



Comptroller General
of the United States

Washington, D.C. 20548

(Gilhooley)

Decision

Matter of: Warren Electrical Construction Corporation

File: B-236173.4; B-236173.5

Date: July 16, 1990

William L. Walsh, Jr., Esq., and William Craig Dubishar, Esq., Venable, Baetjer and Howard, for the protester. Judith Ward Mattox, Esq., Mattox & O'Brien, P.C., for Shorrock Electronic Systems, Inc., an interested party. Lt. Col. Howard G. Curtis, Esq., and Jay B. Winchester, Esq., Department of the Army, for the agency. Kathleen A. Gilhooly, Esq., Andrew T. Pogany, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging awardee's noncompliance with mandatory technical requirements is denied, where the record shows that the awardee's proposal was reasonably evaluated by the agency as meeting the requirements.
2. Protest of change or relaxation of a solicitation requirement in accepting awardee's nonconforming proposal is denied where the protester was not prejudiced and the item meets the government's requirements.
3. Notwithstanding greater importance of technical factors in overall evaluation scheme, agency may make award to lower-cost offeror where record establishes that contracting officer reasonably determined proposals to be technically equal.
4. Improper technical leveling of proposals did not take place where the primary purpose of the contracting agency's discussions was to ascertain what the offeror was proposing to furnish rather than to raise offeror's technical proposal to level found in protester's proposal.

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5. Since contracting agency did not consider protester's price to be too high for the technical approach proposed, agency was not required to conduct discussions on the price proposed by the protester.

DECISION

Warren Electrical Construction Corporation protests the award of a contract to Shorrock Electronic Systems, Inc., under request for proposals (RFP) No. DAMD17-89-R-0012, issued by the Department of the Army for a security system at Fort Detrick, Maryland. Warren contends that Shorrock's proposed system does not comply with the RFP's specifications, and that the agency failed to comply with the RFP's stated evaluation criteria, engaged in technical leveling, failed to conduct meaningful discussions with Warren, and improperly solicited multiple best and final offers (BAFO).

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

The RFP called for fixed-price proposals to furnish and install a building security system for the U.S. Army Research Institute for Infectious Diseases at Fort Detrick. The RFP listed the following three technical evaluation criteria in descending order of importance:

1. Understanding and Proper approach to accomplishing the required Scope of Work;
2. Experience and Expertise of employees proposed to perform under the contract; and
3. Similar contracts.

Offerors were advised in a clause entitled "Weight of Cost or Price and the Technical Proposal" that primary consideration would be given to technical factors rather than cost or price, but that should technical competence between offerors be considered approximately the same, then cost or price could become paramount. In the "Award Selection" clause, offerors were further advised that award would be made to the offeror whose proposal was most advantageous to the government. That clause also provided that in determining which proposal offered the greatest advantage to the government, overall technical merit would be considered more important than price or cost, and the relative importance of price as an evaluation factor would increase with the degree of equality of the technical merits of the proposals.

Eleven proposals were received and evaluated by a three person technical evaluation panel (TEP). Five were determined to be technically unacceptable and excluded from the competitive range. Another offeror withdrew its proposal. Discussions were conducted with the five remaining offerors, including Warren and Shorrock, and BAFOs were received. The TEP reviewed the BAFOs and scored Warren at 90 out of a possible 100 and Shorrock at 79.33. The contracting officer awarded a contract to Warren on July 5, 1989, for \$1,419,744.

Three unsuccessful offerors protested the award to our Office. After considering the protests, the Army determined that meaningful discussions had not been conducted, and sent a letter to all offerors in the competitive range to notify them that discussions were reopened and to clarify two paragraphs of the specifications. After discussions, the Army, in a letter dated September 12, requested a second round of BAFOs, noted deficiencies in all offerors' proposals related to the paragraphs of the specifications that had been clarified, and requested that offerors provide in their BAFOs a contact and phone number for a security system in operation.

After receipt of the second BAFOs, the Army visited locations where each offeror had a security system installed and in operation. The Army determined that several areas, which had not previously been discussed, required clarification, and reopened discussions. The Army conducted second site visits with all offerors except Warren, whose technical proposal was found to require no further clarification. At the second site visits, the Army asked each offeror common questions from a prepared question sheet. Based on the responses received during the site visits, the Army requested further written clarification. By letter dated December 21, the Army requested third BAFOs from all offerors. These BAFOs were received by the January 3, 1990, due date. The TEP scored Warren and Shorrock the highest, with scores of 99 and 96.70, respectively. The contracting officer independently reviewed the BAFOs, determined that Warren and Shorrock were approximately the same in terms of technical competence, and awarded a contract to Shorrock on the basis of its \$1,199,322.15 low price as compared to Warren's price of \$1,745,302.

Warren contends that Shorrock's proposed system does not comply with several paragraphs of the RFP specifications. Warren's contention is based in part upon the opinion of one of the Army's technical evaluators (hereinafter referred to as evaluator A) that Shorrock was noncompliant with various specification requirements.^{1/} Tr. at 134. Warren asserts that Shorrock's CRT [Cathode Ray Tube] display is neither split screen nor system controlled, and does not provide an expandable four-line pop-up detailed description of each alert as required by the specifications. Further, Warren alleges that Shorrock's system design does not comply with the requirement for a "pop-up help" window, the requirement for a one-to-one ratio of micro-processor control units to secured doors, the requirement that the personnel data base be able to be searched on any field or combination of fields, and the requirement for a magnetic tape drive archive with a 60 megabyte capacity.

An item-by-item analysis of each of these issues follows:

SPLIT-SCREEN

Paragraph 7.4.1 of the specifications provides in part that:

"Any given CRT display shall be functionally divided into two parts: one for operator-controlled editing and programming, and the other shall be system-controlled to display alarms, messages, time of day, etc."

According to Warren, Shorrock's proposed system fails to provide a functionally divided split screen because it provides only a single line at the top of the screen dedicated to the announcement of an alarm. Under the Shorrock system, when each alarm is received at the security console, the operator must generally move to a new screen to acknowledge, process and dispose of each particular alarm. Warren contends that since the Shorrock system requires the operator to depress a function key to obtain a description of the incoming alarm, it also does not meet the specification requirement for a system-controlled display of alarms.

^{1/} This issue was the subject of a fact-finding conference under section 21.5(b) of our Bid Protest Regulations at which evaluator A and the other two Army evaluators testified. See 4 C.F.R. § 21.5(b) (1990).

The Army acknowledges that Shorrock's proposal requiring the operator to hit a keystroke to get the rest of the information necessary to respond to an alarm "might not be quite as good" as Warren's, but argues that the specifications did not require all alarm information to be on the screen at once. The Army notes that the evaluators downgraded Shorrock on this issue.

We believe that Shorrock's system was reasonably evaluated as meeting the split-screen requirement. Although evaluator A testified that, in general, Shorrock's proposal did not meet the specifications regarding split-screen capability, Tr. at 120, he conceded that all that was required was that the screen be able to display functionally diverse information in different sections of the screen at the same time. Tr. at 118. Evaluator A acknowledged that Shorrock's system provided information at the top of the screen indicating that there was an alarm that needed to be responded to. Tr. at 124. Further, a second evaluator testified that Shorrock's proposal met the requirement for a split-screen because the "top portion of the screen [was] dedicated for specific information--the time of day, the alarm"; the bottom portion of the screen provided help information and the center of the screen was for those operator functions that had to be performed by the security guards. Tr. at 154, 155. Moreover, the third evaluator testified that in his judgment, Shorrock's proposal met the specification requirements. Tr. at 186. Evaluator A also testified that he intended that the specification contain a requirement for all alarm information to be set forth on one part of the split-screen. However, when asked where the requirement was in the written specification, he referred to the unspecified "etc." in the sentence quoted above from paragraph 7.4.1 of the specifications. Tr. at 121.

From this record, we find no basis for taking exception to the evaluation. It is clear that the specification did not require by its express language that all alarm information be set forth on one part of the split screen, and two evaluators had no difficulty in finding that the essential element of the split-screen requirement was met. The fact the one evaluator had a different view is not controlling. See Unisys Corp., B-232634, Jan. 25, 1989, 89-1 CPD ¶ 75. Shorrock's system could reasonably be found to meet the split-screen requirement since a portion of its screen was dedicated (and system controlled) to the display of messages, the time of day, and to the fact that there are alarms--which is all the specification required.

"POP-UP HELP" WINDOWS

Paragraph 7.14 of the RFP's specifications requires that "the system shall have built-in 'pop-up help' windows to provide the operator with a detailed explanation of the menu being reviewed." Warren contends that Shorrock has failed to provide the required "pop-up help" windows, and cites testimony by evaluator A that during a site visit, Shorrock's proposed solution only provided generic help information to the operator. Tr. at 123.

The Army responds that Shorrock's third BAFO stated in detail how it would meet the pop-up requirement. Shorrock indicated that if awarded the contract, its subcontractor would develop and include pop-up screens in its software.

In an affidavit, one of the evaluators stated that information provided by Shorrock at the site visit and in written communications fully explained how the help screen would operate, and that it would be incorporated into the system if Shorrock were awarded the contract. Moreover, both Evaluator A and a third evaluator testified that an off-the-shelf, fully-configured, fully-functioning system was not required. Tr. at 124, 157. The third evaluator further testified, in response to a request for his opinion as to the acceptability of a pop-up help window displayed by Shorrock at a site visit, that the window physically was there, and when the information required of the Army's specific operators was input into the window, it would perform the function it was supposed to and meet the specification. Tr. at 156.

Warren argues that Shorrock's third BAFO makes only a blanket assurance that it would comply with the specification and that the BAFO thus should not be deemed acceptable. However, that BAFO describes in detail how the "pop-up help" windows will work on the system and how the necessary software will be developed. Since the system was not required to be currently fully functioning to be acceptable, and Shorrock's third BAFO did not take exception to the "pop-up help" window requirement, we find reasonable the Army's determination that Shorrock satisfied that requirement.

STATUS REPORTS

Paragraph 7.15 of the specifications, entitled Status Reports, requires in part that:

"[T]he system shall display the last 50 alerts that have occurred. These alerts shall be

displayed with a one-line description, with an expandable four line pop-up detailed description for each event."

Warren contends that Shorrock's system does not comply with this requirement.

Contrary to Warren's allegations, Shorrock specifically addressed this area in its third BAFO, in response to a question raised by the Army. It stated that "[its subcontractor] will provide the capability of reviewing the last 50 events in the system on the monitor" and that the system will be capable of ". . . acquiring additional detailed information on each of those events displayed on the screen." The contracting officer was convinced that Shorrock, through its subcontractor, was capable of making the modification to its existing system to allow for a "pop-up detailed description of each event." Nothing in the record indicates this judgment was unreasonable.

RATIO OF SECURED DOORS TO REMOTE PANELS

Warren contends that Shorrock's system does not comply with the requirement for a one-to-one ratio of microprocessor control units to secured doors, such that if a remote panel failed then access to only one door would be lost; this requirement was only clarified in the Army's August 25, 1989, letter reopening discussions. In its second BAFO, Shorrock clearly stated it was providing sufficient numbers of panels to provide one for each door, and submitted a parts list showing an increase in the parts necessary to fulfill the required one-to-one ratio. Thus, this contention has no merit.

PERSONNEL DATABASE

Warren also contends that Shorrock's proposal does not adequately address paragraph 7.3.4 of the specifications. That paragraph provides:

"The personnel database will contain information about the cardholders for the given facility. The database shall provide the means to store at a minimum the following cardholder information: One field for the cardholder name, and at least twelve additional fields of information that are user definable. The database shall be able to be searched according to these fields to call up personnel with particular qualifying characteristics (one or more at the same time)."

In its third BAFO, Shorrock provided an answer to a question the Army raised on this area during discussions. Shorrock indicated that its proposed system exceeded the requirement, that there were more than 12 fields in the employee database that were definable by the user, and that if the user designated each field properly during construction of the database, a search could be made of the database based upon each of the fields. Shorrock also indicated it was possible to search the database through one or more fields. The TEP and the contracting officer concluded that Shorrock's BAFO met the personnel database requirement. While Warren indicates that Shorrock's failure to fully explain its capabilities in this area in its initial proposal shows its lack of diligence, we find reasonable the Army's conclusion that Shorrock ultimately met this requirement.^{2/}

MAGNETIC TAPE DRIVE

Paragraph 7.4 of the specifications stated in part that:

". . . The Host Computer system will consist of a CPU, a printer, a CRT display, a keyboard, and a magnetic tape memory drive archive. The central processing unit will consist of . . . a Winchester type 20 megabyte (expandable) hard disk drive The magnetic tape drive archive shall be the cartridge type with a 60 megabyte capacity."

Warren contends that Shorrock failed to meet these requirements because it offered an 80 megabyte hard disk drive with a 40 megabyte magnetic tape drive. According to Warren, a cartridge type magnetic tape drive provides a removable storage medium for archival and security purposes. Warren argues that although an 80 megabyte hard disk drive can store large quantities of data, it cannot be used efficiently or effectively for archival or security purposes.

The Army responds that the 60 megabyte cartridge specification is not material, that Shorrock's proposal far exceeds the government's minimum needs as expressed when the

^{2/} This was not an area where Evaluator A testified Shorrock's system was noncompliant.

specifications are read in their entirety,^{3/} and that Warren is not, in any event, prejudiced. According to the Army, the specification is not material because the price difference between a 40 and 60 megabyte tape drive is minuscule in light of the overall cost of the procurement.

We find the specification here explicitly required a magnetic tape drive with a 60 megabyte capability. Thus, Shorrock's proposal for a 40 megabyte tape drive deviated from the specifications, and acceptance of Shorrock's offer represented a relaxation of the specifications. However, our Office will not sustain a protest on this basis absent evidence of resulting prejudice to the protester, e.g., that the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to an altered requirement. See Simulaser Corp., B-233850, Mar. 3, 1989, 89-1 CPD ¶ 236; Management Sys. Designers, Inc., B-219601, Nov. 13, 1985, 85-2 CPD 546. As indicated above, the Army concluded Shorrock's proposal met its functional 1 year on-line storage requirement. Also, contrary to the assertion of Warren, the Army has found that the 40 megabyte tape drive offered by Shorrock will provide more than adequate archival back-up and is a removable medium that can be safeguarded away from the system. Tr. at 197, 198, and June 6, 1990, affidavit of an evaluator. This addresses Warren's concerns that Shorrock's system is less efficient in this regard. Furthermore, testimony at the fact-finding conference indicated that the cost difference between a 60 and a 40 megabyte tape drive unit was about \$30 to \$40 (Tr. at 192), and the Army has submitted price lists showing that the cost differential between a 60 and a 40 megabyte tape drive and cartridge is similarly minimal. Since the tape drive Shorrock proposed meets the agency's actual needs, and there is no indication that Warren could have altered its approach so as to offset Shorrock's substantially lower price, we decline to sustain this aspect of the protest.

^{3/} The Army contends that the 60 megabyte capacity requirement should be read in conjunction with the functional requirement in paragraph 7.3.5 for on-line storage of 1 year's data. In this regard, the Army cites testimony by one of its evaluators (Tr. at 187) that Shorrock's proposal of an 80 megabyte hard disk drive with a 40 megabyte tape drive far exceeds the requirement of on-line storage for 1 year's data.

REASONABLENESS OF AWARD DECISION

Warren also alleges that the Army changed the stated evaluation criteria, placing an increased reliance on proposed costs, without amending the solicitation to read that the Army would accept the lowest cost, technically acceptable offeror.

We find Warren's argument that the Army converted the procurement from one emphasizing technical factors rather than price into one for the lowest cost to be without merit. Cost became the determinative factor only when the source selection official found that Warren and Shorrock were essentially equal technically. Where selection officials reasonably regard proposals as being essentially equal technically, cost may become the determinative factor in making an award notwithstanding that the evaluation criteria assigned cost less importance than technical considerations. PRC Kentron, B-225677, Apr. 14, 1987, 87-1 CPD ¶ 405.

Our review of the record indicates no basis to object to the agency's determination that the technical proposals were essentially equal. The record shows that in reaching this conclusion the contracting officer reviewed Shorrock's original proposal and each BAFO, as well as each evaluation comment. The relative point scores (99 and 96.7) would tend to indicate the proposals were considered approximately equal. In this regard, we have upheld determinations that technical proposals were essentially equal despite differentials significantly greater than the one here. E.g., Lockheed Corp., B-199741.2, July 31, 1981, 81-2 CPD ¶ 71 (where the differential was more than 15 percent). Indeed, although the contracting officer did not agree with the evaluators' deduction of points for their opinion that the Shorrock system was cumbersome when responding to alarms, since he felt this "opinion" was not a specification requirement, he also found that even with such a deduction the two companies were approximately the same in terms of technical competence. Moreover, the evaluation documentation did not indicate any significant evaluated technical differences between the offerors. Under the circumstances, he found that it was clearly in the government's best interest to award to Shorrock, which offered a substantially lower price.

Given the close scores of Warren and Shorrock, even before the contracting officer discounted the evaluated technical differences, and the file documentation, we find that the agency properly, and consistently with the RFP's evaluation criteria (which specified that should technical competence

between offerors be considered approximately the same, then cost or price could become paramount), selected Shorrock in light of its lower price.

Warren asserts that since Shorrock failed to demonstrate its capabilities in the on-site visits, and because Shorrock's system is "unproven," its proposal could not reasonably be evaluated equal to Warren's. However, we find no requirement that each system's capability be "benchmarked." Thus, we find reasonable the evaluation by the TEP and the contracting officer of Shorrock's acceptable approach.

TECHNICAL LEVELING

Warren also alleges that the Army unfairly assisted Shorrock through technical leveling. According to Warren, technical leveling occurred when the Army provided Shorrock three rounds of BAFOs, two site visits, and requests for clarifications. Warren argues that the numerous government contacts provided Shorrock several opportunities to improve its "inherently weak" proposal.

Technical leveling in discussions is prohibited by Federal Acquisition Regulation (FAR) § 15.610(d)(1) (FAC 84-16) and arises when, as the result of successive round of discussions, the agency helps to bring one proposal up to the level of the other proposals by pointing out inherent weaknesses that remain in an offeror's proposal because of the offeror's own lack of diligence, competence or inventiveness after having been given the opportunity to correct those deficiencies. Raytheon Ocean Sys. Co., B-218620.2, Feb. 6, 1986, 86-1 CPD ¶ 134. On the other hand, there is nothing wrong with requesting more than one round of BAFOs where a valid reason exists to do so. HLJ Management Group, Inc., B-225843.3, Oct. 20, 1988, 88-2 CPD ¶ 375.

Here, the Army called for a second round of BAFOs after properly determining that meaningful discussions had not been conducted before the first round. In this regard, as noted above, the Army clarified the specifications in paragraph 7.5 to essentially require a one-to-one ratio of secured doors to remote panels, and both Shorrock and Warren changed the ratio of secured doors to remote panels in their second BAFOs. The Army requested a third round of BAFOs after discovering during the site visits additional deficiencies and areas in need of clarification in the offerors' proposals. The Army was required to point out deficiencies in the system to fulfill its duty to conduct meaningful discussions. See Besserman Corp., 69 Comp. Gen. 207 (1990), 90-1 CPD ¶ 191.

Technical leveling is not involved where the purpose of discussions is to ascertain what the offeror is proposing to furnish. Ultrasystems Defense, Inc., B-235351, Aug. 31, 1989, 89-2 CPD ¶ 198. Here, the record shows that the Army in its site visits was trying to ensure that it understood exactly what the offerors were actually proposing to do in response to the RFP requirements. In affidavits, each evaluator denied that Shorrock was in any manner coached as to how to meet the RFP's requirements. Indeed, the Army developed a common set of questions to be asked of each offeror at the second site visit. Under these circumstances, even though Shorrock's rating improved to approximate that awarded Warren, we see no basis to conclude that the Army engaged in technical leveling. See Raytheon Ocean Sys. Co., B-218620.2, supra.

MEANINGFUL DISCUSSIONS WITH WARREN

Warren also alleges that the Army failed to conduct meaningful discussions with it. Warren complains that the Army failed to inform Warren before the third request for BAFOs that it considered Warren's proposal a "gold-plated Cadillac" (as the Army stated at an informal bid protest conference) and gave more discussion opportunities to Shorrock than to Warren.

Where a proposal contains no technical uncertainties, a request for BAFOs constitutes meaningful discussions. Weeks Marine, Inc./Bean Dredging Corp., a Joint Venture, 69 Comp. Gen. 108 (1989), 89-2 CPD ¶ 505. That was the situation here for Warren after the second round of BAFOs. The third request for BAFOs, without more, was sufficient in Warren's case to constitute meaningful discussions. Further, the government has no responsibility to tell an offeror that its price is too high unless the government has reason to think that the price is unreasonable. Id.; see also Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54. The record of proposal evaluation shows that the Army did not consider Warren's price too high for the approach the company proposed, so that discussions were not required on the price proposed by Warren. Moreover, the Army was also prohibited by FAR § 15.610(d)(3)(iii) (FAC 84-16) from informing Warren that its price was too high in relation to Shorrock's price. Although Shorrock was given more opportunities for technical discussions than Warren, this circumstance reflects only the greater number of areas in need of clarification that were found in the Shorrock proposal and not any unfair negotiating approach with Warren. See Ultrasystems Defense, Inc., B-235351, supra.

EVALUATOR QUALIFICATIONS

In its comments, Warren also objects that two of the three evaluators were unqualified to evaluate the technical proposals because they lacked training or expertise in the "electronics access control field." Evaluator qualifications are within the contracting agency's sound discretion and do not give rise to review by our Office unless there is a showing of possible abuse of that discretion, by, for example, ignoring a conflict of interest or actual bias on the part of the evaluators. Cajar Defense Support Co., B-237426, Feb. 16, 1990, 90-1 CPD ¶ 286. There has been no such showing here.

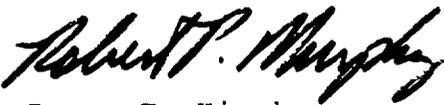
MULTIPLE BAFOS

Finally, Warren contends that the requests for multiple BAFOs did not comply with Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 215.611. That regulation provides that second or subsequent BAFOs should be seldom requested and only in certain circumstances with the approval of an appropriate higher level agency authority. Although the protester contends that it learned at a debriefing on March 2, 1990, that there were not appropriate analyses to support the approval of multiple BAFO requests, a protester has an affirmative obligation to diligently pursue the information that forms that basis of its protest. Space Applications Corp., B-233143.3, Sept. 21, 1989, 89-2 CPD ¶ 255. The Army notified Warren by letter dated August 25, 1989, that it was reopening discussions for the purpose of accepting an additional round of BAFOs, and by letter dated September 12, 1989, the Army requested a second BAFO. By letter dated October 20, the Army notified Warren that it was reopening discussions, and by letter dated December 21, 1989, requested a third BAFO. Warren submitted its second and third BAFOs, but waited until after award, when it protested to our Office on March 8, 1990, to raise the issue of compliance with DFARS § 215.611. The protester's decision to wait several months before pursuing this matter is not, in our view, consistent with its obligation of diligence. Consequently, we find this matter untimely under our Bid Protest Regulations and will not consider it.

CONCLUSION

Warren claims entitlement to recovery of the costs of preparing its proposal and pursuing its protest; this claim is denied in view of our resolution of the protest. Weeks Marine, Inc./Bean Dredging Corp., a Joint Venture, 69 Comp. Gen. 108 (1989), supra.

The protest is denied in part and dismissed in part.

for 
James F. Hinchman
General Counsel