



Comptroller General
of the United States

Washington, D.C. 20548

149705

Decision

REDACTED VERSION

Matter of: Duke/Jones Hanford, Inc.

File: B-249367.10

Date: July 13, 1993

Maureen Duignan, Esq., and Ronald A. Uitz, Esq., Hopkins & Sutter, and James F. Nagle, Esq., Oles, Morrison & Rinker, for the protester.
Kenneth B. Weckstein, Esq., and Raymond Fioravanti, Esq., Epstein Becker & Green, for Kaiser Engineers Hanford Company, an interested party.
Joseph B. Schroeder, Esq., Department of Energy, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency evaluation of proposals is proper where it is reasonable and consistent with the solicitation's evaluation criteria.
2. Where agency reasonably evaluated competing proposals as essentially equal technically, cost could properly be used as the discriminator on which the award decision was based, even though cost was stated to be a less important evaluation criterion than technical factors.
3. Challenges to the cost evaluation are denied where the protester has not demonstrated that the agency evaluated cost unreasonably.

DECISION

Duke/Jones Hanford, Inc. protests the award to Kaiser Engineers Hanford Company of a contract under request for proposals (RFP) No. DE-RP06-92RL12359, for architect/engineer and construction services at the agency's site in

*The decision in this protest was issued subject to a General Accounting Office protective order on July 13, 1993. After consultation with the parties, our Office determined that the entire text could be removed from the coverage of that protective order, and the decision therefore appears here in full.

Hanford, Washington. Duke/Jones contends that the agency's evaluation of technical and cost proposals was unreasonable and inconsistent with the RFP; that the agency had no reasonable basis for the determination that the two companies' technical proposals were essentially equal; and that the agency record did not include any reasonable basis for the decision to select Kaiser's proposal rather than Duke/Jones's.

We deny the protest.

The RFP, issued on December 30, 1991, anticipated the award of a cost-plus-award-fee management and operating contract for architect/engineer and construction services at the Department of Energy's Hanford nuclear site during a phase-in period, with a 3-year base period of performance and a 2-year option period. The agency estimated that the annual cost of the contract services will be approximately \$100 million.

Section M of the RFP stated that the four categories of evaluation criteria, in descending order of importance, were business and management, technical, personnel program, and cost/financial. Section M also provided that adjectival ratings would be used to rate proposals under the business and management as well as the technical categories, and that, overall, the business and management category was significantly more important than the technical category.

Within the business and management category, Section M identified four criteria, in descending order of importance: (1) organization and personnel, (2) corporate experience and performance, (3) corporate commitment and resources, and (4) phase-in plan. Within the organization and personnel criterion, two subcriteria were of equal importance, key personnel experience and qualifications, and project organization and management plan.¹

¹Because the evaluation of safety records became an issue in the protest, we note that the evaluation criteria in Section M mentioned safety twice: once under the subcriterion for key personnel experience and qualifications, where the RFP stated that "[d]emonstrated capabilities in implementing environmental, health, and safety programs" would be evaluated; and a second time under the second most important subcriterion within corporate experience and performance, where the agency was to evaluate

"[e]xperience and capability of offeror in planning and implementing environmental, safety, health, quality assurance, and industrial security
(continued...)

The RFP required offerors to include in their proposals only limited cost and financial information.² Section M stated that the cost and financial data would be evaluated to assess the reasonableness of the offerors' proposed cost, their understanding of the work, and their financial ability to perform.

Proposals were received from three companies: Duke/Jones, Kaiser, and Raytheon Hanford Company.³ After discussions were conducted and revised proposals were received and evaluated, the agency announced on June 22, 1992, that it had selected Duke/Jones for negotiation of a contract. The selection decision was based on the Duke/Jones proposal's perceived technical superiority to the other proposals, and was made notwithstanding agency concern that Duke/Jones's cost would be higher than that of the competing companies.

The agency provided a debriefing to Kaiser, which then filed a protest with our Office on July 9 alleging, among other things, that the agency had failed to send Kaiser a written request for a best and final offer (BAFO). We dismissed Kaiser's protest as academic after the agency advised our Office on July 28 that it was reopening discussions with the offerors and would set a common cutoff date for BAFOs.

By letter dated August 28, 1992, the agency advised the offerors that it had reopened the selection process and would solicit revised proposals and conduct further discussions. Attached to the August 28 letter were copies of certain documents that had been provided to one or another offeror after the initial announcement of the selection of Duke/Jones; the documents were provided to the three offerors to ensure that the competing firms all had access to the same information.

¹(...continued)

programs, including past performance statistics on safety record for construction operations and overall corporate safety record and awards."

²Specifically, each offeror was required to submit (1) cost information related to key personnel; (2) phase-in costs; (3) costs for the initial year of operation (to include a 5 percent escalation factor for fiscal year 1993); (4) home office costs; (5) information on the offeror's government financial experience; (6) financial statements; (7) information on the offeror's past cost-savings or cost-effectiveness initiatives; and (8) the proposed fee for the initial year of operation.

³Raytheon was not a party to the protest, and we therefore do not discuss its proposal further.

Attached to the August 28 letter as well was amendment No. 3 to the RFP, which set forth the schedule for submission of revised proposals. That amendment also postponed the dates of the phase-in period from July 1 through September 30, 1992, to January 1 through March 31, 1993. The dates of the first period of operations were changed from October 1, 1992, through September 30, 1993, to April 1 through September 30, 1993, thus shortening the initial performance period from 1 year to 6 months. The amendment did not change the evaluation criteria.

The amendment also required offerors to submit two "contracts" with their revised proposals, one for the phase-in period and the other for the initial period of operations. The offerors were to sign the contracts and to include in each the proposed cost for the respective periods.

After revised proposals were received and evaluated, the agency conducted discussions by means of written questions as well as oral negotiations. BAFOs were then requested, with a common cutoff date of December 1, 1992. The Source Evaluation Board (SEB) evaluated the BAFOs and wrote a final SEB report. The SEB's final evaluation of the proposals assigned the proposals of Duke/Jones and Kaiser identical adjectival ratings for every component of every evaluation criterion, with the exception of key personnel experience and qualifications, for which Duke/Jones's proposal was assigned an "outstanding minus," while Kaiser's was rated "good plus"; and the phase-in plan, for which Duke/Jones's proposal was rated "good," while Kaiser's was rated "outstanding." Even as to those elements, however, the relevant overall category rating assigned was the same for both proposals: "good plus" for the business and management category. Regarding the cost proposals, the SEB report noted that Kaiser had proposed to perform the phase-in at no cost to the government, which caused its evaluated cost to be lower than that of Duke/Jones.

The SEB report was used to brief the source selection official (SSO) on December 1. The SSO's analysis focused on two facts: first, that the proposals were "virtually even" for the business and management as well as the technical categories; and, second, that Kaiser's no-cost phase-in would cost less than Duke/Jones's and would also be less disruptive, because Kaiser was the incumbent. Accordingly, in a January 6, 1993, determination, the SSO selected Kaiser's proposal for award.

The gravamen of Duke/Jones's protest is the contention that the SSO lacked a reasonable basis for finding the two proposals virtually even in the business and management category. The protester alleges that Duke/Jones's higher

adjectival rating in key personnel experience and qualifications was improperly ignored by the SSO, and that nothing in the contemporaneous record supports the SSO's finding that the two proposals were virtually even. In addition, the protester alleges that Kaiser's proposal should have received lower ratings for certain specific criteria, due both to concerns regarding the company's safety record and to disruption which will occur during its phase-in, notwithstanding its status as the incumbent.

Duke/Jones also raises a number of other objections to the source evaluation and award decision, primarily concerning alleged flaws in the cost evaluation which, if corrected, would demonstrate that the protester's proposal represented the lower cost to the government. We turn first to the challenges to specifics of the technical evaluation, then to the reasonableness of the finding that the two proposals were "virtually even," before addressing the cost evaluation.⁴

THE TECHNICAL EVALUATION

Duke/Jones raises two specific challenges to the agency's technical evaluation: first, that the evaluation of Kaiser's safety record was unreasonable; and second, that the agency's technical evaluators unreasonably assumed that Kaiser's phase-in would cause no disruption.

Our Office will not question an agency's evaluation of proposals unless the agency deviated from the RFP evaluation criteria or the evaluation was unreasonable. See Systems Research Laboratories, Inc., E-246242.2, Apr. 21, 1992, 92-1 CPD ¶ 375. Here, Duke/Jones essentially questions the reasonableness of the technical evaluation.

The protester contends that an internal agency report revealed problems concerning Kaiser's reported safety record, but that the SEB and SSO unreasonably failed to take those concerns into account. The problems essentially indicated that not all of Kaiser's safety-related incidents had been reported. Duke/Jones argues that the safety statistics included in Kaiser's proposal appeared overly favorable because they were tainted by the reporting

⁴The protester also contends that the agency engaged in technical leveling by revealing aspects of Duke/Jones's proposal to Kaiser during the latter firm's debriefing. The agency denies that its debriefing to Kaiser revealed information about Duke/Jones's proposal, and the protester has not shown otherwise. Accordingly, we deny this protest ground as factually unfounded.

problems, particularly for the pre-1992 period, and that the agency thus had no way to know the actual frequency of Kaiser's safety-related incidents.

At issue are two ratings assigned to Kaiser's proposal. The first relevant score is the "good plus" rating that Kaiser's proposal received under the key personnel experience and qualifications evaluation subcriterion, for which the RFP stated (as one of four elements within that subcriterion) that "[d]emonstrated capabilities in implementing environmental, health, and safety programs" would be evaluated. The second relevant score is the "good" rating that Kaiser's proposal was assigned for "[e]xperience and capability of offeror in planning and implementing environmental, safety, health, quality assurance, and industrial security programs, including past performance statistics on safety record for construction operations and overall corporate safety record and awards," one of the subcriteria under corporate experience and performance.

The procuring activity states that it was aware of the agency questions about the reliability of Kaiser's statistics regarding safety-related incidents and that it assumed that accurate figures for Kaiser's statistics would be worse than those reported. The agency contends that the ratings assigned to Kaiser's proposal were reasonable. The agency focuses on the limited role of the statistics in the evaluation overall, and explains that safety statistics provided only one consideration in the evaluation of safety matters, which focused more on safety programs than safety statistics. In addition, the agency notes that the demonstration of capabilities in implementing safety programs was only one of three elements within one of four factors within the key personnel subcriterion. In this context and in terms of comparing Kaiser's statistics with other offerors', the agency suggests that the ratings assigned to Kaiser's proposal would not have changed even if Kaiser's statistics, accurately reported, had been significantly worse than the offeror indicated.

In addition, the SSO testified, during a hearing conducted in connection with this protest, that his personal knowledge of Kaiser's commitment and of the company's corrective actions in the area of safety convinced him that the favorable ratings assigned to Kaiser's proposal were justified. In his view, notwithstanding the concerns about Kaiser's past reporting of safety matters, the company demonstrated a strong commitment to safety, and its proposal therefore merited the ratings received.

We find the agency's evaluation reasonable. Although Duke/Jones is correct that the agency record includes criticism of Kaiser's safety record data and there may be doubt about the accuracy of Kaiser's safety-related statistics, the procuring activity was aware of those concerns during the evaluation process, and it has explained the countervailing considerations which provided grounds for the ratings assigned. The agency's conclusion that, on balance, Kaiser deserved a positive assessment for its safety record thus had a reasonable basis. Particularly in light of the limited role that safety statistics played in the RFP evaluation criteria, Duke/Jones has not shown that the agency's evaluation of Kaiser's proposal under the safety-related subcriteria was unreasonable.

The other aspect of the technical evaluation challenged by Duke/Jones concerns the evaluation of Kaiser's phase-in plan. The protester contends that the evaluators unreasonably concluded that Kaiser's phase-in would involve no disruption, notwithstanding the changes that Kaiser proposed to implement during the phase-in period.⁵

The agency contends that this allegation lacks a factual basis. According to the agency, the evaluators concluded that Kaiser's phase-in would result in minimal disruption, rather than no disruption. The conclusion that minimal disruption would occur, notwithstanding the changes which Kaiser proposed to implement, was based largely on Kaiser's status as the incumbent.

⁵Duke/Jones also contends that the agency evaluators improperly considered cost in their evaluation of Kaiser's technical proposal. Pointing to technical evaluator worksheets citing the no-cost aspect of Kaiser's phase-in proposal as a strong point, Duke/Jones argues that it was improper for the evaluators to consider cost considerations during the technical evaluation. The agency concedes that the evaluators initially mentioned the no-cost aspect of Kaiser's phase-in in their worksheets, but argues that the SEB subsequently recognized that this was inappropriate. Accordingly, the SEB based its "outstanding" rating on the technical aspects of Kaiser's phase-in, without consideration of cost. We note in this regard that the SE report justified the evaluation without reference to the no-cost aspect of the proposed phase-in. The record does not indicate that the agency's explanation in this matter is inaccurate, and we find that the agency did not consider cost as part of the technical evaluation of Kaiser's phase-in plan.

Duke/Jones has not established that the agency's evaluation of Kaiser's phase-in plan was unreasonable. As the agency notes, the evaluators considered Kaiser's incumbency as an indication that its phase-in would involve limited disruption, but the record does not indicate disregard for the possibility of some disruption. While one might generally expect that award to an incumbent could involve no disruption at all, here the changes proposed by Kaiser suggest why some disruption, even if minimal, may occur even where an incumbent is awarded a successor contract. The record does not suggest, however, that the agency was unreasonable in concluding that award to Kaiser would lead to significantly less disruption than award to Duke/Jones.

THE FINDING THAT THE PROPOSALS WERE "VIRTUALLY EVEN"

As noted above, the core of Duke/Jones's protest is its contention that the agency lacked a reasonable basis for finding the two proposals virtually even--that is, essentially equal--in the business and management category. The protester alleges that, independent of the technical evaluation challenges discussed in the preceding section, the record contains no contemporaneous justification for the finding that the technical proposals of Duke/Jones and Kaiser were essentially equal. In particular, Duke/Jones contends that the SSO unreasonably ignored the "outstanding" rating that the SEB had assigned to Duke/Jones's proposal for its key personnel experience and qualifications.

Although the protester focuses exclusively on the determination by the SSO that the proposals were essentially equal, the SEB effectively made a similar determination when it concluded that, under the business and management category overall, Duke/Jones's and Kaiser's proposals both merited a "good plus" rating. We first consider the SEB's determination, before turning to the SSO's finding.

As detailed above, the SEB report, in evaluating the key personnel experience and qualifications subcriterion, assigned an "outstanding minus" rating to Duke/Jones's proposal and a "good plus" rating to Kaiser's. Those two ratings are the closest scores that the governing rating system allowed (that is, "outstanding minus" is immediately above "good plus" in the rating scheme). The core of Duke/Jones's protest is that, in assigning different assessments to Duke/Jones's and Kaiser's proposal under the key personnel experience and qualifications subcriterion, the SEB had made a finding that Duke/Jones's proposal was significantly superior, and that finding was improperly ignored when the SEB assigned two proposals identical scores for the criterion as a whole.

In its narrative description of the BAFOs, the SEB report states that there was only a "slight difference" in the relative strength of the three proposals being evaluated in the key personnel experience and qualifications subcriterion. We need not decide whether this description of the difference among the proposals would support a finding that, as to the organization and personnel criterion as a whole, Duke/Jones's and Kaiser's proposals were essentially equal, because the "slight difference" at issue had nothing to do with Duke/Jones's proposal's being superior. The SEB found (and its report explains the basis for this finding) that it was the third offeror's proposal--not at issue in the protest--that was slightly stronger than either Duke/Jones's or Kaiser's under the key personnel experience and qualifications subcriterion. While minor distinctions may have led the SEB to assign slightly different ratings to Duke/Jones's and Kaiser's proposals for the subcriterion, the SEB found that those two proposals were of substantially equivalent technical merit for the organization and personnel criterion overall, and this finding is supported by the narrative in the SEB report.

We also reject Duke/Jones's allegation that the record provides no basis for the SSO's finding that the two parties' proposals were "virtually even" technically. As to the key personnel experience and qualifications subcriterion, the SEB report's narrative provides such a basis, and that narrative is supported by the identical rating scores on the criterion level.⁶ The reasonableness of the SSO's conclusion that the two proposals were technically equivalent overall is particularly clear when the focus is broadened from the evaluation of the key personnel subcriterion to include all technical evaluation criteria. As to the other subcriterion under organization and personnel--which was weighted as heavily as the key personnel subcriterion--the two proposals were assigned identical ratings, and Duke/Jones has not challenged those ratings. Furthermore, under every other technical criterion and subcriterion in the technical evaluation, the two proposals received identical ratings, and Duke/Jones has not successfully challenged those ratings (indeed, the only

⁶During the hearing conducted in connection with this protest, the SSO testified that his personal knowledge of Kaiser's proposed key personnel also helped persuade him that there was no justification for that company's proposal receiving a rating even slightly lower than Duke/Jones's under the key personnel experience and qualifications subcriterion. While this additional factor may have reinforced the SSO's determination of technical equivalence, his determination was adequately supported by the record even without this supplemental consideration.

challenges it raised were to the safety evaluation, where we found the agency's evaluation reasonable, as explained above).⁷ In the context of the entire technical evaluation, we conclude that, even if Duke/Jones were correct in arguing that its proposal retained an advantage under the key personnel subcriterion, the virtually identical evaluations for the other subcriteria and criteria provided a reasonable basis for the SSO to determine that the two proposals had essentially equivalent technical merit. Accordingly, the SSO's determination was reasonable and adequately supported by the contemporaneous record, and we therefore deny this basis of protest.

THE COST EVALUATION

Because the agency reasonably concluded that the two technical proposals at issue here were substantially equal, it was proper for the agency to make award based on cost, notwithstanding the RFP provision assigning technical criteria greater weight than cost.⁸ See Arthur D. Little, Inc., B-243450, July 31, 1991, 91-2 CPD ¶ 106. Duke/Jones raises a number of challenges to the agency's evaluation of the offerors' cost proposals, which we review here. As explained below, none of Duke/Jones's challenges provides a viable basis to call into question the reasonableness of the agency's finding that Duke/Jones's proposal would entail higher costs than Kaiser's.

Duke/Jones contends that its non-key personnel would cost less than Kaiser's, and that the agency unreasonably focused on key personnel costs. The agency responds that its

⁷The one remaining instance where the agency did not find the two technical proposals equal was the phase-in plan, for which, as discussed earlier, the agency reasonably found Kaiser's proposal superior.

⁸It is for this reason that we deny Duke/Jones's contention that the agency assigned too much weight to certain aspects of key personnel costs and the phase-in proposal. The protester couches this allegation as a matter of inadequate discussions, and asserts that the agency failed to inform Duke/Jones that these two cost areas would be critical in the source selection. The concern does not really relate to the conduct of discussions, but rather to the fact that evaluation criteria which were not the most heavily weighted criteria in the RFP nonetheless served as discriminators in the final source selection decision. So long as the less heavily weighted criteria have been disclosed to offerors in the RFP, as they were here, there is nothing improper in their becoming the discriminator where competing proposals are evaluated as equal in the more heavily weighted ones.

experience is that non-key personnel generally remain in place at the same salary despite changes in contractors. In support of this position, the agency points out that the RFP requires that most incumbent personnel be retained by a new contractor. Duke/Jones has not refuted the agency's position, which appears reasonable.

Similarly, Duke/Jones alleges that the agency should have calculated the overall cost of each proposal, rather than focusing on costs associated with key personnel and phase-in. The agency's response is that too many variables exist which precluded reliable overall cost estimates and that the RFP did not call for overall cost estimates. Again, Duke/Jones has not refuted the agency's position, which is consistent with the RFP and appears reasonable.

Duke/Jones also challenges the agency's assumption that its key personnel salaries would be paid entirely by the government, while part of Kaiser's salaries would be absorbed by the contractor. The agency responds that Kaiser explicitly proposed making part of its key personnel salaries nonreimbursable, while Duke/Jones did not. The protester contends that it viewed its key personnel salaries as merely proposals, and that it was ready to negotiate them or to absorb part of them without being reimbursed by the government. The agency counters that amendment No. 3, requiring offerors to submit signed contract documents with their BAFOs, made clear that the agency wanted to see the actual costs, including salary costs, which the offerors proposed that the government would pay.

The protester is essentially arguing that its key personnel salaries would have actually cost the government an indeterminate amount less than the salaries that Duke/Jones identified in its proposal. We find this position unreasonable. The protester's proposal did not state that Duke/Jones was willing to absorb part of the proposed salaries or otherwise indicate that the agency would not be expected to pay the full amount of the salaries, as is the norm in a cost-plus-award-fee procurement such as this one. Accordingly, the agency could not reasonably infer, or be expected to infer, that the company was willing to charge the government less than those full salaries.⁹ We

⁹Duke/Jones sometimes appears to suggest that Kaiser enjoyed an unfair advantage either due to its status as the incumbent or as the beneficiary of unequal treatment by the agency. The record does not support such an allegation. For instance, the third offeror, as well as the incumbent Kaiser, proposed caps on the dollar amount of their key personnel salaries which would be reimbursable by the

(continued...)

therefore conclude that the agency reasonably compared Duke/Jones's proposed key personnel salaries with that portion of Kaiser's proposed salaries which the offeror stated was to be reimbursed by the government.

Next, Duke/Jones contends that the agency failed to consider the costs which Kaiser would charge to the government during the phase-in period. Essentially, the protester's argument is that Kaiser will circumvent its commitment to provide a no-cost phase-in by categorizing certain phase-in costs as the incumbent's ongoing contract performance costs. The agency responds that it is confident that it will be able to enforce Kaiser's commitment to provide a no-cost phase-in.

Kaiser's proposal for a no-cost phase-in is comparable to an offeror's proposing to impose caps on certain costs. While protesters may contend that caps will be circumvented, an agency's reliance on such cost limitations is generally proper, absent evidence which calls into question the effectiveness of the cap. See Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202. Otherwise, the question of whether the agency will succeed in enforcing the cap is a matter of contract administration beyond the bid protest jurisdiction of our Office. 4 C.F.R. § 21.3(m)(1) (1993). Because Duke/Jones has not demonstrated that the agency will have to reimburse Kaiser for any phase-in costs or that Kaiser's contractual obligation to provide a no-cost phase-in is otherwise doubtful, the agency reasonably relied on the awardee's no-cost phase-in proposal.¹⁰

⁹(...continued)

government. Duke/Jones did not do so, even though the agency had advised the company during discussions that its proposed salaries were considered high. Moreover, while Duke/Jones contends that the agency conducted unequal discussions by "coaching" Kaiser as to the intent of amendment No. 3, any such allegedly unequal treatment was of no consequence, since Kaiser had already proposed to absorb part of the key personnel salaries even before amendment No. 3 was issued.

¹⁰Duke/Jones's remaining challenges to the cost evaluation are also without merit. Thus, while the protester complains that Kaiser's proposed costs failed to include a required escalation factor for fiscal year 1993 salaries, the protester has not rebutted the agency's response that there was no need for Kaiser to use an escalation factor added to 1992 salaries, since (due to the delay in request for final BAFOs) it was able to include the actual 1993 salaries in its proposal. Furthermore, while Duke/Jones alleges that the agency evaluated proposals unequally by including a

(continued...)

In sum, we find that the agency's cost evaluation was both reasonable and consistent with the RFP. We therefore deny Duke/Jones's challenge to that evaluation.

The protest is denied.

James F. Hinchman
General Counsel

¹⁰(...continued)
particular fringe benefit cost in Duke/Jones's evaluated costs but not Kaiser's, the agency responds that it did not know that Duke/Jones had included that cost in its proposal. Duke/Jones has not established that it was unreasonable for the agency to be unaware of the inclusion of that cost, which was not explicitly identified in Duke/Jones's proposal (and whose impact, in any event, has not been demonstrated to be significant). Finally, while the protester contends that the agency treated nonrecurring relocation costs as a recurring cost for Duke/Jones, the agency denies that it did so, and the protester has pointed to no evidence to refute the agency's position.