the costs of filing and pursuing the protests are generally inappropriate. See Federal Properties of R.I., Inc., B-218192.2, May 7, 1985, 85-1 C.P.D. ¶ 508, and The Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 C.P.D. ¶ 132.

Here, although pursuant to our recommendation Pechan will have an opportunity to compete for subsequent contracts, it has lost any opportunity to compete for and be awarded the contract for the basic contract period. Accordingly, the basis for our denial of the costs of filing and pursuing a protest, the opportunity to compete for essentially the same solicitation, which was present in Federal Properties of R.I., Inc., B-218192.2, supra, and The Hamilton Tool Co., B-218260.4, supra, is not present here. Therefore, we allow recovery of Pechan's costs of filing and pursuing the protest. See EHE National Health Services, Inc., B-219361.2, Oct. 1, 1985, 65 Comp. Gen. _____, 85-2 C.P.D. ¶ 362.

for 
Comptroller General
of the United States