

Jeremata

DECISION



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

FILE: B-221320, B-221320.2 **DATE:** April 15, 1986

MATTER OF: TEK, J.V. Morrison-Knudsen/Harnischfeger

DIGEST:

1. Protest that agency's successive rounds of discussions constituted technical leveling is denied where record does not show that discussions were utilized to point out weaknesses caused by the awardee's lack of diligence or competence or that agency improperly coached the awardee to bring the awardee's proposal up to the protester's level. Agency questions and comments advised all offerors of the deficiencies in their proposals and resolved uncertainties regarding each offeror's proposed approach and agency's actions are consistent with Federal Acquisition Regulation, 48 C.F.R. § 610(d)(1) (1984), which requires an agency to conduct meaningful discussions by pointing out weaknesses, excesses or deficiencies in the proposals.
2. Protest that agency was constrained to award the contract for a certain dollar amount and conducted successive rounds of discussions to ensure award to the lowest cost offeror is denied where record does not show that funding was limited in such a manner so as to require award only to the low offeror.
3. Where record reveals no evidence that the agency conveyed to an offeror, either directly or indirectly, during discussions a better technical approach or the protester's technical approach, technical transfusion has not been shown.
4. Contracting officer properly may decide in favor of a technically lower rated proposal in order to take advantage of its lower cost, even though cost was less important than technical merit, where he reasonably

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determines that the cost premium involved in making an award to the higher rated, higher priced offeror is not justified in light of the acceptable level of technical competence available at the lower cost.

5. Protest that agency's evaluation improperly ignored proposed subcontractor's prior performance record and that agency should have directly considered proposed subcontractor's responsibility because of the subcontractor's poor performance record is denied where agency evaluated subcontractor's capabilities as part of the overall evaluation and agency evaluation is not found unreasonable.

TEK, J.V., a joint venture of Turner Construction and Eaton-Kenway, protests the award of a contract to Sharpe Constructors under request for proposals (RFP) No. DACA05-85-R-0036 issued by the Department of the Army for the construction of the Western Distribution Center at the Sharpe Army Depot, California. The Western Distribution Center is to be a large warehouse with automated storage and retrieval capability. TEK contends that the Army engaged in technical leveling and technical transfusion during negotiations. In addition, TEK argues that the award to Sharpe was not made in accordance with the RFP's evaluation criteria. Both TEK and Morrison-Knudsen/Harnischfeger (M-K), an interested party to the protest, have requested reimbursement of proposal preparation expenses in view of the award to Sharpe.

We deny the protest and the claims.

Background

The RFP was issued on December 26, 1984, and was for all necessary services, labor and material to construct the Western Distribution Center and to install and make operable the automated material handling system. Section 1N of the RFP advised offerors of the overall evaluation process and indicated that technical merit would be weighted 60 percent and cost 40 percent. The evaluation criteria which would be considered and which were of equal relative importance were as follows: 1) Project management; 2) Process control system; and 3) Mechanical Features. Award would be made to "that responsible offeror, whose offer, conforming substantially to this RFP, is most advantageous to the government, technical and cost proposal evaluation factors, cost, and other factors considered."

Prior to the receipt of initial proposals, seven amendments to the RFP were issued and, on April 23, 1985, the Army received proposals from four firms: TEK, Sharpe, M-K and Foster Wheeler USA Corp. (FW). A technical evaluation committee (TEC) was convened and between April 23, 1985, and November 7, 1985, discussions were held with all offerors. The TEC conducted three rounds of written discussions and met with each offeror directly on another three occasions. Also, five additional amendments to the RFP were issued during this period. The final technical evaluation results and the best and final offers (BAFOs) of the four firms were as follows:

	<u>Technical</u>	<u>Cost</u>	<u>BAFO</u>	<u>Total</u>
TEK	60	34	\$130,613,217	94
Sharpe	53	40	\$112,295,705	93
M-K	56	37	\$121,055,313	93
FW	37	38	\$119,031,388	75

The Army determined that the technical scores of the top three offerors did not demonstrate a significant technical difference and that any of the top three offerors was capable of performing the work without any adverse affect on overall quality. As a result, the Army decided to award the contract to Sharpe on the basis of the firm's lowest cost. Because sufficient funds were not available to award all the base items, option items and additive items included in the RFP, the award to Sharpe was in the amount of \$104,663,798.^{1/}

Technical Leveling and Transfusion

TEK argues that the numerous amendments issued by the Army and the successive rounds of discussions which were conducted effectively raised Sharpe's technical score and that this constituted technical leveling even if the process was unintentional. TEK contends that discussions should not be conducted to help unacceptable proposals become "acceptable" and, since the Army never had any substantive technical problems with its proposal, there was no reason for the Army to engage in extended discussions with the other offerors. TEK alleges that the only reason this occurred is because the Army did not have sufficient funds to award the contract to a technically superior but higher

^{1/} The price difference between TEK's and Sharpe's cost proposals on the items actually awarded was over \$16,000,000. The Army concluded that the technical difference between the proposals on these items did not justify an award to TEK at its significantly higher cost.

priced proposal and that the Army issued repeated amendments and conducted numerous discussions in order to bring the low cost proposal in conformance with the RFP's technical requirements. TEK complains that the less technically qualified benefited the most from this process and that the number of amendments and requests for clarification issued and the rounds of discussion which were conducted resulted in improper technical leveling.

Also, TEK contends that technical transfusion occurred. TEK alleges that the Army utilized information contained in its proposal to assist the other offerors in raising their technical scores. TEK contends that its technical approach was improperly disclosed through the repeated clarification requests and discussion questions and comments and that the Army's actions in this regard were also improper.

The Army contends that neither technical leveling nor transfusion occurred during negotiations.^{2/} The Army argues that in view of the size and complexity of the project, the number of amendments issued and scope of discussions conducted were not unusual. The Army indicates that discussions were held to point out those areas in each offeror's proposal that did not conform to the RFP's requirements and to provide each offeror with an opportunity to revise its proposal. Successive rounds of discussions were conducted to allow the TEC to become fully comfortable with the technical approach proposed by each offeror.

In addition, the Army indicates that TEK's technical point score increased more than Sharpe's as a result of the discussions. The Army contends that it never sought to

^{2/} The Army also argues that TEK's protest is untimely since TEK's complaint concerns the Army's reopening of discussions and, therefore, should have been filed no later than 10 days after TEK was apprised that further discussions were being held. In our view, TEK has not protested the fact that further discussions were held, but rather the content of those discussions, and we believe TEK could reasonably wait until it learned the results of the discussions with Sharpe before protesting. See Raytheon Ocean Systems Co., B-218620.2, Feb. 6, 1986, 86-1 CPD ¶ 134.

merely raise the technical score of the low cost offer and points out that the TEC was not permitted access to any pricing information and, therefore, was not aware which of the proposals was the most costly. Furthermore, the Army argues that the contracting officer always had the option of requesting additional funds to award the contract.

Also, the Army contends that all amendments and comments or questions issued were carefully screened to ensure that technical information was not leaked from one offeror to another. The Army argues that no technical transference occurred and that TEK's allegation in this regard is mere speculation and should be denied.

Technical leveling in discussions is prohibited by section 15.610(d)(1) of the Federal Acquisition Regulation (FAR) and is defined as helping an offeror bring its proposal up to the level of the other proposals through successive rounds of discussions. 48 C.F.R. § 15.610(d)(1) (1984). An agency, however, has an obligation to conduct meaningful discussions by pointing out to all offerors weaknesses, excesses or deficiencies in their proposals and technical leveling does not occur unless the successive rounds of discussions are utilized to point out weaknesses caused by the offeror's lack of diligence or competence. See 48 C.F.R. § 15.610(c)-(d); Joule Engineering Corp.--Reconsideration, B-217072.2, May 23, 1985, 85-1 CPD ¶ 589; The Advantech Corp., B-207793, Jan. 3, 1983, 83-1 CPD ¶ 3.

From our in camera review of the record, we do not believe the Army engaged in technical leveling. The Army's successive rounds of discussions were not designed to bring all proposals up to TEK's level; rather, the questions and comments were for the purpose of advising all offerors of the deficiencies in their proposals and resolving uncertainties as required by the FAR. See Southwest Regional Laboratory, B-219985, Dec. 16, 1985, 85-2 CPD ¶ 666. The questions and comments directed to Sharpe concerned areas of deficiencies in Sharpe's proposal or solicited additional clarifying information and we find nothing which shows that these deficiencies resulted from a lack of diligence or competence by Sharpe, or that the Army provided improper assistance to Sharpe or any other offeror with the intent of bringing that proposal up to TEK's level. Raytheon Ocean Systems Co., B-218620.2, supra.

Moreover, we note that the Army had questions concerning each technical proposal and the technical scores of all offerors increased as a result of the discussions. Despite TEK's assertion that Sharpe benefited the most from

the successive rounds of discussions, TEK's raw technical score increased more than Sharpe's during this period while the weighted difference between the two technical scores did not vary significantly between each successive round. Sharpe's initial proposal was generally acceptable and was determined within the competitive range even though questions remained concerning its proposal as well as the others before an award decision could be made. The successive rounds of discussions were held so that the Army could gain confidence in each offeror's technical approach and, in the absence of evidence showing improper coaching, we conclude that no technical leveling occurred. See Raytheon Ocean Systems, Co., B-218620.2, supra; Systems Development Corp. and International Business Machines, B-204672, Mar. 9, 1982, 82-1 CPD ¶ 218 at 27.

In addition, we find no evidence which shows that the Army was constrained to award this contract for a certain dollar amount. The Army indicates that it could have requested additional funds if award to a higher cost, higher technically rated proposal was warranted and our review provides no basis to conclude that only Sharpe's low cost proposal could have been accepted. To the extent the amendments issued had the effect of making less costly technical approaches acceptable to the Army, we see nothing improper in this action since all offerors were treated equally and competed based on the same requirements. In our view, TEK's contention that the Army's actions were designed to ensure award to the lowest cost offeror directly questions the subjective motivation of the Army's procuring officials and prejudicial motives will not be attributed to such officials on the basis of inference or supposition. Eaton-Kenway, B-212575.2, June 20, 1984, 84-1 CPD ¶ 649. Although the Army was concerned over the availability of sufficient funding for this project, we find no evidence that the number of amendments issued by the Army or the rounds of discussions conducted were so motivated.

Concerning TEK's allegation of technical transference, the record contains no evidence which indicates that the Army conveyed to Sharpe, either directly or indirectly, a better technical approach or TEK's technical approach. Therefore, we find TEK's protest on this basis without merit. Raytheon Ocean Systems Co., B-218620.2, supra.

Source Selection

TEK contends that the award to Sharpe ignored the RFP's evaluation criteria and was improperly based on cost. TEK argues that the RFP contained a precise numerical evaluation

formula which provided for a 60/40 technical/cost tradeoff and that under this formula, award could not be made to a lower cost, lower technically rated proposal without a determination that the proposals were technically equivalent. TEK contends that the Army never considered TEK's and Sharpe's proposals to be technically equivalent and that, in any event, such a determination could not be justified in view of the respective point scores. TEK indicates that the point spread between the cost proposals was less than the difference in technical scores and TEK contends that a determination of technical equivalence under these circumstances would conflict with the RFP's evaluation criteria which assign the greater weight to technical merit.

Also, TEK notes that 60 percent of the work under the RFP relates to material handling and that Sharpe intends to utilize Sperry Corporation to perform this work. TEK argues that Sperry has failed to complete any of the three material handling contracts it has been awarded in the past and that Sharpe should not have been included in the competitive range since "Project Management" was listed as the most important evaluation factor. TEK has submitted documents which indicate that one of Sperry's prior contracts was terminated for the convenience of the government and that Sperry was having difficulties meeting the delivery schedule under another similar contract. TEK contends that because of Sperry's poor performance record, the Army should have conducted a separate inquiry into Sperry's responsibility even though prime contractors are generally responsible for determining the responsibility of their subcontractors.

The Army contends that the seven-point difference in technical merit between TEK's and Sharpe's proposals did not justify an award to TEK at its higher price. The price difference between the proposals for all contract requirements was over \$18,000,000 and there was still a difference of over \$16,000,000 considering only the items actually awarded. Since the cost difference was significant and because the Army did not consider TEK's technical proposal substantially better than Sharpe's, the Army argues that the contracting officer properly decided to award the contract to Sharpe.

With respect to the evaluation of Sharpe's proposed subcontractor for the material handling portion of the contract, the Army contends that the evaluation team properly evaluated Sperry's experience and expertise as part of Sharpe's overall technical proposal. Also, while no pre-award survey of Sperry was conducted, the Army indicates

that the evaluation team was well aware of Sperry's prior performance record and that Sharpe's technical score for management ability in the material handling area reflected Sperry's prior experience. The Army contends that Sperry has never been defaulted for its work on other material handling contracts and that the extensive project design for the Western Distribution Center would preclude the operational difficulties that were encountered in prior projects. The Army argues that Sharpe's proposal was properly included in the competitive range and that Sperry is capable of performing the material handling portion of the contract.

We have recognized that in a negotiated procurement, selection officials have the discretion to make determinations concerning cost/technical tradeoffs and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Thus, even when cost is the least important evaluation criteria, we will uphold an award to a lower priced, lower scored offeror where it is determined that the cost premium involved in making an award to a higher rated, higher priced offeror is not justified in light of the acceptable level of technical competence available at the lower cost. AMG Assocs., Inc., B-220565, Dec. 16, 1985, 85-2 CPD ¶ 673; The BDM Corp., B-202707, Oct. 28, 1981, 81-2 CPD ¶ 354. The determining element is not the difference in technical merit, per se, but the considered judgment of the procuring agency concerning the significance of that difference. Hager Sharpe and Abramson, Inc., B-201368, May 8, 1981, 81-1 CPD ¶ 365.

Here, the contracting officer made a considered judgment, based on overall technical and cost considerations, to award the contract to Sharpe as the most advantageous offeror. The record shows that the contracting officer considered whether the additional technical merit offered by TEK was worth the extra expense.^{3/} The

^{3/} We disagree with TEK's assertion that the RFP contained a precise numerical formula which required the Army to evaluate the two proposals as technically equivalent before an award to a lower point-scored offeror could be made. The RFP did not state that award would be made to the offeror with the highest point total, but rather indicated that award would be made to that offeror which is evaluated as
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contracting officer determined that the difference in technical merit was not significant, particularly in view of the great difference in cost. This is exactly the kind of decisionmaking which is vested in the discretion of selection officials, and we find no basis to object to it here.

Concerning the evaluation of Sharpe's proposed subcontractor for the material handling portion of this contract, we note that we will question an agency's determination concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion, or violation of procurement statutes or regulations. Bank Street College of Education, 63 Comp Gen. 393 (1984), 84-1 CPD ¶ 607. The protester bears the burden of affirmatively proving its case and the fact that the protester disagrees with the agency's conclusions does not render the evaluation unreasonable. Frank E. Basil, Inc.; Jet Services, Inc., B-208133, Jan. 25, 1983, 83-1 CPD ¶ 91.

In our view, TEK has not shown that the Army's evaluation of Sperry's capabilities to perform this portion of the contract for Sharpe was unreasonable. The record shows that the Army was aware of Sperry's past performance record and the Army disagrees with TEK's characterization of Sperry's performance under those contracts. We find nothing in the record which indicates that the evaluation of Sperry's capabilities and the scoring of Sharpe's proposal in this area reflected anything other than the reasoned judgment of the evaluation team members and, accordingly, we see no basis to conclude that Sharpe should have been excluded from the competitive range. Furthermore, while a contracting officer may directly determine a proposed subcontractor's responsibility where the prospective

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most advantageous to the government. Cf. Harrison Systems Ltd., 63 Comp. Gen. 379 (1984), 84-1 CPD ¶ 572. Under these circumstances, we have consistently held that selecting officials have the discretion to determine whether any technical difference is sufficiently significant to outweigh the cost difference. Warren Management, Inc., B-217257, Apr. 9, 1985, 85-1 CPD ¶ 407; Petro-Engineering, Inc., B-218255.2, June 12, 1985, 85-1 CPD ¶ 677; See also DLI Engineering Corp.--Reconsideration, B-218335.2 et al., Oct. 28, 1985, 85-2 CPD ¶ 468 at 5.

contract involves substantial subcontracting, see Omneco, Inc., et al., B-218343 et al., June 10, 1985, 85-1 CPD ¶ 660, we note that Sperry's expertise and experience were considered during the evaluation of Sharpe's proposal. Although Sperry apparently experienced performance delays in past projects, the Army indicates that it was aware of Sperry's performance record on these projects and was satisfied that similar difficulties would not occur at the Western Distribution Center. Based on the record, we see no reason to object to the Army's failure to conduct a further investigation of Sperry.

Remaining Allegations

TEK has also alleged that Sharpe submitted an unsolicited alternative proposal offering a price reduction if certain aspects of the scope of work were changed and that this proposal may have biased the final results. TEK contends that the workload and design requirements were changed prior to award and that the contract awarded Sharpe differed from the scope of work contained in the RFP. TEK also complains that the Army's administrative report was inadequate and failed to include all relevant documents and that the Army should have suspended contract performance since the Army received notice of the protest within 10 days after award.

The Army denies that any unsolicited proposal was received from Sharpe or that the award to Sharpe was based on a scope of work different from that contained in the RFP. Our review of the record, including the contract awarded Sharpe, reveals no support for these allegations and TEK has presented no evidence to support its contentions. Accordingly, we find that TEK has failed to meet its burden of proof. Metric Systems Corp., B-218275, June 13, 1985, 85-1 CPD ¶ 682.

With respect to the agency report filed by the Army, the Army has provided our Office the documents related to the evaluation process to which TEK was denied access. To the extent TEK is arguing that it should have also received these documents, TEK's sole recourse is to pursue the remedies provided under the Freedom of Information Act, 5 U.S.C. § 552 (1982). See RCA Service Co., B-219636, Nov. 4, 1985, 85-2 CPD ¶ 518. Concerning the Army's alleged failure to suspend contract performance, the Army disputes TEK's assertion that it received notice within 10 days of the date of contract award. In view of our finding that the award to Sharpe was proper, we see no need to resolve this issue.

Finally, in light of our decision denying TEK's protest, we see no basis to consider either TEK's or M-K's claim for proposal preparation costs.

The protest and claims are denied.

for *Seymour Efron*
Harry R. Van Cleve
General Counsel