



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: D.O.N. Protective Services, Inc.

File: B-249066

Date: October 23, 1992

Don L. Frierson and James I. Luke for the protester, Nancy O. Dix, Esq., and Ted D. Billbe, Esq., Gray, Cary, Ames & Frye, for Steinhoff and Sadler, Inc., an interested party.

Paul Brundage, Esq., and Don G. Bush, Esq., National Aeronautics and Space Administration, for the agency. Catherine M. Evans, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's technical evaluation of proposals is denied where General Accounting Office's review of protester's proposal confirms that proposal failed to address certain requirements.
2. Protest alleging that agency improperly made upward adjustments to proposed costs under cost-reimbursement solicitation is denied where agency had reasonable basis for adjustments.
3. Protest of agency's alleged failure to consider protester's status as a labor surplus area concern is without merit where place of contract performance is not a labor surplus area.
4. Protest allegation that agency's pre-proposal site visit was insufficient to allow offerors other than the incumbent contractor to prepare adequate proposals is untimely where not filed before proposals were due.

DECISION

D.O.N. Protective Services, Inc. protests the National Aeronautics and Space Administration's (NASA) decision to award a contract to Steinhoff & Sadler, Inc. (SSI), under request for proposals (RFP) No. 13-SSC-P-92-1, for security services at the John C. Stennis Space Center, Mississippi. D.O.N. primarily alleges that the agency improperly found SSI's proposal superior to D.O.N.'s, notwithstanding SSI's higher cost.

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

The RFP, issued on February 10, 1992, contemplated award of a cost plus award fee contract for a base year and 4 option years, based on estimated levels of effort for standard and emergency services. Proposals were to be evaluated based on the following four criteria: mission suitability and cost, which were considered approximately equal in importance; relevant experience/past performance, which was considered less important than the first two factors; and other considerations, which was considered least important.

NASA received twelve proposals in response to the solicitation; the agency determined three proposals (including those submitted by D.O.N. and SSI, the incumbent contractor) to be in the competitive range. NASA then conducted written and oral discussions with the offerors and requested best and final offers (BAFO). Based upon the evaluation of BAFOs, SSI's proposal was ranked first and D.O.N.'s proposal was ranked second. While D.O.N.'s proposal was found to have a slightly lower probable cost than SSI's--\$9,920,508 versus \$10,151,561--the agency determined that SSI's proposal offered substantial technical advantages in the areas of mission suitability and experience/past performance. Furthermore, the agency noted that not only did D.O.N.'s cost advantage amount to less than \$50,000 per year over the expected 5-year life of the contract, but in addition the evaluators attached a "high confidence level" to SSI's probable cost and only a "moderate confidence level" to D.O.N.'s probable cost. As a result, the agency determined that SSI's proposal was most advantageous to the government. Upon learning of the resulting decision to make award to SSI, D.O.N. filed an agency level protest; when the contracting officer denied that protest, D.O.N. filed this protest with our Office.

TECHNICAL EVALUATION

D.O.N. challenges the evaluation under the technical evaluation factors for mission suitability and corporate experience/past performance.

The evaluation of proposals and the determination of their relative merits is primarily the function of the procuring agency, since it is the agency that is responsible for defining its needs and the best method of accommodating them, and must bear the burden of any difficulties resulting from a defective evaluation. Dimensions Travel Co., B-224214, Jan. 13, 1987, 87-1 CPD ¶ 52. In reviewing protests against allegedly improper evaluations, therefore, we examine the record only to determine whether the agency's

judgment was reasonable and in accord with the evaluation criteria listed in the RFP, Taft Broadcasting Corp., B-222818, July 29, 1986, 86-2 CPD ¶ 125. As discussed below, the record establishes that the agency's technical evaluation was reasonable and consistent with the stated evaluation criteria.

Mission Suitability Factor

Under the mission suitability factor, the most important technical evaluation factor, the RFP set forth the following subfactors and their relative weights:

a.	Management plan/understanding the requirement:	
	Operating plan and procedures	275 points
	Organization plan	175 points
b.	Key personnel:	
	Senior management personnel	225 points
	Other personnel	125 points
c.	Corporate resources:	
	Staffing plan	120 points
	Human resource and control	<u>80 points</u>

Total: 1,000 points

The Source Evaluation Committee (SEC) rated SSI's proposal "excellent" under this factor, with a score of 980 points, while D.O.N.'s proposal was rated "very good" at 898 points. As discussed below, the principal weaknesses perceived in D.O.N.'s proposal were in the areas of operating plan and procedures, other personnel, and staffing plan.

Operating plan and procedures subfactor

D.O.N.'s proposal earned a rating of very good under this subfactor, with 248 of 275 points; SSI was rated excellent at 267 points. Although the SEC noted a number of strengths in this area of D.O.N.'s initial proposal--including the level of detail in the operating plan, a comprehensive safety plan and safety training program, and the identification of potential risks with proposals for mitigating them--it identified three "weaknesses," two of which were not corrected during discussions: (1) a lack of specific plans for handling government property, and (2) a lack of specific information about training for new requirements. D.O.N. asserts that it corrected these problems in its responses to NASA's discussion questions.

Our review of the record, however, supports NASA's view that the weaknesses were not corrected. When asked to explain

its procedures for handling government property, D.O.N. responded with a brief list of NASA handbooks that it would use to guide it in developing procedures, and a list of categories (e.g., acquisition, property records, damage reports) in which procedures would be developed. D.O.N., however, did not describe the actual procedures it would follow in handling government property. We therefore find the agency reasonably concluded, based on this response, that D.O.N. had not adequately explained its procedures in this regard.

As for D.O.N.'s perceived failure to provide sufficient information on training for new requirements, we note that D.O.N. was asked during discussions to elaborate on its training plan; its response, however, did not address new training requirements. While D.O.N. argues that its training plan should not have been downgraded on this basis because it was otherwise comprehensive and detailed, it is undisputed that its proposal did not address training for new requirements, and D.O.N. does not dispute that new requirements may arise during the course of the contract. We therefore find no basis for questioning the agency's downgrading of the proposal in this area.

Other personnel subfactor

Under the subfactor for other personnel, D.O.N. received an adjectival rating of good, with 81 of 125 possible points; SSI was rated excellent at 123 points. Although the SEC recognized the extensive experience of D.O.N.'s proposed personnel, it found two deficiencies: the proposed investigator demonstrated no criminal investigative experience, and one of the proposed shift supervisors had not worked in law enforcement or security between 1983 and 1991. D.O.N. contends that the agency improperly downgraded its proposed investigator under this subfactor because criminal investigative experience was not required and, in any case, the individual does in fact have investigative experience. In addition, D.O.N. asserts that the agency failed to give proper credit for the proposed shift supervisor's extensive relevant experience.

We find that the record supports NASA's conclusions. The RFP listed among the required duties of management and supervisory level employees the investigation of missing, stolen or damaged government property. At oral discussions, the proposed investigator was asked to elaborate on his background; his response confirmed that his experience was primarily in the areas of intelligence and communications. While this experience included extensive internal audit work, it appears to have been related more to business administration than to security or law enforcement. In our view, given his assigned duties as set forth in the RFP,

NASA properly considered the criminal investigative experience of D.O.N.'s proposed investigator and reasonably downgraded the proposal when D.O.N. failed to establish that the proposed individual possessed such experience. With respect to the proposed shift supervisor, we think NASA reasonably found the individual's lack of recent experience in the security field to be a deficiency; D.O.N.'s disagreement with that conclusion does not render it unreasonable. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

Staffing plan subfactor

D.O.N. initially earned an adjectival rating of very good, scoring 108 of 120 points, under the subfactor for staffing plan; SSI was rated excellent with 118 points. The SEC's primary concern in this area was insufficient staffing of the main (South) reception area during peak hours--D.O.N.'s cost proposal indicated that only a single receptionist would be working at this location. As D.O.N.'s staffing plan did not discuss receptionist coverage, D.O.N. was asked during discussions to explain the duties and responsibilities of the receptionists. In its response, D.O.N. acknowledged the significant duties and responsibilities assigned to receptionists, stating that they are responsible for visitors to the installation, including registration, issuance of badges and vehicle decals, notification of employees being visited, and directing visitors to their destinations; in addition, receptionists perform other tasks such as maintaining records, processing traffic tickets, and issuing security credentials. Since D.O.N.'s response did not resolve the agency's concern that one receptionist could not perform all of these functions at the main reception center during peak hours, the SEC downgraded the proposal slightly, from 108 to 102 points under this subfactor.

In asserting that the agency improperly downgraded its proposal in this regard, D.O.N. claims that it proposed part-time receptionists to assist during peak periods, and notes that its administrative assistant, who is also assigned to the main reception center, could also provide support for the receptionist. However, none of this was explained in D.O.N.'s proposal, which simply stated that the "receptionist will be located in the South Reception Center"; no explanation of additional part-time coverage or contingency support was offered. We therefore find reasonable the agency's decision to downgrade D.O.N.'s proposal based on the insufficient staffing of the main reception area during peak hours.

The agency also noted as a weakness in D.O.N.'s staffing plan an inconsistency between the proposed staffing and the cost proposal. In this regard, the SEC found that D.O.N.

proposed to staff a reception area that was not listed as an RFP requirement, but at the same time did not include the cost of staffing that area in its cost proposal. D.O.N. explains that it proposed to staff the post, even though it believed that the post would be closing, because there were references to it in the RFP. To account for this in its cost proposal, D.O.N. structured its cost spreadsheets (which were to be submitted on floppy disk) to allow contracting personnel to "turn on" the cost for the post by computer if the agency required the post to be staffed. The spreadsheets contained explanatory notes to that effect. D.O.N. argues that the agency failed to understand its treatment of this staff position in its proposal and, as a result, improperly downgraded the proposal.

In view of the fact that the reception post at issue was not an RFP requirement, it is not clear why the agency considered it necessary to downgrade D.O.N.'s proposal for a perceived failure to include the cost of staffing that post. We find, however, that any agency error here did not affect the award decision. While it is not clear exactly how many points D.O.N.'s proposal was downgraded for this particular concern, in view of the fact that it was characterized as a "minor weakness," we think that no more than a few of the 18 points D.O.N. lost under the staffing plan subfactor are attributable to this perceived problem. SSI's score under the mission suitability factor was nearly 100 points higher than D.O.N.'s; the few points disputed here would not appreciably affect the difference between the two scores and correction of the agency's alleged error would not affect the outcome of the competition.

Corporate Experience/Past Performance Factor

Under the corporate experience/past performance factor, the second most important technical factor, SSI again was rated excellent, while D.O.N. was rated very good. The evaluation of proposals under this factor focused on the offeror's experience with, and performance of, comparable efforts, including subcontractor performance, cost control, safety, quality control, employee turnover, and compliance with cost accounting standards. The SEC noted that D.O.N. had little experience in cost-reimbursement contracts of this size; most of D.O.N.'s experience was with smaller, fixed-price contracts which have different types of reporting requirements than do cost reimbursement contracts. In contrast, SSI's proposal indicated experience with other cost-reimbursement contracts of comparable size, including its current contract at Stennis Space Center.

D.O.N. argues that the SEC's conclusion regarding SSI's superior experience is unreasonable because SSI has only existed as a corporation since 1991, when it took over performance of the contract from Quad S Company pursuant to a novation agreement. D.O.N.'s argument is without merit. While SSI as a corporation is relatively new, its management is essentially the same as that for Quad S Company, which had performed the Stennis Space Center contract and other large security contracts, including one at NASA's George C. Marshall Space Flight Center, since 1987. In evaluating the experience of a new business such as this one, an agency may consider the experience of supervisory personnel. See LD Research Corp., B-230912.3, Sept. 9, 1988, 88-2 CPD ¶ 223; Data Flow Corp., et al., B-209444 et al., July 6, 1983, 83-2 CPD ¶ 57; B-167051(1), July 14, 1970. We therefore conclude that the agency properly considered the extensive experience of SSI's management personnel in awarding the firm a high score for its corporate experience.

COST EVALUATION

The solicitation provided for cost proposals to be analyzed to determine the probable cost of doing business based upon the offeror's proposed approach. In this regard, the RFP identified the most important elements of the cost proposal as the realism of the proposed wage rates, overhead, general and administrative costs, and award fee. The RFP also provided that offerors' proposed compensation packages would be evaluated with a view towards whether they enhanced recruitment and retention of personnel. Based on these considerations, the agency adjusted D.O.N.'s proposed cost upward by a total of \$345,373, primarily in the area of employee wages and benefits. D.O.N. challenges each of the agency's upward adjustments.

First, NASA adjusted D.O.N.'s proposed cost upward to bring the cost of union employee wages for the base contract year, which was scheduled to commence on August 1, 1992, in line with the wages under SSI's collective bargaining agreement, which expires on May 16, 1993. Similar adjustments were made to reflect vacation time required for union employees under the collective bargaining agreement. D.O.N. claims that its proposed union wages for the base year were those set forth in the RFP's Service Contract Act interim wage determination; it argues that the agency could not properly increase D.O.N.'s proposed costs for the base year to reflect higher wage levels than those set forth in the wage determination.

D.O.N.'s argument is without merit. Under the Service Contract Act of 1965 and its implementing regulations, successor contractors are required to pay wage rates and fringe benefits to service employees they hire in accordance

with the predecessor contractor's collective bargaining agreement. 41 U.S.C. § 353(c) (1988); 29 C.F.R. § 4.1b (1992). Before issuing a solicitation for a successor contract, agencies are required to apply to the Department of Labor for a wage determination that reflects the terms of the collective bargaining agreement; this wage determination then governs the contract. 29 C.F.R. § 4.3(a). Here, the agency was unable to obtain a wage determination incorporating the terms of the labor agreement before issuing the solicitation. Accordingly, the RFP included an "interim" wage determination. It informed offerors that a wage determination incorporating the terms of the collective bargaining agreement would be forthcoming and would apply to the contract (retroactively, if necessary). See 29 C.F.R. § 4.4(f). Since the collective bargaining agreement, and not the interim wage determination in the RFP, governs the wages and fringe benefits that must be paid to union member under this contract, the agency properly adjusted D.O.N.'s proposed wages and cost of vacation time to conform to the labor agreement. See Unified Indus. Inc., B-237868, Apr. 2, 1990, 90-1 CPD ¶ 346.

NASA's cost evaluation also made upward adjustments to D.O.N.'s proposed wages for certain non-union personnel. In this regard, while D.O.N.'s proposal stated that the firm would hire the incumbent's personnel, D.O.N. proposed to pay them less than SSI was paying them. Therefore, NASA adjusted the wages for these personnel upward to their current levels and, in addition, adjusted the vacation hours to the incumbent's levels in order to account for the probable cost of retaining these personnel. D.O.N. objects to these adjustments, arguing that the agency does not know whether D.O.N. will ultimately retain the incumbent contractor's personnel in these positions.

We find the agency's upward adjustments to be reasonable. When a cost-reimbursement contract is to be awarded, the offerors' estimated costs of contract performance should not be considered as controlling since the estimates may not provide valid indications of final actual costs, which, within certain limits, the government is required to pay. See Federal Acquisition Regulation (FAR) § 15.605(d); Science Applications Int'l Corp., B-232548; B-232548.2, Jan. 22, 1989, 89-1 CPD ¶ 52. The agency's evaluation of estimated costs thus should be aimed at determining the extent to which the offeror's estimates represent what the contract should cost, assuming reasonable economy and efficiency. Science Applications Int'l Corp., supra. An evaluation of this nature necessarily involves the exercise of informed judgment. Our review is limited to considering whether the agency's cost realism determination is reasonably based and not arbitrary. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Since D.O.N.'s

proposal stated that the firm expected to retain 89 percent of the incumbent contractor's personnel, we think the agency reasonably assumed it likely that D.O.N. would have to pay these employees as much as they are currently making, and offer them the same amount of vacation time, in order to retain them as proposed. See Scott Servs., Inc., B-181075, Oct. 30, 1974, 74-2 CPD ¶ 232.

D.O.N. also objects to NASA's addition of a 3 percent escalation factor to both union and non-union wages for the option years. D.O.N. asserts that it properly proposed the wage rates set forth in the interim wage determination for the entire life of the contract; it argues that the agency could not assume that wages would escalate 3 percent in the option years.

Again, we find the agency's evaluation reasonable. We have no basis to object to the agency's application of a 3 percent escalation factor to D.O.N.'s proposed union wages. The union's collective bargaining agreement, effective since 1990, expires in May 1993. The agency concluded that the likely future collective bargaining agreement rates would be somewhat higher than the current rates. In our view, the agency reasonably applied an escalation factor to the option year prices to account for this likelihood. We also think the agency reasonably applied a corresponding escalation factor to non-union wages. See ERC Envir. and Energy Servs. Co., Inc., B-241549, Feb. 12, 1991, 91-1 CPD ¶ 155.

NASA also adjusted D.O.N.'s proposed cost upward to account for holiday pay rates for guards. The spreadsheets accompanying D.O.N.'s cost proposal reflected straight time pay rates for holidays; NASA adjusted D.O.N.'s proposed cost upward to reflect overtime pay. D.O.N. argues that it was required to account for holiday pay separately from overtime pay in order not to confuse it with other types of overtime pay. However, D.O.N. does not explain; nor is it otherwise evident, where in its proposal the required holiday overtime pay was in fact accounted for. We therefore have no basis to question the agency's adjustment to D.O.N.'s cost proposal in this regard.

D.O.N.'s remaining challenge to the cost evaluation involves upward adjustment of its proposed cost of state unemployment insurance. Here, the agency adjusted D.O.N.'s proposed rate of .4 percent to 1.1 percent, since that is the cost SSI currently is paying. As this adjustment accounts for a very small portion--approximately \$13,000--of the total upward adjustment to D.O.N.'s proposed cost, we find that any agency error in this area would not affect the award decision; we therefore need not address it here.

OTHER PROTEST GROUNDS

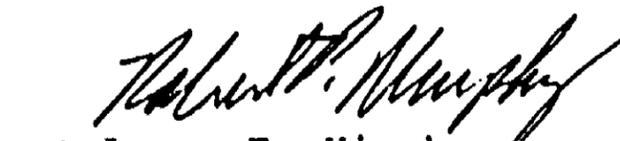
D.O.N. complains that NASA improperly failed to take its status as a labor surplus area (LSA) concern into account in the evaluation. D.O.N.'s allegation is misplaced. The solicitation incorporated by reference Federal Acquisition Regulation (FAR) § 52.220-1, Preference for Labor Surplus Area Concerns. This clause provides that, while the solicitation was not set aside for LSA concerns, an offeror's status as an LSA concern may affect its entitlement to award in the case of tie offers or evaluation under the Buy American Act. Neither case applies here. NASA therefore had no basis to consider D.O.N.'s LSA status in the evaluation. See Litton Sys., Inc., Potentiometer Div., B-218638, July 26, 1985, 85-2 CPD ¶ 95.

Finally, D.O.N. complains that a pre-proposal site visit NASA arranged was limited to a bus tour of the Stennis Space Center facilities, and therefore did not allow offerors to observe any unique or specific security considerations that should have been addressed in proposals. D.O.N. asserts that this abbreviated site visit conferred an unfair competitive advantage on SSI, the incumbent contractor. This protest ground is untimely; D.O.N. should have protested the perceived inadequacy of the site visit prior to the closing time for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); see San Antonio Floor Finishers, Inc., B-231386, Feb. 4, 1991, 91-1 CPD ¶ 112.

CONCLUSION

In summary, based upon our review of the evaluation record, we find that NASA reasonably determined D.O.N.'s proposal to be deficient in certain areas; we find no basis for questioning NASA's determination that SSI submitted the technically superior proposal. In addition, the record supports the reasonableness of the agency's cost evaluation. Accordingly, in view of the solicitation's emphasis on technical factors, and the relatively minor (about 2 percent) difference between the probable costs of the two proposals, we conclude that the agency reasonably determined SSI's proposal to be most advantageous to the government and selected SSI for award.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel