



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Prospect Associates Limited

File: B-249047

Date: October 20, 1992

Richard J. Webber, Esq., and John J. O'Brien, Esq., Arent Fox Kintner Plotkin & Kahn, for the protester. James F. Trickett, Richard Brown, Esq., and Michael Colvin, Department of Health and Human Services, for the agency. Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation places greater importance on technical factors than on cost in overall evaluation scheme, agency properly may award contract to a lower cost offeror where the contracting officer reasonably determines proposals to be technically equal.
2. Where cost realism evaluation, even as adjusted based on protester's assumptions, establishes that awardee's proposed costs are lower than protester's, there is no basis to disturb decision based on lower proposed cost.

DECISION

Prospect Associates Limited protests the award of a cost-plus-fixed-fee contract to Technical Resources, Inc. under request for proposals (RFP) No. NIH-OD-92-02, issued by the National Institutes of Health (NIH), Department of Health and Human Services. Prospect, the incumbent contractor, contends that NIH erred in determining that TRI's proposal was technically equivalent to Prospect's and conducted an inaccurate cost realism evaluation of the two proposals.

We deny the protest.

The solicitation is for the provision of technical support to the NIH Office of Medical Applications of Research in conjunction with its responsibilities to identify and assess medical technologies; to make judgments as to their suitability for incorporation into medical practice; and to further the understanding and advancement of disease

prevention research and health promotion. The awardee is to provide all necessary personnel, facilities, supplies and services to accomplish five stated tasks: technology assessment by Consensus Development Conferences (CDCs); technology transfer by information dissemination; technology assessment through outside experts, consultants, speakers, etc.; evaluation of technology assessment efforts; and reports. As part of the CDC task, the contractor furnishes administrative, management, and clerical support for those conferences.

The RFP, which was issued in November 1991, required offerors to submit separate technical and cost proposals based on 69,685 direct labor hours over 3 years, and on 23,229 hours per year for 2 option years, and to include certain uniform cost assumptions provided in the RFP. According to the RFP's evaluation factors, the technical proposal would receive "paramount consideration" with cost considered "secondary." However, in the event the technical evaluation revealed offerors to be approximately equal in technical ability (i.e., technically equivalent), then the estimated cost of performance would become paramount. Award was to be made to the best advantage of the government, cost and other factors considered. In addition to certain mandatory qualification criteria concerning turn-around time for materials and adequate conference facilities, the RFP established four technical evaluation criteria: Staff (40 points); Scientific/Technical Approach (20 points); Corporate Experience (20 points); and Facilities and Resources (20 points). The Staff criterion was divided into two subfactors: Project Manager (20 points) and Task Leaders and Other Staff (20 points).

NIH received proposals from Prospect, TRI, and a third concern by the January 13, 1992, closing date. The technical evaluators found the proposals of Prospect and TRI to be technically acceptable with scores of 92.5 and 85.5, respectively. The third offeror's proposal was evaluated as technically unacceptable and eliminated from the competitive range. The evaluation of cost proposals included analysis of proposed direct labor rates, annual escalation rates, fringe benefits, overhead, general and administrative (G&A) expenses, accounting systems, and financial capability. NIH conducted oral and written negotiations with TRI and Prospect on technical and cost issues. Each offeror submitted best and final offers (BAFOs) on March 20.

The evaluators reevaluated each technical proposal in light of the BAFO submissions. Both proposals received improved scores: Prospect, 95 and TRI, 89. On the basis of the closeness in technical scores and of the evaluators' analysis, the contracting officer concluded that the proposals were technically equivalent.

Based on the BAFOs and the uniform cost assumptions, TRI's evaluated cost was \$844,515 less than Prospect's evaluated cost. To better ascertain which was the lower cost proposal, the contracting officer considered which costs varied between the offerors and set aside those costs considered consistent regardless of the offeror ("flow through" costs), and determined that TRI's cost was actually \$367,256 less than Prospect's cost. In view of the technical equivalence of the proposals and TRI's lower evaluated cost, NIH awarded the contract to TRI on June 5, 1992. After being debriefed, Prospect filed this protest.

Prospect contends that the contracting officer (the source selection official) failed to provide a coherent rationale for his conclusion that the two proposals were technically equivalent. Prospect relies on its overall higher technical score; weaknesses in TRI's proposal which remained in its BAFO; and the assessment of the project officer that Prospect's proposal was superior to TRI's. Prospect also objects to the agency's cost realism evaluation. According to Prospect, the real cost difference between the offerors is not significant enough to warrant award to TRI. Prospect requests that the contracting officer be required to reconvene the technical evaluators to seek their guidance on whether Prospect's proposal is in fact better than TRI's. We find nothing unreasonable in the contracting officer's determinations.

THE TECHNICAL EVALUATION

The procuring agency has the primary responsibility for evaluating the relative merits of offerors' technical proposals and has a reasonable amount of discretion in the evaluation of those proposals. McLaughlin Enters., Inc., B-229521, Mar. 4, 1988, 88-1 CPD ¶ 232. It is not the function of our Office to evaluate proposals de novo. Rather, we will examine the evaluation in its entirety to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria. Pemco Aeroplex, Inc., B-239672.5, Apr. 12, 1991, 91-1 CPD ¶ 367. In reviewing a selection determination like the one here, we will look at the entire record, including statements and arguments made in response to a protest, so that we may determine whether the particular selection decision is supportable. We do not limit our review to the question of whether the selection was properly supported at the time it was made. Bank Street College of Educ., 63 Comp. Gen. 393 (1984), 84-1 CPD ¶ 607.

Prospect argues that its proposal's superiority is indicated by its overall technical score of 95, which is 6 points higher than TRI's proposal score of 89. Prospect also notes that its proposal received 12 perfect scores from the four

evaluators, while TRI's proposal received only eight. From our review of the record, we find that the contracting officer reasonably determined the proposals to be technically equivalent.

At a hearing on this protest, the contracting officer stated that he considered the proposals technically equivalent based both on the 6-point difference and on the evaluators' comments. Video Transcript (VT) at 10:15. The contracting specialist, who advised the contracting officer, explained how the two determined that the 6-point difference was not significant. VT at 9:16-25. Noting first that the 5 technical criteria were all equal in rank (20 points), the contracting specialist stated that in two areas (Project Manager and Corporate Experience) there was only a .5 average point score difference, which was itself viewed as not significant.¹ VT at 9:16-17. The 1 average point difference in the area of Facilities and Resources, when considered in conjunction with the site visit to TRI's "more than adequate" facility, was determined to be negligible. Id. The remaining difference was attributable to 2 average points each in the areas of Task Leaders and Technical Approach. VT at 9:17. Overall, the point scores were determined to reflect that the proposals were equivalent. VT at 9:25.

Whether a given point spread between competing offerors' proposals indicates the significant superiority of one proposal over another depends on the facts and circumstances of each procurement. While technical point scores and descriptive ratings must be considered by source selection officials in making this determination, they are not bound thereby; rather, source selection officials must determine if they agree that the point scores are indicative of technical superiority and what the difference may mean in contract performance. Merdan Group, Inc., B-231880.3, Feb. 28, 1989, 89-1 CPD ¶ 210. Proposals have been viewed as equivalent from a technical standpoint with technical score differentials of more than 15 percent. See Ogilvy, Adams & Reinhart, B-246172.2, Apr. 1, 1992, 92-1 CPD ¶ 332. Here the point differential is between 6 and 7 percent.

Further, in reaching his determination of technical equivalence, the contracting officer did not limit his

¹At the hearing, the contract specialist spoke in terms of raw score differences, prior to averaging for the final overall evaluation score. In raw scores among the four evaluators, there was a 24 point difference between the proposals which, when averaged to reach the evaluated score, is reduced to 6 points overall. For purposes of this decision, we have used the average score.

review to the difference in scores. He reviewed the initial proposal evaluations and the BAFO score sheets containing the evaluators comments,² and memoranda from the project officer and the contract specialist. VT at 9:37, 55, 10:22-23, 30. He also discussed the evaluations with the contract specialist and other contract personnel. VT at 9:28, 39-40.

In particular, the contracting officer considered the evaluators' initial assessment that both offerors' personnel, facilities, and capabilities would enable them to provide outstanding performance. While the initial evaluations noted more weaknesses in TRI's proposal than in Prospect's, the contracting officer found that these weaknesses were adequately addressed by TRI's BAFO. The fact that the evaluators did not all award TRI's proposal high scores and did not all believe that TRI had resolved all weaknesses does not obviate the contracting officer's determination. It is not unusual for different evaluators to have reasonable differences of opinion. Monarch Enters., Inc., B-233303 et al., Mar. 2, 1989, 89-1 CPD ¶ 222.

In reviewing the BAFO evaluations, the contracting officer noted that two of the evaluators had no outstanding concerns or questions and that one of them increased TRI's Technical Approach score based on TRI's suggested solutions to potential problems being "innovative and creative." Although another evaluator found TRI's answers not sharp and convincing, he nevertheless found no reason to downgrade the proposal and raised TRI's score in two areas where he found improvement, Technical Approach and Facilities and Resources. The fourth evaluator, who scored TRI's proposal the lowest, continued to have concerns in the areas of Staff, Technical Approach, and Facilities and Resources. However, the contracting officer found that these concerns involved evaluation and publication issues, which historically involved the least effort on the part of the contractor. Overall, the contracting officer was not concerned by the number of weaknesses, but whether the issues had been resolved. Once he concluded that there were no significant, unresolved issues, he determined that the proposals were equivalent. We find that this analysis by the contracting officer reasonably supports his determination of technical equivalence.

²At the hearing, the contracting officer was confused over whether he had reviewed the actual BAFO score sheets or a (nonexistent) summary of them. VT at 9:55, 10:18-19, 26-28, 32-33. Based upon the contracting officer's hearing statements as a whole and his post-hearing comments, we conclude that he reviewed the actual score sheets prior to making the determination of equivalence.

Prospect points out that the contracting officer acknowledged at the hearing that he was not qualified to "second guess" the evaluators. VT at 10:12. From this, Prospect argues that it was improper for the contracting officer not to consult with the evaluators to learn whether they considered the remaining weaknesses significant. We disagree. While he did not believe himself qualified to second guess the technical findings of the evaluators, the contracting officer was qualified to weigh the concerns raised by some of the evaluators, consider them in context with the differing opinions of other evaluators, and determine whether the negative concerns were significant. Source selection officials are not bound by the recommendations of lower-level evaluators, even though the working-level evaluators may normally be expected to have the technical expertise required for such evaluations. Wyle Laboratories, Inc.; Latecoere Int'l, Inc., 69 Comp. Gen. 648 (1990), 90-2 CPD ¶ 107.

Our conclusion is not changed by the contracting officer's consideration of BAFO evaluation memoranda from the project officer and the contract specialist. The project officer, who was not part of the evaluation team, reviewed the offerors' BAFOs prior to their evaluation and opined that Prospect's proposal was superior. The contract specialist prepared a memorandum in rebuttal, noting the positive evaluation comments about TRI's proposal made by the evaluators.

Prospect argues that the contract specialist's memorandum was not balanced because it failed to provide any negative comments from the evaluators. Prospect also argues that the contracting officer apparently ignored the project officer's assessment of Prospect's superiority. The contracting officer, however, reviewed both documents (VT at 10:22-23, 30) in addition to the actual comments of the evaluators. Moreover, while the memoranda themselves may be one-sided, it is clear from the record that the contracting officer considered both the positive and negative aspects of the evaluation before making his determination of equivalence.³

³As part of this argument, Prospect highlighted a comment made by one of the evaluators that a particular action by TRI was a "+" (i.e., shorthand for "plus"), and alleged that the comment was misinterpreted by the contract specialist's memorandum as "A+" (i.e., a superior grade). Since the comment is positive regardless of the interpretation, and since the contracting officer reviewed the comments himself, we do not agree that any misinterpretation by the contract specialist was significant.

THE COST EVALUATION

Where a selection official reasonably regards proposals as being essentially equal technically, cost may become the determining factor in making an award decision notwithstanding that the evaluation criteria assigned cost less importance than technical considerations. See Warren Elec. Constr. Corp., B-236173.4; B-236173.5, July 16, 1990, 90-2 CPD ¶ 34. In making an award determination for a cost reimbursement contract, the contracting agency must perform a cost realism analysis of competing cost proposals, since the government is required to pay the contractor its actual and allowable costs. Federal Acquisition Regulation §§ 15.801, 15.805. The evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agency since it is in the best position to assess the realism of cost and technical approaches and must bear the additional expenses and other adverse results of a defective cost analysis. Burns & Roe Indus. Servs. Co., B-233561, Mar. 7, 1989, 89-1 CPD ¶ 250. Because the cost realism analysis is a matter for the informed judgment of the contracting agency, our review is limited to a determination of whether the agency cost evaluation was reasonable and not arbitrary. Electronic Warfare Integration Network, B-235814, Oct. 16, 1989, 89-2 CPD ¶ 356.

Prospect argues that the cost realism evaluation was flawed because the actual cost difference between the two offers is significantly lower than that considered by the contracting officer. In view of this lower cost difference, Prospect argues that the contracting officer should be required to reevaluate his decision. We disagree.

The overall evaluated cost difference between Prospect and TRI, as reported in the source selection document, exceeded \$844,000 over 5 years. However, the contracting officer considered a more realistic calculation of the difference prior to making his award decision. After eliminating the flow-through costs, a loaded labor rate for each offeror was then calculated including direct salaries, fringe benefits, overhead, G&A, and fixed fee. Separate escalation rates were applied for each year after the first year. Reproduction costs also were considered using the offerors' rates and the uniform assumptions. Based on these calculations, TRI's cost was determined to be \$367,256 less than Prospect's cost.

Prospect contends first that the agency's application of escalation rates was inequitable. The agency used a percentage rate based on Prospect's history for the protester, but used a lower than historical rate for TRI. While it is a fundamental principle of federal procurement

that all offerors must be treated equally, Loral Terracom, Marconi Italiana, 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182, this calculation does not evidence inappropriate unequal treatment.

Escalation rates are proposed by the offerors.⁴ The agency does not attempt to dictate the rates or negotiate lower than normal rates since the actual costs will be reimbursed under the terms of the contract. VT at 11:16. However, for the cost evaluations, in determining whether to use the proposed rate, the NIH cost analysts looked to the historical practices of the offerors to determine if the proposed rates were reasonable. VT at 11:15. When the analysts reviewed Prospect's proposed rate, they found that it was consistent with the offeror's history and so applied it in calculating the evaluated cost. TRI proposed a rate that was lower than both its historical rate and that proposed by Prospect, and so the analysts reviewed the proposal more closely in this regard.

The analysts found that TRI's historical rate had been higher than that proposed, but had dropped each year for 2 years. They also noted that those percentages had included promotions. The proposed rate was consistent with what the analysts considered a "trend." Thus, based on the percentage drop, coupled with a consumer price index which was lower than the proposed escalation rate, the analysts concluded that the proposed rate was reasonable.

We find that the agency was reasonable in its application of escalation rates. Moreover, the agency has calculated the cost difference using the higher percentage for TRI suggested by the protester. Using these calculations, Prospect's evaluated cost would still exceed TRI's cost by more than \$250,000. Thus, the alleged inaccuracy in applying different escalation rates was not determinative.

Prospect next contends that the agency failed to consider the cost impact of TRI's proposal of management hours. Specifically, Prospect notes that TRI was direct billing for the services of two home office management employees, while Prospect's comparable home office management was billed as G&A.⁵ According to Prospect, had the agency included the loaded labor cost of these TRI employees' over 5 years, along with adjustments to fee and G&A, the resulting cost

⁴Because these rates are proprietary to the offerors, they are not revealed in this decision.

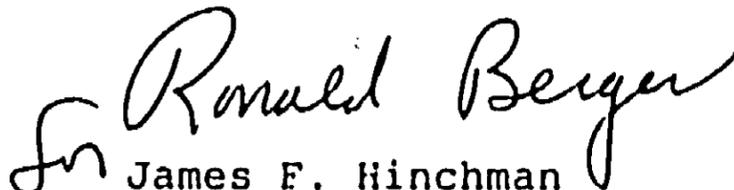
⁵The cost analysts initially questioned TRI's billing of the labor of these employees directly, but found that this was TRI's normal accounting practice.

difference between the proposals would be less than \$16,000 each year. Prospect argues that this difference is so slight that it cannot be known which offeror would ultimately prove to be the lower cost offeror.

The agency contends that only one of the management employee's services are comparable to those proposed by Prospect in its G&A costs. Based on our review of the record, we agree that the agency's conclusion is reasonably based. According to NIH, the other employee will provide "hands-on" service comparable to Prospect's direct billed management effort. The qualifications and proposed responsibilities of this employee support the agency's assessment. Thus, we do not agree that the cost evaluation should be adjusted to compensate for this employee's management hours.

The agency recomputed its cost evaluation to take into account the other employee's time as "extra" hours. After adjustment of TRI's costs, Prospect's evaluated cost still exceeds TRI's cost by more than \$300,000 based on the original TRI escalation rate, and by more than \$200,000 based on the higher TRI escalation rate (see above). After considering these adjustments, based on his finding of technical equivalence and lower cost, the contracting officer remains of the opinion that his award decision was correct. We find no basis to conclude that this determination is unreasonable.

The protest is denied.


James F. Hinchman
General Counsel