

T. R. House



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aviation Contractor Employees, Inc.

File: B-225964

Date: March 30, 1987

DIGEST

Award on an initial proposal basis without discussions to the firm judged to be technically superior but proposing other than the lowest overall cost offer was improper where at least one lower-priced proposal would have been in the competitive range.

DECISION

Aviation Contractor Employees, Inc. (ACE), protests the award of a contract to Pan Am Support Services, Inc., under request for proposals (RFP) No. DABT01-86-R-3005, issued by the Department of the Army. The procurement is for flight training services at Fort Rucker, Alabama. ACE in part complains that the award to Pan Am was improper because Pan Am was not the low offeror and any technical superiority the firm enjoyed did not justify its selection.

We sustain the protest.

BACKGROUND

The RFP contemplated the award of a firm-fixed-price contract to provide various flight training services for a two-year period. Separate technical and price proposals were solicited to be evaluated by a Source Selection Evaluation Board (SSEB) established for the purpose. The SSEB's recommendation was reported to the contracting officer who then selected the successful offeror, subject to approval by higher authority.

The RFP advised potential offerors that the technical proposals were more important than the price proposals and would be evaluated under the major criteria of: (1) Policies and Procedures; (2) Staffing; (3) Organization; (4) Experience; and (5) Personnel Qualifications. These

038494 -132610

criteria were further delineated with respect to their various evaluation subelements. The RFP stated that Criteria (1), (2), and (3) were of equal importance and were more important than Criterion (4), which, in turn, was described as being more important than Criterion (5). (Although not disclosed in the RFP, the number of scoring points assigned to each of these criteria by the Army for technical evaluation purposes was consistent with the description given to potential offerors.)

Six proposals were received in response to the RFP and were evaluated. The SSEB determined that Flight Safety, Inc., (FSI) had submitted the best technical proposal and, accordingly, awarded the proposal the highest number of technical evaluation points. The proposal of Pan Am was rated second-highest technically, with a score only slightly lower than FSI's. ACE was the third-ranked offeror, but its technical score was significantly lower than Pan Am's. The technical scores for the remaining offerors, Burnside Ott, Sikorsky Support Services, Inc., and Mac Air were all lower than Pan Am's and ACE's scores.

In terms of proposed price, FSI's price was the highest and significantly exceeded the government's estimate. The remaining proposed prices were all below that estimate, with Mac Air proposing the second highest price, followed in descending order by Pan Am, ACE, Burnside Ott, and Sikorsky.

The Army did not establish a competitive range for discussion purposes as the agency primarily concluded that, given the labor-intensive nature of the contemplated work, discussions would only result in prohibited technical leveling among the offerors since improvements in the proposals would be solely limited to changes in the respective number of instructors proposed by the various firms for the work. The Army then proceeded to make the award on the basis of the initial proposals as evaluated.

In this regard, the RFP had advised at section L8(c) that the contract award might be made on the basis of initial offers received, without discussions, and, therefore, that proposals as submitted "should contain the offeror's best terms from a cost or price and technical point." The SSEB recommended that Pan Am be awarded the contract because its technical proposal was quite strong and its proposed price was below the government's estimate. The SSEB determined that FSI's slightly superior technical proposal was not worth the price premium that would be associated with its acceptance over Pan Am's. On the other hand, although the SSEB recognized that

other offerors such as ACE had proposed prices lower than Pan Am's, the SSEB noted that these other firms had also received appreciably lower technical scores. The SSEB determined that this evidenced inferiority was not offset by the lower prices.

The SSEB's conclusions were expressed in an analysis which compared the competing offerors on a price-per-technical point basis (total proposed price divided by the number of technical evaluation points). Under this analysis, Pan Am's offer was found to represent the best overall value with the lowest price-per-technical point rating. FSI's price-per-technical point rating was second-lowest and ACE's rating was third-lowest. Accordingly, the SSEB recommended to the contracting officer that Pan Am be selected as the contract awardee, and the contracting officer concurred in that recommendation. ACE's protest to this Office follows the Army's award to Pan Am.

ANALYSIS

The Army justifies its award to Pan Am on the basis of initial proposals without discussions under the provisions of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(a)(3) (1986), which states that the general requirement that written or oral discussions be conducted in a negotiated procurement need not be met in an acquisition situation in which it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service being acquired that acceptance of the most favorable initial proposal without discussions will result in the "lowest overall cost to the Government at a fair and reasonable price." Section 15.610(a)(3) reflects the same exception to the requirement for discussions provided by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. III 1985). An agency may utilize this exception only where (1) the solicitation has advised all offerors of the possibility that an award may be made without discussions, and (2) the award in fact is made without discussions (excepting minor clarifications) being conducted with any offeror. FAR, 48 C.F.R. §§ 15.610(a)(3)(i) and (ii); see also Sperry Corp., 65 Comp. Gen. 195, 198 (1986), 86-1 CPD ¶ 28 at 5.

In Sperry, we noted that 10 U.S.C. § 2305(b)(4)(A)(ii) differed from the pre-CICA predecessor language of 10 U.S.C. § 2304(g) (1982), which did not require that the award result in the "lowest overall cost" to the government. Recently, we clarified our view regarding the discretion afforded

contracting agencies to make an award on the basis of initial proposals without discussions to hold that the CICA language prohibits agencies from accepting an initial proposal that is not the lowest considering only cost and cost-related factors listed in the RFP where there would be at least one lower-priced proposal within the competitive range. Hall-Kimbrell Environmental Services, Inc., B-224521, Feb. 19, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ _____; Training and Information Services, Inc., B-225418, Mar. 9, 1987, 87-1 CPD ¶ _____.

Here, we recognize that ACE's technical proposal was rated significantly inferior to Pan Am's. However, the firm's proposal was judged to be acceptable overall and received fairly strong scores in several subcriteria areas. With regard to those aspects of the proposal about which the SSEB voiced concern, such as the apparent ambiguity between ACE's stated intent in its proposal to provide additional personnel at no additional cost to the government, and the omission of those personnel from the firm's manning charts, as well as ACE's failure to address adequately the firm's management experience in certain areas, we do not see why those concerns were not the proper subject for competitive range discussions.

The purpose of such discussions is to advise offerors of deficiencies in their proposals and to provide them an opportunity for proposal revision so as to satisfy the government's requirements. Price Waterhouse, B-222562, Aug. 18, 1986, 86-2 CPD ¶ 190; Technical Services Corp., B-216408.2, June 5, 1985, 85-1 CPD ¶ 640. In our view, ACE's failure to include the personnel in question in its manning charts may well have merely been an informational deficiency suitable for resolution through discussions. See Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. In that regard, we do not necessarily accept the Army's view that the conduct of normal competitive range discussions would only have resulted in technical leveling--that is, that inferior-rated offerors would have been "coached" during such discussions into increasing the number of personnel originally proposed to the staffing levels featured in the better proposals. We point out that the concept of technical leveling generally involves helping an offeror to bring its proposal up to the level of other proposals through repeated rounds of discussions. See Price Waterhouse, B-222562, supra. In any event, even assuming the agency's concern is valid, we fail to understand the manner in which discussions with ACE for the purpose of resolving the ambiguity between the firm's manning charts and its stated intent to provide additional personnel at no cost would have led to prohibited leveling in this non-technical procurement. See Furuno U.S.A., Inc., B-221814, supra.

Similarly, ACE's failure to address sufficiently its management experience in certain areas may also have represented a resolvable informational deficiency. It appears that the firm provided the resumes of two key personnel in lieu of a detailed description of the firm's management experience in other areas. ACE contends that the experiences of these key employees as set forth in the resumes adequately addressed this evaluation element. Be that as it may, it has been our view that an agency's concern regarding an offeror's inadequate demonstration of its prior experience in its proposal--an informational deficiency clearly distinguishable from a weakness in actual experience which cannot be remedied--is the proper subject for resolution through discussions. See Cosmos Engineers, Inc., B-220000.3, Feb. 24, 1986, 86-1 CPD ¶ 186.

From our review of the record, we believe that ACE potentially could have increased its technical score had the firm been apprised of these perceived informational deficiencies and given the opportunity to correct them in a revised proposal. In our view, it is not inconceivable that ACE would have been able to improve its technical proposal to the point where, with a gain of a relatively modest number of points, its lower proposed price--which in turn could have been reduced upon submission of a best and final offer--would have offset any remaining technical weakness so as to make it the most advantageous offer. Since Pan Am's offer was not the lowest in terms of overall cost and was not the only offer with a reasonable chance of being selected if discussions were conducted, we conclude that the Army's award to Pan Am on the basis of initial proposals was fundamentally inconsistent with the provisions of 10 U.S.C. § 2305(b)(4)(A)(ii) and the FAR, 48 C.F.R. § 15.610(a)(3). Hall-Kimbrell Environmental Services, Inc., B-224521, supra.

Accordingly, by separate letter of today, we are recommending to the Secretary of the Army that discussions now be conducted with all offerors whose proposals are within the competitive range to allow for the submission of revised proposals in satisfaction of the agency's requirements. We further recommend that Pan Am's contract be terminated for the convenience of the government if it is not the successful offeror at the conclusion of these discussions.

The protest is sustained.

for 
Comptroller General
of the United States