



Comptroller General
of the United States
Washington, D.C. 20548

Decision

REDACTED VERSION

Matter of: Continental Maritime of San Diego, Inc.,
File: B-249858.2; B-249858.3
Date: February 11, 1993

Joel R. Feidelman, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.
Lane L. McVey, Esq., McKenna & Cuneo, for National Steel and Shipbuilding Company, an interested party.
Susan S. Grooms, Esq., and Janice Passo, Esq., Department of the Navy, for the agency.
Mary G. Curcio, Esq., and John G. Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that in evaluating awardee's technical proposal procuring agency failed to consider information obtained during a preaward survey is sustained to the extent the solicitation contained responsibility type technical evaluation factors which concerned an offeror's capability to perform the contract.

DECISION

Continental Maritime of San Diego, Inc. protests the award of a contract for lot I of a phased maintenance program for four 16/26 class guided (CG) missile cruisers to National Steel and Shipbuilding Company under request for proposals (RFP) No. N00024-92-R-8501, issued by the Department of the Navy. Continental asserts that the Navy improperly evaluated National's proposal.

We sustain the protest.

*The decision issued on February 11, 1993, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

BACKGROUND

The RFP was issued on December 6, 1991, for a phased maintenance program for nine 16/26 CG cruisers. The RFP contemplated the award of a cost-plus-award-fee contract for each of two lots. The protest concerns the award of lot I for phased maintenance of the four cruisers that did not require drydocking. The solicitation required the successful offeror to (1) plan for the repair and alteration of the ships, (2) prepare for and accomplish the repair and alteration of the ships, (3) accomplish emergent repair and prefabrication/installation of alterations, (4) accomplish provisioning, and (5) furnish supplies ordered by the administrative contracting officer.

The RFP provided that proposals would be evaluated in accordance with the following categories which were listed in descending order of importance: (1) Management Capability, (2) Technical Approach, (3) Resource Availability, and (4) Cost. Each category was followed by several factors that would be considered in the evaluation. The factors relevant to this protest are Cost Reporting and Cost Avoidance and Material Control System under Management Capability, Cost Control and Cost Avoidance under Technical Approach, and Cost Data Support under Cost.

Both Continental and National submitted proposals for lot I by the February 19, 1992, due date. The technical and cost proposals were evaluated and received the following scores under the four categories and the relevant factors:

	Technical	
	National	Continental
Management Capability		
Cost Reporting and Cost Avoidance		
Material Control System		
Technical Approach		
Cost Control and Cost Avoidance		
Resource Availability		
Total Technical Score		

Cost

Cost to the Government

Cost Realism

Cost Data Support

Total Cost Score

Overall Total Score

National's evaluated cost was [deleted] versus Continental's evaluated cost of [deleted].

As a result of National's [deleted] and [deleted], the contracting officer concluded that discussions were not necessary and on June 22, requested a preaward survey of National.

On June 30, before the results of the preaward survey were received, the chairman of the evaluation panel recommended to the acquisition manager that the contract for lot I be awarded to National. Subsequently, on July 15, before the contract was awarded, the preaward survey results were submitted. The survey, among other things, contained the conclusion of the Defense Contract Audit Agency (DCAA) that National's accounting system was not acceptable for government contracting purposes because the firm did not adequately segregate costs at the job level, and because of timekeeping deficiencies. DCAA also pointed out that National was not in compliance with Defense Federal Acquisition Regulation Supplement (DFARS) requirements regarding the firm's material management and accounting system and with Cost Accounting Standards 412, 416, and 418. DCAA recommended a conditional award to National based on the firm's intention to rectify the adverse findings cited in the survey, but stated that National should be found nonresponsible in the absence of a substantial formalized commitment. On August 4, National was awarded the contract. At the same time, the Navy and National signed a contract modification under which National agreed to pursue resolution of 12 specified issues, related to deficiencies noted in the DCAA report.

Continental filed its protest of the award with our Office on August 14. The Navy initially stayed performance of National's contract after it received notice of the protest. However, on September 16, the Navy provided our Office with notice that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for our decision. In accordance

with that determination, National has commenced performance of the contract.

PROTEST OVERVIEW

Continental maintains that the selection of National was improper, because the agency evaluators should have considered the adverse information concerning National's cost accounting system which surfaced during the preaward survey of National. In this regard, the protester points out that each of the three evaluation categories pertaining to Management Capability, Technical Approach, and Cost had at least one factor relating to the offeror's cost accounting system.

For the reasons set forth below, we agree with Continental that the Navy should have considered the impact of the adverse information discovered during the preaward survey of National as it related to the factors under the Management Capability evaluation category. We sustain the protest on this ground.

FAILURE TO USE PREAWARD SURVEY INFORMATION IN TECHNICAL/COST EVALUATION

As a preliminary matter, the Navy contends that Continental's first supplemental protest, submitted on September 30, in which Continental argues that the Navy's evaluation of National's proposal is improper because of the agency's failure to consider the preaward survey information is based on information which Continental was aware of when it filed its initial protest on August 13. Specifically, the Navy argues that both protests are based on deficiencies found by DCAA in Continental's cost accounting system. The Navy therefore argues that Continental's supplemental protest is untimely because the firm did not file it within 10 working days after it knew the basis of protest. See Bid Protest Regulations, 4 C.F.R. § 21.2 (1992).

While Continental's initial protest did concern the same DCAA conclusions concerning National's cost accounting system on which Continental's supplemental protest was based, in the initial protest Continental argued that the Navy improperly permitted National to "correct" these deficiencies. In its supplemental protest Continental argues that the Navy failed to consider the problems in National's cost accounting system in evaluating the firm's cost and technical proposals. There is no evidence in the record to suggest that Continental was aware of this basis of protest before it reviewed the agency's evaluation record contained in the Navy's protest report it received on September 21. Since Continental filed its supplemental

protest on September 30, within 10 working days of September 21, we find the protest is timely.

Continental argues that in evaluating National's technical and cost proposals, the Navy failed to consider the information it obtained from DCAA concerning National's cost accounting system. The protester argues that it was irrational for the Navy to award National [deleted], respectively, for the Cost Reporting and Cost Avoidance and Material Control System factors under the Management Capability category, [deleted] under the Technical Approach category of Cost Control and Cost Avoidance, and [deleted] under the Cost Data Support factor in the Cost category.¹

MANAGEMENT CAPABILITY

The RFP provided in its instructions for the preparation of proposals that for the Cost Reporting and Cost Avoidance factor under the Management Capability category offerors should

"Using your current [cost reporting] system with actual examples from existing or recent contracts describe your system for compiling internal costs and subcontractor costs. Include how costs are budgeted, monitored and controlled. Provide copies of your latest cost report(s) to the Government. Show in examples, narratives and backup data how your organization uses this information. Using the above data, provide example(s) of the actual compilation process; i.e., from time card/purchase order through report to the Navy. Describe the following:

- a. Cost estimating
- b. Budget development process
- c. Traceability of costs to Extended Ship Work Breakdown Line Item Number (ESWBLIN), the specific work performed, and the individual who accomplished it
- d. Management reviews
- e. Contract changes
- f. Control of cost escalation within the scope of the actual work package negotiated for each availability and any subsequent changes
- g. Procedures for insuring minimal impact of changes on schedule or cost
- h. Management procedures to insure work will be accomplished in the most technically effective manner

¹The proposals were evaluated in accordance with a plan that required each factor to be scored on a scale of [deleted] based on specified narrative definitions of [deleted].

while maintaining quality standards and reasonable cost."

In its proposal, National states that it will use its existing cost/schedule control system to fulfill the agency's requirements under this factor and says that this system can ensure accurate compiling of costs, traceability to work items and to the individual or subcontractor performing the work, and will segregate the Navy's costs. The DCAA auditors found that National's accounting system does not in fact identify direct and indirect costs by contract modification, change orders, and contract line items and that National's system (e.g., labor timekeeping and job costing) does not provide for the accumulation and identification of direct and indirect costs by contract modification or change order or contract line item. Continental argues that DCAA's report demonstrates that National's existing cost accounting system does not comply with the requirement that the contractor be able to trace costs to the line item and to contract changes and concludes that the agency's evaluation of National's proposal for this factor as [deleted] was unreasonable.

Under the Management Capability factor Material Control System, offerors were required by the RFP's instructions to "Describe your organizations existing system, and any proposed changes thereto, for material ordering, tracking, and inspection, in-house control and protection, problem identification and resolution thereof." In reviewing National's material control system, DCAA concluded that it was deficient because it did not adequately plan, control, and account for material. Continental therefore asserts that since the system could not perform the functions for which it was proposed, the evaluators unreasonably scored this factor in Continental's proposal as [deleted].

In evaluating proposals, the contracting agency may consider evidence from sources outside the proposal, and, in some circumstances, the contracting officer may not ignore extrinsic evidence that comes to his or her attention. See Ferranti Int'l Defense Sys., Inc., B-237555, Feb. 27, 1990, 90-1 CPD ¶ 239. For a procuring agency to ignore extrinsic evidence indicating that an offeror cannot perform in the way it offered would be unfair to the agency and to other competitors and thus inconsistent with the competitive procurement system. Department of the Navy--Recon., B-244918.3, July 6, 1992, 92-2 CPD ¶ 199; G. Marine Diesel; Phillyship, B-232619; B-232619.2, Jan. 27, 1989, 89-1 CPD ¶ 90. In this case, the Navy argues that the information contained in the DCAA report does not relate to the merits of National's technical and cost proposal, but relates solely to the firm's responsibility. According to the agency, this information, pertaining to whether the firm had

the ability and capacity to perform as it proposed, was properly limited to the agency's consideration of National's responsibility.

It is true that generally an agency's consideration of the technical merit or acceptability of an offeror's proposal is distinct from the consideration of the firm's responsibility. Technical merit or acceptability concerns an assessment of whether the offeror's approach and resources as described in its proposal are worthy of a particular rating or adequate to meet the needs of the agency as expressed in the RFP. In contrast, responsibility involves an assessment of an offeror's ability to perform in accordance with the terms of its proposal and involves the evaluation of information outside the proposal collected during an investigation which is conducted aside from the actual competition and which may include the use of a preaward survey. See Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300.

It is not always possible to draw a distinct line between the two concepts because often traditional responsibility matters are incorporated into technical evaluation criteria used in negotiated procurements, and where an agency uses traditional responsibility criteria to assess technical merit or acceptability, the technical evaluation may involve consideration of an offeror's capability as well as its proposed approach and resources. See G. Marine Diesel; Phillyship, supra. In such cases, the agency may consider relevant information it obtains from outside the proposal for determining responsibility in order to reassess the technical merits of an offeror's proposal. In some circumstances, such information may not be ignored if received before award. For example, where the information clearly contradicts representations in the offeror's proposal, calling into question the evaluators' conclusions concerning the merits of the technical proposal, the information must be considered. Id.

We conclude with respect to the Cost Reporting and Cost Avoidance and the Material Control System factors under the Management Capability category that the agency was required to consider the impact of the new information in the DCAA report. Management Capability by definition assesses an offeror's capability to perform a given task. As discussed above, for evaluation of the Cost Reporting and Cost Avoidance factor, offerors were required to provide actual examples from existing contracts to describe their cost control system and to demonstrate that their system had the capability to perform a number of specific tasks. Thus, the agency was required to evaluate under the solicitation scheme each offeror's approach to perform the tasks and its capability to perform them. Similarly, each offeror's

existing material control system was evaluated as a factor. Under these circumstances, where information in the DCAA report contradicted proposal representations that were major elements of the technical evaluation, the Navy could not ignore the new information in its selection decision.

RECOMMENDATION

In sustaining Continental's protest on this ground, we note that the overall Management Capability scores of Continental and National [deleted] as well as the overall technical scores [deleted] are very close. The overall cost scores (Continental [deleted] and National [deleted]) and the overall total scores (Continental [deleted] and National [deleted]) are also very close. Thus, it is quite possible that if the Navy had properly evaluated National's proposal, a different award decision would have resulted.

Generally, in cases where the evaluators have not considered all relevant information, we recommend that the proposal be reevaluated and the selection decision reconsidered in view of the additional information. See G. Marine Diesel; Phillyship, supra. This remedy is not practical here because the agency entered into an agreement with the awardee under which the firm was required to improve its cost accounting system after award (made on August 4, 1992). The agency continued performance of the contract notwithstanding Continental's protest, and the firm has worked to remedy defects in its accounting system over the past 5 months. Thus, a reevaluation cannot return the parties to their positions before the agency's error. Because of the close technical scores and prices, we are not able to conclude that the protester's proposal would have been the most advantageous to the Navy if the procurement had been properly conducted. As a result, and in view of the current stage of contract performance, we do not believe that it would be proper to recommend that National's contract be terminated. We find that Continental is entitled to recover its proposal preparation costs as well as protest costs, including reasonable attorneys' fees. Continental should submit its claim for these costs directly to the Navy. 4 C.F.R. § 21.6(f).

The protest is sustained.

Comptroller General
of the United States