

Van S. Smith



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Gary Bailey Engineering Consultants

File: B-233438

Date: March 10, 1989

DIGEST

1. A contracting officer properly may select a proposal with a lower technical rating to take advantage of its lower cost, even though cost was the least important evaluation criterion, where he reasonably determines that the cost premium involved in making an award to the higher rated, higher cost offeror is not justified in light of the acceptable level of technical competence available at the lower cost.

2. Agency realism analysis of successful offeror's cost proposal was reasonable. Although awardee estimated the cost of the contract as much less than the protester, the awardee's proposed technical and management approach was acceptable and the agency determined that the firm's proposed cost was reasonable for the proposed approach.

DECISION

Gary Bailey Engineering Consultants protests the award of a contract to Magline, Inc., under request for proposals (RFP) No. DAAK60-88-R-0059S issued by the Army for a value engineering study and prototypes of the standardized integrated command post systems (SICPS) tent frame.

We dismiss the protest in part and deny it in part.

The RFP requested cost-plus-fixed-fee offers for a three phase effort. In phase I, the contractor was to perform an engineering and manufacturing analysis of the current SICPS tent frame. Based on that analysis, the contractor was to propose improvements in the current tent frame and design a separate prototype frame incorporating state-of-the-art design and alternative materials, such as lightweight metals, composites and/or plastics. In phase II, the contractor was to make a prototype of both the retrofit and

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state-of-the-art frames, test the frames itself and make them available to the government for testing. In phase III, the contractor was to fabricate 10 prototypes of the design chosen by the government.

Award under the solicitation was to be made to the offeror whose proposal provided the best mix of technical, management and cost considerations. According to the solicitation, in the evaluation, technical considerations were to be weighted approximately the same as management and cost combined.

Five firms submitted proposals in response to the solicitation. The technical and management proposals were evaluated and, based on the results of that evaluation which did not consider cost, the evaluation panel recommended an award to Bailey. After reviewing both the cost and the panel's technical evaluation, the contracting officer formed a competitive range which included both Bailey and Magline. Following the evaluation of the cost proposals and discussions with Magline and Bailey on cost issues alone, best and final offers were requested and submitted by Bailey and Magline.

The agency then reevaluated the cost proposals and scored the proposals using the following weights: technical, 50 percent; management, 30 percent; and cost, 20 percent. The weighted scores and the two firms' estimated costs were as follows:

	<u>Technical</u>	<u>Management</u>	<u>Cost</u>	<u>Total</u>	<u>Estimated Cost</u>
Magline	38.8	25.0	20 ^{1/}	83.8	\$100,658
Bailey	47.0	29.1	20	96.1	\$214,462

Based on the evaluation, the contracting officer determined that although Bailey received the highest technical and management score, Magline's proposal was also acceptable, Magline fully understood the requirements and the difference in technical and management scores did not justify the additional projected cost of an award to Bailey. Award was made to Magline on September 30, 1988.

^{1/} The RFP stated that costs would be rated as acceptable or unacceptable. Both offerors here received the same score because each cost proposal was considered acceptable.

Bailey primarily contends that the award was not made in accordance with the solicitation evaluation scheme. According to the protester, since it had a higher combined technical, management and cost score than Magline under the criteria set out in the solicitation, it was entitled to the award.

We disagree. First, as the agency points out, the solicitation did not provide for award on the basis of the highest total point score. Rather, the RFP stated that the proposal which provides the best mix of technical, management and cost considerations would be selected for award. The point scores were merely guides for decision-making by the source selection official, who had the discretion to determine whether the technical advantage associated with Bailey's proposal was worth the extra cost. See ICOS Corp. of America, 66 Comp. Gen. 246 (1987), 87-1 CPD ¶ 146. Even where, as here, cost is the least important evaluation criterion, the determining element is not the difference in technical merit per se, but the contracting agency's judgment concerning the significance of that difference. Hardman Joint Venture, B-224551, Feb. 13, 1987, 87-1 CPD ¶ 162.

The contracting officer found that Magline's combined technical and management score of 63.8 (out of 80 points) was lower than Bailey's score of 76.1 in part because some of the evaluators questioned Magline's design and value engineering experience. Based on a review of Magline's proposal, however, the contracting officer determined that the evaluation panel had not given Magline credit for several successful value engineering change proposals for similar tent products. The contracting officer concluded that Magline's proposal demonstrated the extensive design experience required by the solicitation and that the evaluation panel's scoring exaggerated the difference between the two proposals. Under the circumstances, and since Magline's proposal included an acceptable and sound technical and management approach, the contracting officer determined that Bailey's higher rated technical proposal was not so superior to that of Magline to justify a cost that was expected to be twice as high. This is the type of decision vested in the discretion of the contracting officer, and we find no basis to object to it here. AMG Associates, Inc., B-220565, Dec. 16, 1985, 85-2 CPD ¶ 673.

Bailey, nonetheless, argues that its own proposed cost estimate was accurate and that the work required by the solicitation, including state-of-the-art design, materials and analysis, cannot be done for the low cost proposed by Magline. In this respect, Bailey argues that the government

cost estimate for this project, \$102,465, was too low and if corrected, that estimate would be approximately \$200,000 which demonstrates that Magline's cost estimate of \$100,658 was unreasonable and its own estimate of \$214,462 was reasonable. Bailey argues that the contract was awarded to Magline solely because that firm's proposal was within the available funds which equaled the government cost estimate.

The thrust of these arguments is that Magline cannot perform the contract for the cost which it proposed. This is a challenge to the agency's determination of the cost realism of Magline's proposal. In this respect, under a cost-reimbursement type contract, offerors' proposed costs of performance should not be considered as controlling since, regardless of the costs proposed by the offeror, the government is bound to pay the contractor its actual and allowable costs. Federal Acquisition Regulation § 15.605(d). Accordingly, where, as here, the RFP contemplates the award of a cost-type contract, the agency is required to analyze each offeror's proposed costs for realism. GP Taurio, Inc., B-222564, July 22, 1986, 86-2 CPD ¶ 90.

The agency explains that Magline's technical approach and the firm's in-house production capability allowed the firm to propose a much lower cost than Bailey. First, the agency notes that Magline proposed a production method that relies on simple parts that may be produced by casting. On the other hand, Bailey proposed to individually machine each frame which requires much more time and labor. Also, the Army maintains that Magline is a larger firm with the in-house capability to produce the frames using its proposed method, while Bailey is a small engineering firm, with no in-house production capability. Thus, Bailey is at a further cost disadvantage since it had to include in its proposal the cost of a subcontractor using its more expensive individual machining method.

Magline's cost advantage occurs primarily in the third phase of the contract where it proposed to use the less expensive production method. Bailey contends that because of the solicitation requirements relating to state-of-the-art materials, design and analysis, the savings proposed by Magline are not possible. Nonetheless, these requirements primarily affect the cost of the first and second phases of the contract and there is little difference between the two firms' estimated costs for those phases. Most of the difference in cost between the two proposals is in the third phase and, based on the differing approaches and capabilities of the two firms, we believe the agency has

shown how that difference is justified. Under the circumstances, the record supports the reasonableness of the Army's determination that Magline can complete the contract at the cost that it proposed.

We need not consider in detail Bailey's allegation that the Army's original estimate of the cost to perform the contract was too low. While there appear to be some errors in the estimate, the agency has explained them as either typographical errors which did not impact the estimate amount or as de minimis. In any event, the agency properly analyzed Magline's cost estimate for realism and determined that Magline's proposed approach could be accomplished at the cost estimate submitted by the firm. Such an analysis is not limited to a mere comparison of the proposed costs to a government estimate but requires that the government independently determine if the proposed cost estimate is adequate for the proposed approach. Kinton, Inc., B-228260.2, Feb. 5, 1988, 67 Comp. Gen. _____ (1988), 88-1 CPD ¶ 112. Consequently, it is clear that any errors in the agency's cost estimate would not have impacted on the offerors' varying approaches to producing the frames which was the primary cause of the different cost estimates. Thus, those errors had no effect on the agency's cost realism determination.

In its final protest submission filed January 10, Bailey says the technical evaluation panel was correct when it allegedly rejected Magline's proposal as technically unacceptable since Magline's proposal "only briefly referred to the fundamentals." Bailey also says that monthly status reports submitted by Magline under its contract confirm that the firm is using a simplistic stress analysis of limited load cases to make engineering design decisions.

New grounds of protest such as these must independently satisfy the timeliness requirements of our Bid Protest Regulations and thus must be filed not later than 10 working days after the basis is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1988); Bell Technical Operations Corp., B-225819 et al., May 21, 1987, 87-1 CPD ¶ 534. Further, a protester has an affirmative obligation to diligently pursue the information forming a basis for protest, and if the protester fails to do so within a reasonable time, we will dismiss the issue as untimely when it is ultimately raised. D. Moody & Co., Inc., B-227596, July 20, 1987, 87-2 CPD ¶ 70.

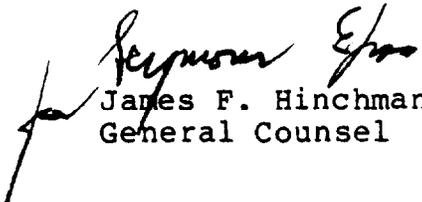
Here, Bailey did not challenge the technical evaluation of Magline's proposal in its initial submission or in its comments on the agency report and the record does not

indicate when Bailey requested and received information on which it bases its allegations regarding the technical evaluation. In the absence of any indication in the record why the arguments raised by Bailey on January 10 could not have been made when Bailey filed its initial protest, or at least when it filed its comments on the report, those arguments are untimely and not for consideration. Arndt & Arndt, B-223473, Sept. 16, 1986, 86-2 CPD ¶ 307.

In any event, contrary to Bailey's contention, there is no indication in the record that Magline's proposal was considered unacceptable by the evaluation panel at any point. Although the technical evaluation panel recommended an award to Bailey, as explained above, however, based on the technical, management and cost evaluations, the contracting officer subsequently included Magline's lower scored but technically acceptable proposal in the competitive range. In this connection, we have no basis upon which to disagree with the contracting officer's action as selection officials are not bound by the scoring or recommendations of the evaluators. Abt Assoc., Inc., B-226130, Apr. 28, 1987, 87-1 CPD ¶ 445.

Finally, although Bailey maintains that Magline has not performed the analysis required by the contract, this is a matter of contract administration, and thus is not for review under our Regulations, 4 C.F.R. § 21.3(m)(1).

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel