



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: A. T. Kearney, Inc.

File: B-237731

Date: March 19, 1990

John W. Egan, for the protester.
David J. O'Connor, Environmental Protection Agency, for the agency.
Peter A. Iannicelli, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that contracting officer improperly failed to request best and final offers, thereby depriving protester of any opportunity to revise or clarify its initial proposal, is denied where contracting officer: (1) held oral discussions with all offerors in the competitive range, including protester; (2) sent each offeror a list of written discussions questions/comments confirming oral discussions; and (3) sent letters inviting each offeror to submit final revisions or modifications to their technical or cost proposals by a common cutoff date/time.
2. Discussions of technical matters were meaningful where agency imparted sufficient information to protester to afford it a reasonable opportunity to identify and correct any deficiencies in its proposal and discussions were designed to guide protester into those portions of its proposal that required amplification.
3. Protest that agency improperly raised protester's proposed costs in cost evaluation for cost-type contract without holding discussions with protester concerning alleged cost deficiencies is denied, where the contracting agency reasonably determined that protester's costs were understated after consulting with Defense Contract Audit Agency and comparing protester's proposed labor rates with rates billed under previous and current contract for similar services, and record shows that protester was not competitively prejudiced in any event.

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DECISION

A. T. Kearney, Inc., protests the Environmental Protection Agency's (EPA) award of a support services contract to Abt Associates, Inc., pursuant to request for proposals (RFP) No. D900374L1. Kearney argues that EPA did not hold meaningful discussions with Kearney nor request best and final offers (BAFOs) from all offerors. Kearney also charges that the contracting agency did not evaluate proposals in accord with the RFP's stated evaluation criteria, because the contract was awarded to Abt even though Abt's proposed costs were higher than Kearney's.

We deny the protest.

Issued on March 31, 1989, the RFP solicited offers to perform economic and regulatory impact analyses in support of the Office of Toxic Substances. The RFP contemplated award of a cost-plus-fixed-fee contract for a basic period ending September 30, 1990, and contained options for 2 additional years. Offers were to be based upon an estimated level of effort for each of the basic and option periods.

The RFP stated that EPA would make award to the responsible offeror whose conforming offer was determined to be most advantageous to the government, cost or price and other factors considered. The RFP also stated that technical quality was considered more important than cost or price and that proposals would be evaluated for cost realism. For award purposes, proposals were to be evaluated on both technical factors and cost for the basic and option periods.

The RFP listed the technical evaluation factors and the maximum number of evaluation points that could be achieved for each factor as: (1) company qualifications and expertise (180 points); (2) personnel availability (40 points); (3) technical qualifications of project team (280 points); (4) technical approach to sample work assignment 1 (150 points); and (5) technical approach to sample work assignment 2 (350 points). A number of evaluation subfactors and the possible point scores for each were listed within each evaluation factor.

Proposals were received from three offerors by the May 1 closing date. After initial proposals were evaluated on both technical merit and cost considerations, all three offerors' proposals were included in the competitive range. Oral discussions were conducted with each offeror during July. Discussions were confirmed by letters to each

offeror, dated July 20, and offerors were advised that they could submit written revisions to their initial proposals by August 7.

After proposal revisions were evaluated on both technical and cost factors, the contracting officer determined that the competitive range should be narrowed to only one firm, and selected that firm, Abt, for contract award. The source selection official concurred. Final negotiations were held with Abt on September 25 and 26, and the contract was awarded to Abt on September 30. EPA notified all offerors, by letters dated October 6, that the contract had been awarded to Abt. On November 9, Kearney filed its protest in our Office. EPA debriefed Kearney on January 9, 1990.

Kearney first alleges that EPA improperly failed to request BAFOs from each offeror, thereby depriving Kearney of any opportunity to revise or clarify its initial proposal as required under subpart 15.6 of the Federal Acquisition Regulation (FAR). We find no merit to this argument.

Generally, contracting officers are required to hold written or oral discussions with all offerors whose initial proposals are in the competitive range. FAR § 15.610(b). After discussions are completed, contracting officers are required to issue to all offerors still remaining within the competitive range requests for BAFOs. FAR § 15.611. Among other things, requests for BAFOs must indicate that discussions are completed, state that this is an opportunity for offerors to submit BAFOs, and set a common cutoff date and time for submission of written BAFOs. Id.

Here, the record shows that EPA did conduct oral discussions with all three offerors in July 1989. On July 20, the contracting officer sent each offeror a letter confirming that oral discussions had been conducted and including a list of questions/comments regarding both technical and cost aspects of each offeror's initial proposals. The contracting officer's letter to Kearney stated:

"You are invited to submit to the Contracting Officer, on or before 4:30 p.m., August 7, 1989, any final revision or modification to your technical or cost proposal setting forth such additional support, clarification, correction or improvement you determine to be necessary either as a result of the discussions or otherwise."

While the contracting officer did not specifically use the words "best and final offer," in our opinion, the letter reasonably should have conveyed to Kearney that discussions

were closed and that Kearney was invited to submit a revised proposal or BAFO by the specified closing time. Accordingly, the protest is denied on this point.

Kearney next contends that the contracting agency failed to hold meaningful discussions with it, and, therefore, Kearney alleges that it was denied an opportunity to revise its initial proposal to correct or clarify any perceived deficiencies therein. In its initial protest, Kearney made only a general allegation that EPA did not treat all offerors equally. In a subsequent letter, dated November 20, Kearney asserted that the agency's discussions were inadequate because EPA did a cost realism assessment of and modified Kearney's revised cost proposal without holding discussions with Kearney concerning the perceived cost deficiencies. It was only after EPA had issued its report responding to Kearney's initial protest and after EPA had held a debriefing conference with Kearney on January 9, 1990, that Kearney provided specific details in support of its allegation that the discussions were inadequate regarding perceived cost deficiencies. Kearney also asserted for the first time that discussions of technical matters were insufficient.

The Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4)(B) (1988), as implemented in FAR § 15.610(b), requires that written or oral discussions be held with all responsible offerors whose proposals are in the competitive range. For competitive range discussions to be meaningful, agencies must point out deficiencies in proposals unless doing so would result in technical transfusion or leveling. URS Int'l, Inc., and Fischer Eng'g & Maintenance Co., Inc. et al., B-232500 et al., Jan 10, 1989, 89-1 CPD ¶ 21.

Although agencies are not obligated to afford offerors all-encompassing discussions, or to discuss every element of a technically acceptable proposal that received less than the maximum possible score, they still generally must lead offerors into the areas of their proposals which require amplification. Id. Discussions should be as specific as practical considerations will permit in advising offerors of the deficiencies in their proposals. Id. The actual content and extent of discussions are matters of judgment primarily for determination by the agency involved, and our Office will review the agency's judgments only to determine if they are reasonable. Technical Servs. Corp., B-216408.2, June 5, 1985, 85-1 CPD ¶ 640.

In view of Kearney's charge that discussions were inadequate regarding perceived technical deficiencies, we examined all evaluation materials and the written record of the

negotiations. In our opinion, the record supports a finding that the discussions on technical matters were adequate and that EPA reasonably led Kearney into those areas of its technical proposal that required amplification.

The record shows proposals were evaluated for technical merit in every factor and related subfactor listed in the RFP, and were given numerical scores that represented the consensus of the evaluators. Each subfactor was rated on a scale of 1 to 5, with 5 representing a proposal that was superior in most features. After initial proposals were evaluated, the technical evaluation panel made up a list of discussion questions/comments for each offeror regarding the perceived weaknesses in their initial proposals. The technical evaluation panel composed discussion questions for any subfactor that was given a rating of only 2, "clarification is required," and, in certain instances, even for subfactors that were given ratings of 3, "adequate." The panel propounded a total of 33 technical questions and 3 cost questions relating to Kearney's proposal.

Kearney first argues that the discussions were inadequate in connection with the personnel availability factor. This evaluation factor was worth 40 points out of a total of 1000 evaluation points for all technical factors combined. The RFP required offerors to demonstrate the continuous availability of key prime contractor personnel and specifically designated all project managers and senior economists/financial analysts as key personnel.

The technical evaluation panel rated Kearney's initial proposal as adequate for personnel availability. However, the evaluation panel was concerned about the availability of Kearney's staff for several reasons. Among other things, the evaluators noted that certain key personnel were only available to work on the contract part of the time during the first year. The evaluators were also concerned because Kearney's proposal did not demonstrate a strong commitment to hiring new staff or quickly replacing employees who might leave Kearney's employment or otherwise become unavailable to work on this contract.

The contracting officer reports that these concerns were discussed with Kearney by telephone even though the proposal was rated adequate on this factor. The agency also posed the following written questions related to personnel availability:

"Will prime commit to guaranteeing services of key personnel and subcontractors for at least 3 months after initiation of contract?"

"Please describe method by which prime will appropriately replace key personnel unable to work on this contract. Will prime commit to substitute's availability for at least the first 3 months of work on a project?"

"What would be the availability of key personnel if other pending or possible projects or contracts are factored into the prime's availability calculations?"

In response to the first question, concerning a 3-month commitment for all key personnel, essentially, Kearney responded by quoting the RFP's key personnel requirement and stating that it was acceptable to Kearney and its proposed subcontractors. Kearney also stated that key personnel would be made available and would be committed to the project upon notification of contract award. The question about replacing key personnel elicited a citation to the RFP's key personnel clause and a statement that Kearney would comply with the requirement. Kearney further stated: "[w]e foresee no difficulty in providing qualified and suitable substitute[s] from our in-house staff." The question regarding the effect of other possible contracts/projects on the availability of key personnel drew a citation to an exhibit in the initial proposal that allegedly addressed this concern. Among other things, Kearney indicated that the availability of certain key employees was based upon the assumption that Kearney would not be eligible to compete for the follow-on contract to an EPA contract Kearney was presently performing. Also, Kearney indicated that it was competing for another EPA contract but was confident that its staff resources would enable Kearney to perform fully and responsively if awarded the present contract.

The contracting officer reports that, after discussing these matters with Kearney by telephone and reviewing Kearney's proposal revisions, the technical evaluation panel concluded that Kearney had not significantly improved its proposal in this factor, and, therefore, continued to rate Kearney's proposal as merely adequate.

Kearney contends that discussions were insufficient because EPA did not identify which key individuals the evaluators were concerned about. Kearney states that during the debriefing conference EPA identified two key employees about whom the evaluators were concerned regarding whether they would continue to work on the contract for a substantial time period if the contract were awarded to Kearney. Kearney points out that those two employees are still

employed by Kearney at the present time and, in fact, are working on another EPA contract.

In our opinion, the record shows that EPA provided Kearney with sufficient information during discussions to be able to identify and cure any weaknesses regarding personnel availability in its initial proposal. The above questions clearly should have alerted Kearney to the fact that the evaluation panel believed that there was a weakness in Kearney's proposal related to the commitment of key employees to the impending contract, both with regard to how long key employees would continue to work on the project and with regard to the percentage of the time they would devote to this particular contract as opposed to other projects. See Fairchild Weston Sys., Inc., B-229568.2, Apr. 22, 1988, 88-1 CPD ¶ 394.

From the evaluation documents, it is apparent that the panel was apprehensive that Kearney employees in key positions might not be committed to working on the contract for an extensive period of time and that Kearney might not be able to provide qualified replacements if key personnel were unable to continue to work on the contract. What EPA wanted from Kearney was a strong statement of commitment to hiring new staff and replacing key staff members quickly when necessary, some assurance that key employees or replacements would work on the contract for at least 3 months, and a description of other contracts that might have an impact upon the availability of the key staff members proposed for the present contract. Kearney's response did not state how Kearney would "guarantee" services of key personnel for the first 3 months, indicate what employees would be available as substitutes, nor state any possible substitutes' credentials. Furthermore, Kearney did not provide any detail to show how it would allocate key personnel between two EPA contracts, if the firm were awarded both this and the other EPA contract for which Kearney was competing. Quite simply, Kearney's revisions did not ease the evaluators' concerns, and, therefore, EPA did not upgrade Kearney's score above adequate for this evaluation factor.

Kearney has offered no evidence to show that the evaluation was unreasonable, but merely has argued that it was not given sufficient information so that it could improve its proposal on this factor. Moreover, the fact that two key employees are still employed by Kearney at present is not relevant to the evaluation of Kearney's proposal at the time that evaluation was made. In any event, as Kearney has not provided any evidence to show that the evaluation was improper, the mere fact that Kearney may not agree with the technical evaluation panel's assessment of its revised

proposal is not sufficient to find the evaluation unreasonable. See United Telecontrol Electronics, Inc., B-235774.2, Nov. 7, 1989, 89-2 CPD ¶ 433.

Kearney next contends that discussions were inadequate regarding responsiveness, an evaluation subfactor worth 20 points, in the company qualifications and expertise evaluation criterion; the RFP required offerors to demonstrate their ability to respond rapidly to short-term work assignments and to changes in budget and schedule. Responsiveness was also an evaluation subfactor, worth 10 points, in the technical qualifications of project team evaluation criterion; here, the RFP required offerors to demonstrate responsiveness in budget and period-of-performance requirements, changes in program priorities and schedules, and anticipating coordination and communications problems.

The evaluation panel gave Kearney's initial proposal a score of 1 for responsiveness in connection with company qualifications/expertise, indicating that the proposal was deficient and in need of significant changes. The evaluation documents show that the evaluators considered the proposal deficient because Kearney had not provided examples of having met EPA's needs when faced with emergency deadlines. The panel rated Kearney's initial proposal a 2 for responsiveness in connection with the technical qualifications of the project team, indicating that clarifications were needed. The evaluation documents show that the evaluators wanted clarification in the form of additional demonstrations of the proposed project manager's responsiveness.

The contracting officer reports that both areas were the subject of telephone discussions with Kearney. Regarding company qualifications, the written discussions stated:

"Responsiveness is not supported by examples."

"Please provide additional examples of having met EPA's needs when faced with emergency deadlines."

In addition, regarding the project manager's qualifications, the written discussions stated: "Please provide additional demonstrations of project manager's responsiveness."

While Kearney contends that the evaluation panel did not point out the perceived deficiencies in the responsiveness subfactors, we fail to see how the discussions could have been any more direct in telling Kearney exactly what it was

that the evaluators wanted from Kearney. Additionally, Kearney must have understood from the discussions what EPA was concerned about in the responsiveness area, because Kearney supplied revisions that caused the evaluators to upgrade the score for Kearney's proposal to 3 for each subfactor, indicating that the proposal was considered adequate. Moreover, the evaluation documents show that Kearney did, in fact, provide better examples of its rapid response capabilities and a better discussion of the project manager's responsiveness.

Kearney next argues that EPA improperly raised the costs proposed by Kearney without holding discussions with the firm. Kearney contends that EPA had a duty to tell Kearney during the discussions phase of the procurement that EPA believed that Kearney's costs were understated.

EPA states that Kearney underrepresented its labor costs and, therefore, EPA added a sum to reflect more accurately the likely labor costs to Kearney's proposed costs to compute Kearney's evaluated costs plus fee. The contracting officer reports that EPA did not discuss this recalculation of Kearney's costs with Kearney, because EPA was not aware that Kearney's proposed costs were unrealistically low when EPA held discussions with all offerors.

According to EPA, a preliminary review of Kearney's initial cost proposal gave EPA no reason to question Kearney's estimated costs. EPA reports that it was sometime later, after discussions had been completed, that it learned, from discussing Kearney's costs with a Defense Contract Audit Agency (DCAA) auditor who was auditing Kearney's proposed rates for another contract, that Kearney was proposing labor and indirect rates that were outdated. EPA states that it also learned that Kearney had incurred cost overruns under a similar contract.

The contracting officer reports that, in order to get a more realistic estimate of the probable Kearney costs, EPA examined Kearney's average rates billed under an earlier contract. EPA also used the average hourly rates Kearney was currently billing under a similar contract for similar services using many of the same personnel as proposed in the present procurement. In this manner, EPA calculated an evaluated cost for Kearney's proposal and used that amount to compare Kearney's offer with the other two revised offers received in this procurement. Similar "should cost" evaluations were also conducted on the other two offers received.

After examining each offeror's revised cost and technical proposals, on September 19, the contracting officer determined that the competitive range should be narrowed to just Abt, and that final negotiations culminating in award should be conducted with Abt alone. This determination was based upon the superior technical merit of Abt's proposal, even though Abt's evaluated cost plus fee was higher than Kearney's evaluated cost plus fee, and was concurred in by the source selection official.

We have held that there is nothing improper per se in an agency's making more than one competitive range determination and in dropping a firm from further award consideration, so long as the firm's exclusion was ultimately justified. See Merret Square, Inc., B-220526.2, Mar. 17, 1986, 86-1 CPD ¶ 259; BASIX Controls Sys. Corp., B-212668, July 2, 1984, 84-2 CPD ¶ 2. Moreover, we have frequently held that, in cost-reimbursement contracts, evaluated costs are a better basis than proposed costs for judging the likely cost of a contract to the government. Booz, Allen & Hamilton, 63 Comp. Gen. 599 (1984), 84-2 CPD ¶ 329. Our review of an agency's cost realism assessment is limited to determining whether the agency's cost realism evaluation was reasonable. See Mar, Inc., B-215798, Jan. 30, 1985, 85-1 CPD ¶ 121.

Here, EPA reasonably decided, after consulting with a DCAA auditor who had examined Kearney's proposed rates in connection with another EPA procurement, that the rates proposed by Kearney were out of date. See A. T. Kearney, Inc., B-237366; B-237366.2, Feb. 14, 1990, 90-1 CPD ¶ _____. Rather than using the rates proposed by Kearney, EPA looked at the rates billed by Kearney under an earlier contract and under another current contract, both for similar services. Using these rates as representative of Kearney's rates for this type of work, EPA adjusted Kearney's rates for realism. In our view, EPA's upward adjustment of Kearney's rates after discussing the matter with a knowledgeable DCAA auditor and comparing the proposed rates with actual rates billed under two other Kearney contracts was reasonable. Booz, Allen & Hamilton, 63 Comp. Gen. 599, supra.

We recognize that perceived cost deficiencies generally are appropriate matters for discussions between the contracting agency and an offeror. Here, however, we find that Kearney suffered no competitive prejudice as a result of the agency's decision not to hold discussions with Kearney regarding its cost proposal.

Abt received a technical score of 933 points, 26 percent higher than Kearney's score of 742 points. After the agency

adjusted Kearney's costs for realism, Abt's costs were only about 8 percent higher than Kearney's; based on proposed costs, Abt's costs were 21 percent higher than Kearney's. According to the contracting officer, however, when EPA discovered that Kearney had understated its costs and EPA recalculated those costs to reflect more realistic rates, EPA "chose not to reopen negotiations to explore the Kearney cost proposal since that would not have affected the source selection decision." In essence, EPA decided that, regardless of the cost advantage offered by Kearney, it would have selected Abt for award based on the technical superiority of its proposal; this position is consistent with the evaluation scheme in the RFP, which provided that technical factors were more important than cost. Accordingly, in our view, Kearney suffered no competitive prejudice as a result of EPA's decision not to conduct discussions regarding its cost proposal, and EPA's failure to advise Kearney of the alleged cost-related deficiencies in its proposal thus provides no basis to upset the award to Abt. See Tampa Shipyards, Inc., B-231802, Sept. 30, 1988, 88-2 CPD ¶ 304.

Finally, Kearney alleges that award to Abt was not in accord with the RFP's stated evaluation criteria because Abt's proposed costs were higher than the costs proposed by Kearney. However, in negotiated procurements, unless the solicitation so specifies, there is no requirement that award be based on lowest cost. See Comarco, Inc., B-225504, et al., Mar. 18, 1987, 87-1 CPD ¶ 305. A procuring agency has the discretion to select a more highly rated technical proposal if doing so is reasonable and is consistent with the evaluation scheme set forth in the solicitation. See Systems Eng'g Assocs. Corp., B-232597, Oct. 4, 1988, 88-2 CPD ¶ 315. Here, in view of the RFP's emphasis on technical merit rather than cost, and because Abt's proposal was rated considerably higher than Kearney's proposal by the evaluators, we find that EPA's cost/technical tradeoff was reasonable and consistent with the RFP's evaluation criteria. See Stewart-Warner Elecs. Corp., B-235774.3, Dec. 27, 1989, 89-2 CPD ¶ 598.

Accordingly, the protest is denied.



James F. Hinchman
General Counsel