



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Environmental Health Research and Testing,
Inc.

File: B-243702.2

Date: October 29, 1991

Michael A. Pereira, Ph.D. for the protester,
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McPherson and Hand, for Technology Applications, Inc., an
interested party.
David J. O'Connor, Environmental Protection Agency, for the
agency.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Award to offeror submitting higher-cost, technically superior proposal under request for proposals which gave greater weight to technical merit compared with cost is justified where contracting agency reasonably determined that acceptance of the proposal was worth the higher cost.
2. Contracting agency satisfied the requirement for meaningful discussions of agency's concern related to methods development where a discussion request addressed to the protester asked the firm to further demonstrate its understanding of the requirements of the statement of work, especially methods development, thereby leading the firm into the area of its proposal needing amplification.

DECISION

Environmental Health Research and Testing, Inc. (EHRT) protests the award of a contract to Technology Applications, Inc. under request for proposals (RFP) No. C01221RB1, issued by the Environmental Protection Agency (EPA) for services in support of EPA's Environmental Monitoring Systems Laboratory in Cincinnati, Ohio. EHRT argues that EPA failed to give sufficient weight to cost in the award selection and otherwise failed to follow the solicitation evaluation criteria.

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

The RFP contemplated the award of a cost-plus-award-fee, level-of-effort type contract for a 6-month base period and 4 option years. The contractor is to provide various types of support to EPA's laboratory, including support in the development of methods and the performance of chemical analyses, evaluation of sampling and analytical techniques, computer support, literature surveys, microbiological analyses, statistical support, training courses and support for technical meetings and EPA outreach programs. The solicitation stated that work under the contract was to be performed in response to written work assignments issued by the contracting officer.

Under the RFP, award was required to be made to the offeror whose proposal conformed to the solicitation and was most advantageous to the government, cost and other factors considered. The solicitation also stated that technical quality was more important than cost although cost would become more important as proposals become equal in technical merit. The solicitation, as amended, listed the following technical evaluation criteria, each with various subcriteria:

1. Demonstrated Understanding of Technical Requirements (200 points).
2. Demonstrated Corporate Experience (200).
3. Program Management Plan (240).
4. Qualifications of Professional Personnel (240).
5. Qualifications of Other Personnel (70).
6. Quality Assurance Program Plan (50).

The EPA received three proposals. After evaluation of the proposals, the evaluation panel assigned a score of 878 (out of 1,000 possible points) to Technology Applications, 599 to EHRT, and 58 to the third offeror. The agency created a competitive range, including Technology Applications and EHRT and held discussions with those firms. Based on responses to the discussions, the evaluation panel reevaluated the proposals and increased Technology Application's score to 920 and EHRT's score to 677. The agency also evaluated and held discussions regarding the cost proposals and requested and evaluated best and final offers (BAFO). Technology Application's negotiated cost was \$16,007,547 and EHRT's was \$14,930,747.

EPA explains that it awarded the contract to Technology Applications based on that firm's superior technical capabilities. The agency's source selection document states that Technology Application's proposal demonstrated outstanding capability in 9 of the 14 technical subcriteria and demonstrated higher technical qualifications than EHRT on 10 of the 14 subcriteria.

With respect to cost, EPA determined that all negotiated cost and fee elements of Technology Application's proposal were realistic and reasonable and that the firm's proposed cost adequately reflected its technical proposal and the RFP requirements. Also, although the cost of EHRT's proposal is approximately 7 percent less than the awardee's, the agency notes that this cost advantage is misleading in part since it is due primarily to EHRT's failure to charge on-site labor overhead on optional tasks which may not be exercised.

EHRT argues that in awarding the contract to Technology Applications, EPA failed to consider EHRT's cost advantage. The protester notes that the solicitation stated that as proposals become more equal in technical merit, cost would become more important and argues that since its proposal was at least adequate on all the evaluation factors and its evaluated cost was over \$1 million lower than the awardee's, it should have received the award. EHRT also maintains that EPA used evaluation factors not listed in the solicitation and failed to conduct discussions concerning issues that were considered deficiencies.

In a negotiated procurement, there is no requirement that award be made on the basis of lowest cost. Agency officials have broad discretion in determining the manner and extent to which they will make use of technical and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed to the other is governed only by the test of rationality and consistency with the established evaluation factors. Grey Advertising Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325; Midwest Research Inst., B-240268, Nov. 5, 1990, 90-2 CPD ¶ 364. We will uphold awards to offerors with higher technical scores and higher costs as long as the results are consistent with the evaluation criteria, and the contracting agency reasonably determines that the cost premium involved was justified considering the significant technical superiority of the selected offeror's proposal. PECO Enters., Inc., B-232307, Oct. 27, 1988, 88-2 CPD ¶ 398.

Here, the solicitation specifically stated that technical quality was more important than cost and, therefore, reasonably indicated that EPA was willing to pay a cost premium for a technically superior offer. Thus, an award based on Technology Application's higher-cost, superior technical proposal was consistent with the solicitation as long as the technical difference was sufficiently significant to outweigh EHRT's cost advantage. Midwest Research Inst., supra.

Although the agency considered EHRT's proposal acceptable under all the technical evaluation criteria and subcriteria, the contracting officer and the source selection authority

also concluded that Technology Application's proposal was technically superior under most of the technical evaluation criteria and subcriteria. The record indicates that the evaluators considered Technology Application's superior technical proposal to be worth its additional cost.

The protester disputes the agency's judgment in selecting Technology Application's higher-cost proposal by arguing that negative statements in the source selection document relating to EHRT's ability to perform the contract are contradicted by comments of the evaluation panel in the other evaluation documents. In this respect, the protester notes that the source selection document states that EHRT would not be able to perform the contract at a technical level equal to Technology Applications or at a level necessary to support program needs and that the apparent cost savings of the EHRT proposal would be lost, due to inefficiencies and rejection of work that failed to meet standards. The protester points to positive comments in the evaluation documents where members of the evaluation panel concluded that there were no known factors that would preclude award to EHRT, and stated that its proposal demonstrated a satisfactory understanding of the statement of work and included no omissions that would require a major proposal revision. EHRT argues that these comments contradict the criticisms of its proposal in the source selection statement and indicate that the agency inappropriately used Technology Application's proposal as a performance standard, instead of basing the competition on the ability to meet EPA's needs.

We find no contradiction between the evaluation panel's comments and the source selection document. The positive comments by the evaluation panel--which appear in the evaluation of the initial proposal--taken in context, merely indicate that the members of the panel concluded that EHRT's proposal should be included in the competitive range. There is nothing in the evaluation record that contradicts the conclusion in the source selection statement that Technology Application's proposal was sufficiently technically superior to outweigh any cost advantage that could result from EHRT's proposal, and therefore we have no basis to question the agency's cost/technical tradeoff decision.

EHRT also argues that the agency failed to apply the evaluation factors set out in the solicitation and misled the firm during discussions. In this respect, EHRT argues that a change in the statement of work and one of the issues raised with it during discussions misled it to stress implementation of methods in its BAFO, as opposed to methods

development, with a detrimental effect on the firm's final technical score.

The statement of work included a list of activities which the contractor must be prepared to perform. Solicitation amendment No. 2 deleted from that list the example "Develop methods," and inserted "Provide technical support in the development of methods." EPA reports that this change was made to clearly reflect that the contractor will provide support to the agency and will not perform its nondelegable duties of developing and promulgating new methods. The record shows that the evaluators found that EHRT's proposal did not adequately address method development and instrumental techniques. As a result, during discussions EHRT was asked to "[f]urther demonstrate your understanding of the technical requirements of the statement of work, especially method development and instrumental techniques." Although EHRT responded to this issue in its BAFO, the evaluation board concluded that the firm's response did not merit an increased score because its BAFO only compared existing methods as opposed to discussing the development of new methods. The evaluators also stated that EHRT did not provide evidence of method development experience.

EHRT argues that the change in the statement of work and the discussion request relating to methods development and instrumental techniques led it to emphasize the technical aspects of methods development, rather than research aspects. The protester also argues that it was misled in this respect by EPA's questioning during cost discussions of the "excessive" rate of pay the firm proposed for its project manager which, according to the protester, led the firm to "believe that more technical rather than professional support was required." In sum, EHRT argues that "the EPA at no time asked EHRT to describe how it will develop methods. . . . If the EPA wanted a description of how methods will be developed rather than how technical support will be supplied to the EPA for the development of methods, it should have specifically asked the bidders to furnish procedures of how method will be developed as well as the types of methods the EPA wants developed."

In our view, although the protester has not made its position on this issue entirely clear, the record does not demonstrate that the evaluation was flawed or that EHRT was misled during discussions. First, we note that EHRT draws a distinction between the technical aspects of methods development, and the more demanding research aspects, which the protester argues encompass the development of new techniques. We think, however, that it should have been reasonably clear from the solicitation that the support required "in the development of methods" would require the contractor to provide support for any and all agency

activities encompassed within methods development, including research. EHRT's conclusion that the agency was interested only in the contractor providing support for the technical aspects of methods development was prompted by the solicitation language that the contractor was to provide "technical support" for the development of methods. We do not believe that it was reasonable for the protester to conclude that "technical support" for method development meant that only the technical aspects of methods development should be addressed. To the contrary, it should have been evident that what the solicitation required was support for the full range of research activities performed by the laboratory, including the development of new methods. In this respect, the solicitation states that the contractor is to provide services in support of "research activities" of EPA's laboratory in Ohio. Among various other activities, the statement of work explains that the EPA's laboratory performs "method evaluation studies," and provides support to other laboratories "concerning method development." We are aware of no distinction in the solicitation between technical and research aspects of methods development, and we do not think that the solicitation limited the required work to only technical aspects.

With respect EHRT's argument that it was misled during discussions, agencies are not required to conduct all-encompassing discussions, but rather need only lead offerors into areas of their proposals needing responses or amplification. SAMCO dba Advanced Health Sys., Inc., B-237981.3, Apr. 24, 1990, 90-1 CPD ¶ 413. Here, the EPA conducted adequate discussions with EHRT. During discussions, the agency asked the firm to demonstrate its understanding of the technical requirements, especially methods development. The evaluators were concerned that EHRT's proposal included a "textbook description" of methods development and that the firm failed to demonstrate an understanding of the requirements. We think that the question asked of EHRT directed the firm to the area of concern to the evaluators and, in our view, a more specific request would have defeated the purpose of the discussion request, which was to discover if EHRT understood the requirements of the statement of work. Under the circumstances of this case, we think EHRT was reasonably on notice of the evaluators' concerns regarding its proposal.

EHRT also argues that EPA improperly downgraded it because the project manager and group leaders proposed by EHRT have limited research management experience. According to the protester, its initial proposal and BAFO elaborated on the management skill of its proposed personnel on technical projects. EHRT argues that the criticism of its proposal for not including research management experience indicates the use of an unannounced evaluation criterion.

As we explained above, we think that the solicitation stated that the contractor is to provide support to EPA's laboratory in all aspects of the laboratory's work. Under the circumstances, we do not think that it was reasonable for EHRT to conclude that the agency wanted personnel with management skills in only the relatively limited technical aspects of the required work.

EHRT's initial protest submission included an argument that its quality assurance plan was downgraded for failing to conform to the required format, in spite of the fact that the solicitation required no particular format for quality assurance plans. In response, the agency explains that it improperly scored EHRT's BAFO under the Quality Assurance Program Plan criterion. According to the agency, it corrected that score by increasing EHRT's final technical score from 677 to 697. The agency prepared an amended source selection decision which considered EHRT's increased score, and again concluded that award to Technology Applications was in the best interests of the government. Thus, the agency argues that the scoring error made no difference in the selection decision.

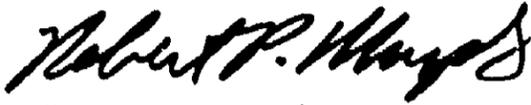
Although the agency responded to this issue in its comments on the agency report, EHRT did not attempt to rebut the agency's response. Therefore, we consider EHRT to have abandoned this ground of protest. Ross Aviation, Inc., B-236952, Jan. 22, 1990, 90-1 CPD ¶ 83.

EHRT also requests that we consider "a long history" of procurements in which it has not been awarded contracts by EPA. This contention provides no basis to challenge EPA's evaluation and selection decision in this case. Since our bid protest function encompasses only objections which relate to particular procurements, 31 U.S.C. § 3551(1) (1988); Cajar Defense Support Co., B-237426, Feb. 16, 1990, 90-1 CPD ¶ 286, we cannot consider EHRT's allegations regarding other contracts that were not awarded to EHRT.

Finally, EHRT requests that we comment on the EPA's policy regarding release of information under the Freedom of Information Act. According to the protester, EPA should have released to it the technical proposals of its competitors. In the copy of its report on the protest that it sent to the protester, EPA did not include a copy of Technology Application's proposal since that firm claimed that its proposal was proprietary. We reviewed the agency's decision on the release of documents and concluded that the protester

was given all the information that it was entitled to under our Bid Protest Regulations, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(d)).

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel