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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Greenhorne & O'Mara--Reconsideration and Protest

File: B-247116.3; B-247116.4

Date: October 7, 1992

Paul Shnitzer, Esq., Crowell & Moring, for Greenhorne & O'Mara, Inc., the requesting party.
Del Stiltner Dameron, Esq., and Alison L. Doyle, Esq., McKenna & Cuneo, for the protester.
Robert S. Brock, Esq., Federal Emergency Management Agency, for the agency.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegation that General Accounting Office's (GAO) recommendation to make award to protester improperly failed to require agency to execute justification for award to technically superior, higher-priced offeror is denied; agency need not prepare formal justification before following GAO recommendation that was based on showing in record that award to technically superior, higher-priced offeror was consistent with solicitation's evaluation scheme.

2. General Accounting Office (GAO) will not object to price discussions conducted with one offeror, pursuant to GAO recommendation to make award to that offeror, where the discussions do not affect GAO's original conclusion that the offeror was entitled to award.

DECISION

Greenhorne & O'Mara, Inc. (G&O) requests reconsideration of our decision, Dewberry & Davis, B-247116, May 5, 1992, 92-1 CPD ¶ 421, in which we sustained Dewberry & Davis' (D&D) protest against a contract award to G&O under request for proposals (RFP) No. EMW-92-ER, issued by the Federal Emergency Management Agency (FEMA) for standby disaster assistance. G&O also protests FEMA's implementation of our recommendation for corrective action.

We deny the request and the protest.

The RFP provided that technical merit would be more important than price in the award decision, but noted that price could become the deciding factor if proposals were found to be technically equal. The initial evaluation found that the D&D proposal was "significantly better" than G&O's; the two proposals scored 97.7 and 70.3 points (out of 100 possible), respectively. Following discussions, D&D's score was increased to 98.9 points, while G&O's score was raised to 74.3 points. The evaluation panel found that D&D demonstrated an understanding of the disaster assistance program, had sound organization and an excellent management plan, possessed excellent program managers and competent professionals, was able to respond rapidly and field numerous specialists for extended periods of time, and had demonstrated experience in disaster assistance. The evaluators discerned no weaknesses in the proposal. As for G&O, the panel found the firm weak in the area of management experience, and concluded that this would have an adverse effect on G&O's ability to complete assigned tasks. The panel concluded that D&D's proposal was "significantly better and ranked substantially higher" than G&O's.

After evaluation of best and final offers (BAFO), the contracting officer executed a negotiation memorandum recommending award to G&O on the basis of its low price. In this regard, the contracting officer stated,

> "[n]otwithstanding the panel's preference for the higher rated technical company (Dewberry & Davis), Federal Acquisition Regulations are too firmly imbedded in the philosophy and practice of the 'low bidder' and 'minimal needs of the government' to make any other rational choice in this matter beside the firm of Greenhorne & O'Mara.
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> "As iterated by the technical evaluation panel in their report, all three offerors were deemed to be 'acceptable.' It should be noted that even though Dewberry & Davis has a substantially higher technical score, this does not impact the competition. As evidenced by the panel's comments, they feel Dewberry & Davis is the most qualified (and preferred from a program standpoint) . . . and Greenhorne & O'Mara is the least preferred, and on the low end of the acceptable spectrum. However, the panel was neither willing to deem Greenhorne & O'Mara as 'unacceptable,' nor make a case of technical superiority for Dewberry & Davis. The situation at hand is a perfect example of the old adage of 'the government drives Chevrolets, not Cadillacs.' It is evident that the government's minimal needs in this situation can be met by Greenhorne &

> O'Mara at a substantially lower cost than the services proposed by Dewberry & Davis."

Accordingly, award was made to G&O on December 19.

We sustained D&D's protest of the award. We concluded that the agency's ultimate determination that D&D's proposal was not technically superior to G&O's such that it warranted payment of a higher price, was contrary to the evaluation record and the RFP evaluation criteria. In this regard, we noted that where cost is secondary to technical considerations under an RFP evaluation scheme, as here, selection of a lower-priced proposal over a proposal with a higher technical score requires an adequate justification, i.e., some showing the agency reasonably concluded that, notwithstanding the point differential between the two proposals, they were essentially equal. PharmChem Labs., Inc., B-244385, Oct. 8, 1991, 91-2 CPD ¶ 317; DynCorp, 71 Comp. Gen. 129, (1991) 91-2 CPD ¶ 575. We also pointed out that the Federal Acquisition Regulation (FAR) requires agencies to document their selection decisions to show the relative differences between proposals, their weaknesses and risks, and the basis and reasons for the selection decision. FAR § 15.612(d)(2). We found that the decision document here expressly discounted the RFP's evaluation scheme, which weighted technical merit more heavily than price, in favor of a perceived FAR preference for award to the "low bidder." As the decision failed to document a rational basis for selection of G&O over D&D, we recommended that the agency either make award to D&D as the technically superior offeror with a reasonable price, or execute a proper cost/technical tradeoff decision documenting the reasons that D&D's acknowledged superiority is not worth the cost premium.

In considering our recommendation, FEMA determined that it could not justify the award to G&O in light of the concerns raised in our decision. In a memorandum executed May 20, the contracting officer stated that, as a result of our May 5 decision sustaining D&D's protest, G&O's contract is partially terminated for the convenience of the government, and that the successful protester, D&D, shall assume all contract responsibilities as of June 1. In the preparation for the new award, FEMA obtained price reductions from D&D in the areas of overhead, subcontractor markup, and inflation rate; these reductions amounted to 3 percent of its BAFO price.

G&O'S REQUEST FOR RECONSIDERATION

G&O contends that the record contained ample support for FEMA's conclusion that D&D's proposal was not "substantially" superior to G&O's and therefore did not warrant payment of a higher price. In particular, G&O

asserts that most of the difference between the offerors' technical point scores was due to D&D's incumbency. Once the incumbency advantage is removed, G&O argues, D&D has very little technical advantage, and that slight technical advantage is outweighed by its 20 percent higher price.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must either show that our prior decision contains errors of fact or law, or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1992). Repetition of arguments previously made does not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. G&O argued during the development of the protest record that D&D's technical advantage should be discounted because it is no more than an incumbency advantage; we considered this argument in arriving at our decision.[1] G&O's disagreement with our conclusion does not provide us with a basis for reconsidering it. See id.

G&O also argues that our recommendation improperly failed to require that FEMA make a specific determination that D&D's technical superiority is worth its higher cost before awarding the contract to D&D. G&O is incorrect. The import of our decision was to recognize two potential proper results: (1) award to G&O if FEMA properly justified its original award decision, or (2) if FEMA could not do so, award to D&D based on our conclusion that such an award would be consistent with the record and the evaluation scheme. This latter portion of our recommendation was based on the complete evaluation record--which clearly established that D&D's proposal was considered far superior to G&O's and that its price on its face was not excessively higher than G&O's or deemed to be unreasonable--and the RFP evaluation scheme, which made technical superiority more important than price. Given these choices, FEMA's determination that it could not justify an award to G&O essentially constituted a determination that the other alternative presented in our decision, award to D&D, was the justifiable one. Under these circumstances, execution of a justification for award

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[1]G&O correctly points out that selection officials may discount an offeror's technical evaluation advantage that arises from its incumbency if a less experienced offeror can be expected to make up the difference through early hands-on experience. See Sparta, Inc., B-228216, Jan. 15, 1988, 88-1 CPD ¶ 37. In this case, however, the evaluators specifically found that G&O's lack of experience would have a negative impact on task completion and cost; the source selection decision did not adequately justify award to G&O notwithstanding the evaluators' conclusion.

to the higher-priced offeror would have been a pointless formality. We conclude that FEMA was not required to execute the determination.

G&O'S PROTEST

Upon learning that FEMA had followed our recommendation to make award to D&D, G&O protested the award. G&O primarily argues that the award was improper because it was based on price reductions the agency negotiated with D&D after receiving our decision. G&O contends that FEMA's negotiations with D&D for a lower price establish that its BAFO price was unreasonable; G&O argues that D&D therefore was not eligible for award. Alternatively, G&O asserts that the price negotiations with D&D constituted discussions from which G&O was improperly excluded; G&O maintains that FEMA should have reopened discussions with all offerors in the competitive range and accepted new BAFOs before making an award decision.

Contrary to G&O's assertion, D&D's price reduction does not establish that its BAFO price was unreasonable. As D&D's initial protest had questioned the agency's cost evaluation, the issue of price reasonableness was fully developed in the record. While we did not address the issue in our decision because we sustained the protest on other grounds, the record showed that the agency properly found D&D's BAFO price to be reasonable. Our conclusion in this regard was implicit in our recommendation, which advised FEMA to make award to D&D as "the technically superior offeror with a reasonable price." (Indeed, if the record had suggested otherwise, we would not have been able to recommend award to D&D based on its technical superiority.) Further, given our recommendation of award to D&D (if, as the agency determined, award to G&O could not be justified), and the contracting officer's acceptance of that recommendation, the further price reductions obtained from D&D clearly were in the nature of price reductions by the otherwise successful offeror, which are permissible. See Information Sys. & Networks Corp., B-220661, Jan. 13, 1986, 86-1 CPD ¶ 30. As noted above, the contracting officer's memorandum of May 20 shows that prior to any price reductions by D&D he had begun the process of terminating G&O's contract and awarding to D&D.

The request for reconsideration and protest are denied.

James F. Hinchman
General Counsel