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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fairbanks Associates--Request for Reconsideration

File: B-221374.9

Date: August 11, 1986

DIGEST

1. General Accounting Office denies request for reconsideration of a prior decision which held that a protester was not prejudiced by the failure of the solicitation to state that an annual cost ceiling was expressed in present value terms. Where the request for best and final offers, in effect, amended the solicitation by deleting the ceiling, protester does not show error of law or fact that would warrant reversal of the prior decision.
2. The General Accounting Office denies request for reconsideration of a prior decision which held that where a solicitation did not specify the inflation rates that would be used for cost evaluation purposes, the agency was free to use any reasonable rates and there was not a reasonable possibility of prejudice due to the agency's use of inflation rates that were lower than those used by the protester.
3. When an evaluation formula set forth in a solicitation already gives equal weight to technical factors and cost, cost may not properly be given additional weight.

DECISION

Fairbanks Associates requests reconsideration of our decision, Fort Wainwright Developers, Inc., et al., B-221374, et al., May 14, 1986, 65 Comp. Gen. ____, 86-1 CPD ¶ 459. In its protest, Fairbanks Associates alleged that the United States Army Corps of Engineers improperly awarded a contract to North Star Alaska Housing Corporation for the construction, leaseback to the government, operation, and maintenance of military family housing at Fort Wainwright, Fairbanks, Alaska. The agency made the award under request for proposals (RFP) No. DACA85-85-R-0019.

In our decision, we denied Fairbanks Associates' protest, which was based upon allegations that (1) the awardee's "average annual cost" exceeded the RFP's cost ceiling; (2) the ambiguity of the cost ceiling competitively prejudiced offerors; (3) the cost evaluation was flawed because the methodology used differed from that described in the RFP; and

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(4) award to a higher priced offeror was not in the best interest of the government. On reconsideration, the protester contends that the decision is erroneous in law and fact because prejudice did result from ambiguities in the solicitation. We deny the request for reconsideration.

BACKGROUND

The Corps conducted this procurement pursuant to section 801 of the Military Construction Authorization Act of 1984, 10 U.S.C. § 2828(g) (Supp. III 1985), as amended by the Military Construction Authorization Act of 1986, Pub. L. No. 99-167, § 801, 99 Stat. 961, 985-86. The RFP provided for technical proposals to be evaluated on the basis of site design and engineering, dwelling unit design and engineering, and maintenance plans, with a maximum of 1,300 evaluation points available for these factors. It further provided that the relative value of proposals would be established by means of a cost/quality ratio. This was to be calculated by dividing the combined proposed shelter and maintenance rent for each proposal,^{1/} projected over 19.5 years, by the quality (technical) points that the proposal received.

Life cycle costs were also a basis for evaluation, since the underlying objective of the procurement was to determine whether contractor construction and leaseback of the housing units under section 801 would be more cost effective than government construction and operation.^{2/} In this regard, the RFP specified that the "average annual cost" of shelter and maintenance rent was not to exceed \$8,140,000. Although not stated in the solicitation, this figure represented the uniform annual equivalent of the cost of government construction, expressed in present value terms, less 5 percent. North Star's initial proposal, with a combined total first-year shelter and maintenance rent of \$8,139,800, was highest-ranked technically; when these costs were projected over 19.5 years, the firm also had the lowest cost per quality point. The Corps' subsequent economic analysis resulted in an evaluated life cycle cost of \$56,169,071, or a uniform annual equivalent of \$7,427,807, for North Star's proposal. The agency considered this cost effective, compared with the corresponding figure for government construction \$8,140,000 and it submitted the economic analysis to the appropriate committees of Congress. However, the staff of the Subcommittee on Military Construction, House Committee on Appropriations, determined that all proposals

^{1/} Shelter rent represents the contractor's return on and of its investment; maintenance rent represents the contractor's charge for keeping the units in adequate repair.

^{2/} The Act specifically provides that no contract may be entered into until the Secretary of Defense submits to the appropriate committees of Congress, in writing, "an economic analysis (based upon life cycle costing procedures) which demonstrates that the proposed contract is cost effective in comparison with the alternative means of furnishing the same facilities," i.e., government construction. 10 U.S.C. § 2828(g)(6)(A).

were too high. The agency advised offerors of this fact and requested best and final offers.

After receipt of best and final offers, the Corps ultimately concluded that contractor construction would be the better alternative. The award to North Star, with a final total first-year shelter and maintenance rent of \$7,730,920 was based on the fact that the firm again had the lowest cost per quality point, \$160,665. Fairbanks Associates was ranked second, with a combined total first year shelter and maintenance rent of \$6,806,871 and a cost per quality point of \$163,694.

In our May 14 decision, we disagreed with the protester that the Corps should have summarily rejected North Star's initial proposal because the average of its total projected costs, undiscounted, exceeded \$8,140,000. We found the protester's suggested method of determining average annual cost,^{3/} the term used in the solicitation in connection with the cost ceiling, would not permit a meaningful comparison of the cost of government construction with the cost of contractor construction. That was because without discounting the total projected costs and expressing them in present value terms, the costs would not reflect the fact that due to inflation, dollars that will be paid by the government to the contractor in future years will be worth less than current dollars. Nor would such a method of cost analysis meet the applicable Office of Management and Budget (OMB) Circular No. A-104 requirement that "undiscounted cash flow analysis will not be the basis for identifying the most economic of lease-or-purchase alternatives." Further, we found that the RFP indicated that the ceiling would be applied during the economic analysis stage of the evaluation process, completed for submission to Congress, rather than at the initial proposal stage as Fairbanks Associates suggested.

More important, we determined that while the RFP could have been more clearly drafted, defining average annual cost and/or explaining how it would be calculated, the deficiency was not prejudicial to the protester. Rather, we stated, when--after the submission of initial offers--the Corps told offerors that the applicable congressional committee considered all proposed prices too high, the cost ceiling was no longer relevant. Nor did the record indicate that the ceiling had been used in the formation of best and final offers. Fairbanks Associates' initial offer was already below the ceiling (whether calculated as the Corps intended or as Fairbanks Associates believed reasonable), and Fairbanks then lowered its price significantly in its best and final offer. Thus, we were not persuaded by the protester's contention that, but for its understanding of the cost ceiling, it would have offered a higher price.

^{3/} Fairbanks Associates would merely have taken each offeror's total projected costs and divided by 19.5 to obtain an average annual cost.

Concerning the cost evaluation, we disagreed with the protester's interpretation of the RFP as mandating evaluation of the maintenance rent by use of the "Economic Indicators" prepared for the Joint Economic Committee of Congress by the Council of Economic Advisors. Instead, we found that the RFP mandated the use of "Economic Indicators" for payment purposes, but did not state that these indicators for past years would be used for evaluation purposes. We held that the agency was free to use any reasonable index, including the Office of Management and Budget (OMB) rates stipulated by the Secretary of Defense that are specifically intended to predict future inflation. (These rates were less than the average of past "Economic Indicators.") We held that although Fairbanks Associates' method of estimating future inflation may have been reasonable, the protester had not met its burden of showing that the agency's use of the OMB rates was unreasonable.

Alternatively, in our May 14 decision, we questioned whether there was a reasonable possibility that by increasing its price, Fairbanks Associates could have displaced North Star. (North Star had 984 technical points, while Fairbanks Associates had only 862.) We stated that an increase in price might make the protester's offer less competitive by also increasing its cost per quality point. In order to displace North Star, an increased price would have had to result in an increase in technical score that not only outweighed the detriment from the higher price, but also made up the substantial difference in technical scores between North Star and Fairbanks Associates. Specifically, we noted there was a difference of 122 quality points (12 percent) between Fairbanks Associates and North Star which, using best and final offers, translated into a difference of \$3,029 per quality point. The protester did not suggest how it could have improved its technical proposal so as to result in a substantial increase in quality for an unspecified additional price. Further, we found that the maintenance rent represented less than 16 percent of Fairbanks Associates' proposed first-year price, and that it was not reasonable to assume that a small change in this portion of its price, due to use of a different inflation rate, would have increased the firm's cost/quality ratio. Also, we considered Fairbanks Associates' bare statement that it would have submitted a more elaborate proposal insufficient, standing alone, to show that the firm would have had a reasonable chance of receiving the award if it had known of either the actual nature of the cost ceiling or the method of evaluating maintenance rent.

RECONSIDERATION

On reconsideration, Fairbanks Associates contends that our May 14 decision is erroneous because of the failure to find prejudice. The protester argues that the prejudice it suffered as a result of the alleged ambiguities in the solicitation concerning annual average cost and escalation rates meets the applicable legal standard for modifying our decision and is clear from the record.

The protester concedes the reasonableness of our interpretations of the cost ceiling and the escalation rates, but maintains that its own interpretations are at least as reasonable, so that the existence of two reasonable interpretations renders the RFP ambiguous. The protester continues to maintain that but for its interpretations of the limitations on cost and of the escalation rates, it could have submitted a better technical proposal at a higher price and displaced North Star.

Fairbanks Associates contends our May 14 decision imposed too high a burden of proof for prejudice. According to Fairbanks Associates, it clearly meets the standard for prejudice set forth in Wheeler Brothers, Inc., et al.--Request for Reconsideration, B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388, i.e., a "reasonable possibility that the protester was displaced due to the unfair competitive advantage afforded another offeror as a result of the defect." The firm argues that a reasonable possibility that the firm was displaced as a result of alleged ambiguities is indicated in the cost savings offered by its proposal and the minimal percentage difference between the cost per quality point ratios of the two proposals. According to the protester, its proposed first-year price was 12 percent less than North Star's, and this price difference should offset the difference in quality points. Further, the protester maintains that a comparison of the cost per quality point ratios of the proposals--there was a 2 percent difference--would be a more accurate measurement of the difference between the proposals. The protester argues that in Wheeler Brothers, our Office found a reasonable possibility of prejudice when the difference between competing offers was approximately 3 percent of the estimated value of the contract. Fairbanks Associates suggests that only minor hypothetical changes needed to be made in its technical proposal to displace North Star. Examples that Fairbanks suggests include enhanced fixtures, larger rooms, or added recreational facilities.

ANALYSIS

We believe the request for reconsideration is based in part on a misinterpretation of our May 14 decision. Central to our decision on the cost ceiling was our holding that once the Corps told offerors that the applicable congressional committee considered prices too high and requested lower best and final offers, the cost ceiling was irrelevant. At that time, any compliance with the cost ceiling in the RFP, however interpreted, became academic. Thus, the request for best and final offers in effect amended the RFP by deleting the cost ceiling. For this reason, we continue to find the protester's contention that but for its understanding of the cost ceiling, it would have offered a higher priced, technically superior proposal totally unpersuasive.

We emphasize the facts in the case that rebut Fairbanks Associates' argument on this point: Fairbanks Associates' initial price was less than the cost ceiling, whether calculated as the Corps intended or as Fairbanks Associates believed reasonable; in its best and final offer,

Fairbanks Associates lowered its price significantly. Thus, it is clear from the record that the protester did not rely on its interpretation of the cost ceiling in calculating its proposed price. Accordingly, the protester's contention that it was prejudiced due to its interpretation of the cost ceiling is without merit. We deny the request for reconsideration on this basis.

Concerning the evaluation of the maintenance rent, we continue to find that the solicitation was silent as to the specific inflation rates that would be used for evaluation purposes. Thus, the agency was free to use any reasonable rate or rates. Under the circumstances, the protester has the burden of establishing, not that its method of evaluation might be reasonable, but that the agency's method was unreasonable. See Centurial Products, 64 Comp. Gen. 858 (1985), 85-2 CPD ¶ 305. Fairbanks Associates did not do so in its original protest and has not done so here. More importantly, we remain unconvinced that there was a reasonable possibility that Fairbanks Associates' was prejudiced by the Corps use of inflation rates supplied by the Office of Management and Budget to the Secretary of Defense. The rates used by the Corps were at most 1.3 percent less than the rate used by Fairbanks Associates, which was based on a 4 year average of past "Economic Indicators."^{4/} Maintenance represents less than 16 percent of Fairbanks Associates' proposed first-year price, and it is not reasonable to assume that a small increase in this small portion of its offered price would have increased the firm's cost/quality ratio.

We also continue to question the reasonable possibility of displacement of North Star by Fairbanks Associates. We find no validity to the protester's contention that the cost savings offered by its proposal would offset the difference in quality points between its proposal and that of North Star. The evaluation formula--as clearly and unambiguously set out in the RFP--already gives equal weight to cost and technical factors. The formula is as follows:

$$\frac{\text{projected 19.5 year costs}}{\text{technical points}} = \text{cost per quality point}$$

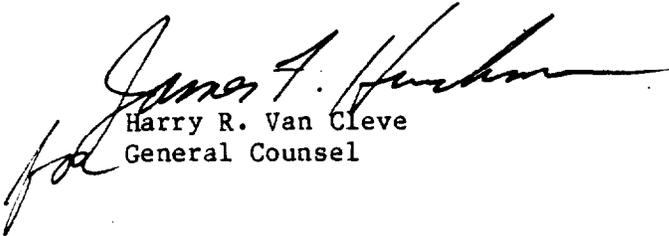
Thus, it would not be proper to give additional weight to cost. Although there was a 2 percent difference between North Star's and Fairbanks Associates' cost per quality point ratio, we considered the substantial difference in technical scores (12 percent) between the two offerors of paramount importance. As stated above, in order to displace North Star, any increased price would have had to result in an increase in Fairbanks

^{4/} The rates used by the Corps were 4 percent for fiscal year 1984 and 4.4 percent for fiscal year 1985; the rates gradually decreased to 3.4 percent for fiscal year 1989 and each year thereafter. The protester, on the other hand, used a constant 4.7 percent inflation rate.

Associates' technical score that not only outweighed the detriment from the higher price, but also made up the substantial difference in technical scores. Further, as we stated in our May 14 decision, even if the firm had been aware that the Corps would use lower inflation rates to evaluate its proposed first-year maintenance rent; we do not believe that there was a reasonable possibility that the firm could have increased its technical score by an amount sufficient to displace the awardee by increasing that portion of its proposed price representing maintenance rent.

Although Fairbanks now hypothesizes as to the increase in price and technical score that could have displaced North Star, these bare statements, after award, are not sufficient in themselves to show that the firm would have had a reasonable chance of receiving the award. See WHY R & D, Inc., B-221817, Apr. 16, 1986, 86-1 CPD ¶ 375.

The request for reconsideration is denied.


Harry R. Van Cleve
General Counsel