S. Rich

The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Kunkel-Wiese, Inc.

**File:** B-233133

**Date:** January 31, 1989

**DIGEST**

1. Award of contract to higher-priced offeror which had higher-ranked proposal in technical areas is proper where contracting agency's selection decision is reasonable since selection officials have broad discretion in making a price/technical tradeoff so long as it is consistent with the solicitation's evaluation scheme.

2. Contracting agency is only obligated to notify unsuccessful firms of the agency's award decision after the award has been made.

**DECISION**

Kunkel-Wiese, Inc. (KW) protests the award of a contract to Dillon Construction, Inc. under request for proposals (RFP) No. CC-88-76, issued by the Panama Canal Commission (PCC) for the replacement of locomotive turntables at the Gatun and Miraflores locks on the Panama Canal. KW argues that PCC improperly failed to adhere to the RFP's evaluation criteria, that the contracting officer awarded the contract in bad faith without advance notice to the protester, and that PCC improperly evaluated the experience of Dillon's proposed subcontractor.

We deny the protest.

The RFP stated that award would be made to the firm offering the best overall proposal based "primarily upon technical merit," with cost considered as appropriate. The RFP contemplated the submission of separate technical and price proposals. Price proposals were to be submitted on the basis of firm fixed-priced offers. For award purposes, the RFP listed the following technical evaluation factors: 1) appropriateness of the schedule and detailed work plan demonstrating understanding of the work (100 points); 2) timeliness of past performance (25 points);

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3) sufficiency of equipment (75 points); 4) past experience (50 points); 5) financial capability (50 points); 6) experience of key personnel (50 points); and 7) knowledge of local laws (25 points), for a total of 375 points. The RFP stated that the proposed prices of substantially equal technical proposals would be a major factor in selection of a proposal for award. However, the RFP also stated that PCC reserved the right to award to other than the low offeror, if the evaluation results in a determination that another offeror is "significantly superior" from a technical standpoint.

KW and Dillon were the only two firms to submit initial offers and, after evaluation, PCC determined that Dillon's offer was technically acceptable and that KW's offer was susceptible of being made technically acceptable. Accordingly, both firms were included in the competitive range, and PCC conducted written and oral discussions with each offeror. Thereafter, both firms submitted best and final offers (BAFOs) and received the following evaluation scores:

| Firm | Points |
|---|---|
| Dillon | 325 |
| KW | 260 |

Both firms' BAFOs were considered technically acceptable. As to price, KW's offer was only slightly lower than Dillon's ($2,887,977 and $2,924,254, respectively).

After consideration of the relative technical merit of the proposals, and in light of the negligible price difference between the firms, the contracting officer decided to make award to Dillon as the higher-priced, but technically superior offeror. On September 23, prior to making an award, the contracting officer orally advised both firms of his decision.

Thereafter, on September 26, KW requested a debriefing, which was scheduled for the following day. During the course of the debriefing, the protester urged the contracting officer to contact other government contracting activities regarding allegations by KW regarding Dillon's performance on other contracts; according to KW, Dillon had failed in the past to complete work on government contracts in a timely fashion. The contracting officer, although doubting that he would discover any new information, agreed to contact other government contracting activities as KW requested. In addition, the protester asked the contracting officer to provide notice prior to making the award to Dillon so that KW could file for an injunction in District

Court against the award.1/ After telephonically contacting a number of contracting activities, the contracting officer, on September 29, made the award to Dillon without prior notice to the protester. This protest followed.

The protester first argues that PCC improperly failed to adhere to the RFP's evaluation criteria in making its award to Dillon. According to KW, PCC's actions during the course of the procurement led the firm to believe that its proposal and Dillon's proposal were essentially equal from a technical standpoint and that price would be the overriding consideration in the award decision. In support of its position, KW states that in none of PCC's written communications to the firm did the agency suggest that there existed a significant technical difference between its proposal and Dillon's. KW also states that during oral discussions, when it suggested that the award decision would be based upon technical superiority, the agency's personnel stated that price would be important in the award decision. Finally, KW argues that it was misled into submitting a BAFO; according to the protester, had it known of the technical disparity between the offers, it would not have submitted a BAFO. In this connection, KW argues that award should have been made on the basis of initial offers had the technical disparity between the firms been as significant as suggested by PCC.

The agency responds that it made a proper price/technical tradeoff in its decision to award to Dillon, and that such a tradeoff was contemplated by the RFP. In addition, PCC states that there was nothing improper in its actions during the course of the procurement. As to its written communications with KW, the agency states that at no time did it indicate that the firms' offers were essentially equal from a technical standpoint. As to its statement during oral discussions, the agency states that it did nothing more than emphasize to KW the terms of the RFP, namely, that price would be a factor in its award decision. Finally, PCC argues that it properly included KW within the competitive range, conducted discussions, and requested a BAFO from the firm, since KW's proposal was determined to be susceptible

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1/ In this connection, we note that the record contains an apparent dispute between the parties regarding an exchange which took place during the debriefing. According to KW, the contracting officer agreed to apprise KW of his intention to make award to Dillon prior to doing so, in order to provide KW an opportunity to file for its injunction. The agency, on the other hand, states that it only agreed to conduct the inquiries requested by KW before making the award.

of being made technically acceptable, and the firm thus had a reasonable chance of receiving the award.

We agree with the agency. The RFP specified that award would be made to the firm submitting the best overall proposal with primary consideration being given to technical merit. The RFP also specified that price would become the major selection factor only between substantially equal technical proposals. Our Office has consistently held that under solicitations which call for award on the basis of best overall value to the government, agency source selection officials have broad discretion to make cost/technical tradeoffs; such tradeoffs must only have a reasonable basis. See, e.g., Southeastern Computer Consultants, Inc., B-229064, Jan. 19, 1988, 88-1 CPD ¶ 48. Where the record supports an agency's selection of a higher priced, technically superior offeror, we will not question the agency's source selection determination. Id.

Here, we think that the record contains reasonable support for the agency's decision to award to Dillon as the technically superior offeror. As noted above, Dillon scored significantly higher on its technical proposal than did KW and the price difference between the firms was negligible. Briefly, PCC found that Dillon's proposal contained a more complete and thoroughly analyzed plan for carrying out the work. The information submitted by Dillon also showed that the firm had more experience in heavy construction, using equipment such as cranes and barges, than did KW. While the agency found that KW had put together a "good team," Dillon's team was found to be equally good in every respect and very superior in the key position of superintendent, for which Dillon proposed an individual with extraordinary experience in this type of heavy construction. Based on this record, we have no basis to question the agency's decision that selection of Dillon, with the technically higher-ranked proposal and with only a negligibly higher price, was justified.

We also do not find any evidence in the record to suggest that PCC intimated to KW that the two firms' proposals were substantially equal technically. As to the written correspondence relied upon by KW,2/ we think it can only be reasonably interpreted as indicating no more than that KW was within the competitive range for discussion purposes and

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2/ This correspondence is comprised of the agency's letter to KW in which the agency propounded written discussion questions to the firm and PCC's letter apprising KW of PCC's award decision.

was ultimately found to be technically acceptable. Additionally, we disagree with the protester's interpretation of the agency's comments during oral discussions concerning the importance of price in the selection decision; in our view, the agency did nothing more than reiterate the terms of the RFP.

Similarly, we do not believe that the agency acted improperly by including KW within the competitive range. As noted above, the protester's initial proposal was found to be susceptible of being made acceptable. As such, it was properly included within the competitive range, and the agency properly conducted discussions with and requested a BAFO from the firm. See Federal Acquisition Regulation (FAR) § 15.609(a) (FAC 84-16); Kay and Assocs., Inc., B-228434, Jan. 27, 1988, 88-1 CPD ¶ 81.

The protester next argues that the contracting officer acted in bad faith by not apprising KW of his ultimate source selection decision prior to making the actual award. According to KW, PCC improperly deprived it of its legal right to seek an injunction by failing to apprise the firm of its decision to make the award to Dillon, especially in light of the fact that the contracting officer had "promised" to do so. The agency denies ever having made a promise to KW to that effect.

FAR § 15.1001(a) (FAC 84-13) requires contracting agencies to promptly notify unsuccessful offerors that their proposals have not been selected for award ". . . unless disclosure might prejudice the government's interests." However, FAR § 15.1001(c) only imposes an obligation upon contracting agencies to notify unsuccessful firms of the agency's award decision once the award has been made. We are aware of no legal authority under the circumstances here which imposes a duty upon contracting officials to notify offerors prior to making an award.

KW next argues that PCC improperly evaluated Dillon's offer in the area of its demolition subcontractor. According to the protester, Dillon's demolition subcontractor does not meet the experience requirements contained in the statement of work which, in pertinent part, states that the "[d]emolition work shall be performed by a general contractor or specialty subcontractor experienced in this type of work." KW argues that Dillon's subcontractor is a relatively new concern which does not have the capability to perform the work. According to KW, it was the only firm whose subcontractor was qualified to perform the work.

The record shows that Dillon proposed Admiral Construction Company as its subcontractor for demolition. While this firm is newly-formed, its principals previously were the president and vice-president of Concrete Coring Company of Panama, which successfully completed (in an exemplary manner) what the agency considered to be the most ambitious concrete cutting project ever accomplished by PCC in Panama (concrete drilling at Gatun Locks). In this regard, an agency may properly consider the experience of a predecessor firm or of the corporation's principal officers which was obtained prior to incorporation date. S. C. Jones Services, Inc., B-223155, Aug. 5, 1986, 86-2 CPD ¶ 158. We therefore have no basis to question the agency's determination that Dillon's proposed subcontractor was acceptable.

Finally, KW argues that the PCC improperly evaluated its proposal in terms of financial capability to perform the contract, an evaluation factor worth 50 points of the possible 375 points under the solicitation's evaluation scheme. KW received 20 of the possible points while Dillon received 40. According to KW, the evaluation was improper because it was "compared" to Dillon, a financially larger firm. KW contends that each firm should have been (but was not) independently evaluated and argues that, had this been done, its liquidity and its commitments for credit for use in connection with performance of the subject contract would have resulted in a higher rating.

We simply note that, even if KW received a perfect score under this criterion, it would have receive only 30 additional points which, in view of Dillon's demonstrated superiority in the more important technical areas, would not have altered the selection decision. Thus, there is no basis to conclude that any misevaluation under this criterion could have prejudiced KW by depriving the firm of an award to which it was otherwise entitled. See Employment Perspective, B-218338, June 24, 1985, 85-1 CPD ¶ 715; Lingtec, Inc., B-208777, Aug. 30, 1983, 83-2 CPD ¶ 270. Accordingly, we need not consider this matter separately.

The protest is denied.

for Seymour Efros
James F. Hinchman
General Counsel