



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

10637

Decision

Matter of: Loral Western Development Labs
File: B-256066
Date: May 5, 1994

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Sue Sheain, Esq., and Ronald E. Uchacz, Esq., Department of Defense, Maryland Procurement Office, for the agency.
Mary G. Curcio, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably determined that protester's proposal presented a risk of interrupted and delayed performance where protester proposed to hire seven employees (30 percent of the overseas work force) to perform the overseas portion of the contract and four of those seven employees did not have the required security clearance.
2. Where solicitation narrowly defined personnel qualifications evaluation subfactor in terms of years of experience and skill mix, security clearance status of proposed personnel was not reasonably related to personnel qualifications and procuring agency improperly evaluated security clearance status under that subfactor. Protester, however, was not prejudiced by the improper evaluation since the agency's concern with clearance status was properly considered under the personnel availability subfactor and no other factor considered in the award decision would change if the erroneous evaluation were corrected. Accordingly, the award decision would not change just because clearance status was improperly considered under the qualifications subfactor.
3. Where, after learning of possible violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act, contracting officer did not proceed with the procurement until authorized to do so by a higher-level official, and the head of the contracting agency decided, based on the facts known to him before award, that no violation had occurred, procuring agency properly

followed the requirements of the Federal Acquisition Regulation regarding an agency's obligations in the face of a possible procurement integrity violation.

DECISION

Loral Western Development Labs protests the award of a cost-plus-award fee, level-of-effort contract to HRB Systems, Inc. under request for proposals (RFP) No. MDA904-93-R-1001, issued by the National Security Agency (NSA), Maryland Procurement Office, for the agency's Worldwide Software Lifecycle Support Program. Loral asserts that NSA used undisclosed criteria to evaluate its proposal, improperly made award to a higher-cost offeror, and failed to consider that HRB violated the procurement integrity provisions of the Office of Federal Procurement Policy Act.

We deny the protest.

BACKGROUND

The RFP contemplated award of the Worldwide Software Lifecycle Support contract (WSLSC) for a base year and 3 option years.¹ The contractor is required to provide specified labor categories and associated hours necessary to perform highly-skilled support services at locations inside the continental United States (CONUS) and outside the continental United States (OCONUS). The services include professional engineering, software support and maintenance, technical support, configuration management, and documentation required to supervise and support the performance of these services.

The RFP statement of work (SOW) listed the categories of personnel that the contractor was required to provide along with the number of years of required experience for each category and the required skill mix for each category. The RFP also required the contractor to use personnel with top secret/access to compartmented information (TS/SI) clearances to perform the contract.

The RFP provided for award to the responsible offeror which submitted the proposal most advantageous to the government and stated that proposals would be evaluated against the following criteria: technical/personnel, management, and

¹The life cycle support services are required to support and maintain government computer systems. WSLCS combines the support NSA currently receives under two existing contracts--the Maintenance Enhancement of Computer Software contract (MECS) and the Field Systems Life Cycle Support contract (FSLSC).

cost. Technical was weighted 50 percent, management 15 percent, and cost 35 percent. Under the technical factor, personnel qualifications and personnel availability were listed as subfactors and each was worth 25 percent of the evaluation score. Under the cost factor, the RFP stated that the evaluation would consider evaluated cost, worth 15 percent, and cost realism, worth 20 percent.

NSA received proposals from Loral and HRB. After evaluating the offers, conducting discussions with both offerors and receiving and evaluating best and final offers (BAFO), NSA determined that the RFP did not accurately reflect its needs and issued amendment No. 4 to the solicitation which deleted the phase-in plan,² changed the basis of award, decreased the level-of-effort and provided HRB and Loral with written discussion questions. After evaluating the responses to the discussion questions, NSA provided Loral with additional cost and technical questions and requested both offerors to submit second BAFOs by November 23. NSA received, evaluated, and scored the BAFOs and, after applying the RFP assigned weights to the raw scores for each factor, gave Loral a technical/management score of 56.10, a cost score of 33.8, and a combined score of 89.90. Loral's weighted total score, however, was decreased to 86.15 after the chairperson of the technical evaluation committee determined that Loral's raw score of 89 for personnel qualifications should be reduced to 74 because Loral proposed four individuals without TS/SI security clearances. HRB received a weighted technical/management score of 61.43, a cost score of 32.6, and a combined score of 94.03. Loral's BAFO cost was 17 percent lower than HRB's BAFO cost.³ The evaluation board recommended award to HRB based

²As issued, the RFP provided for a phase-in period. NSA initially intended to exercise the options on the FSLSC contract and to have the awardee under this solicitation perform the MECS portion of the contract during the phase-in period. Due to delays in the procurement, however, the agency extended both the MECS contract and the FSLSC contract a number of times. As a result, there were no option periods left on the FSLSC contract and the phase-in plan was deleted from the solicitation.

³Although Loral asserts that its proposal should have been selected for award solely because its proposed cost is 17 percent lower than that proposed by HRB, in a negotiated procurement the government is not required to make award to the firm offering the lowest price unless the RFP specifies that price will be the determinative award factor, a circumstance not present in this case. See Irwin & Leighton, Inc., B-241734, Feb. 25, 1991, 91-1 CPD ¶ 208.

on the difference in point scores and, consistent with the RFP, recognized that the point scores took into account the technical/management evaluation factors and cost. The source selection authority reviewed the evaluation results and agreed that HRB should be selected for award. The contract was awarded to HRB and this protest followed.

PERSONNEL AVAILABILITY

The solicitation provided for the evaluation of personnel availability as a subfactor of the technical/personnel evaluation factor and stated that personnel availability would be evaluated from the standpoint of risk in achieving the required manning levels upon assuming site support responsibilities. After evaluating Loral's first BAFO, NSA was concerned, among other reasons, because Loral proposed 12 people to perform on the contract who were not currently employed by Loral and because Loral proposed 4 people for overseas positions whose resumes indicated that they did not have TS/SI clearances. During discussions, the agency asked Loral what effect these two things would have on its staffing plan.⁴ After reviewing Loral's responses, forwarding additional discussion questions to Loral, and requesting and receiving a second round of BAFOs, NSA gave Loral's proposal a score of 78.33 for personnel availability which was considered "minimally acceptable" under the agency's proposal evaluation plan. Specifically, the evaluators were concerned because Loral still proposed 11 individuals who were not currently employed by Loral; of these, 7 were proposed for the OCONUS sites. These seven comprised 30 percent of the OCONUS work force. In addition, three of the seven did not have a TS/SI clearance and one had no clearance at all. The agency believed, based on these factors, that Loral's proposal presented a significant risk of delayed and interrupted performance if Loral were awarded the contract.

⁴Loral argues that NSA failed to hold adequate discussion with Loral regarding the clearance status of its proposed personnel. We disagree. NSA's request to Loral during discussions to explain the effect on its staffing plan of having proposed four personnel without the required clearances was sufficient to place Loral on notice of the agency's concern with the availability of Loral's proposed staff and thus constituted adequate discussions. See RAI, Inc.; The Endmark Corp., B-250663 et al., Feb. 16, 1993, 93-1 CPD ¶ 140.

Loral protests that the agency's evaluation of its proposal for personnel availability was arbitrary and unreasonable.⁷ Loral asserts that the agency's evaluation, which counted the number of individuals presently employed by the contractor, and then assessed risk in direct proportion to those numbers, did not take into account that Loral has trained, qualified, and cleared personnel who are either at the sites or available to start the contract on 24 hours notice. Loral further asserts that the agency's evaluation ignores historical evidence that a successor contractor hires at least 50 percent of the individuals employed by the predecessor contractor at the particular site. Loral also complains that NSA considered the clearance status of its proposed personnel under this factor.

NSA explains that it could not afford downtime at critical times and that because of the potential for international crises, its systems demand uninterrupted service. Thus, the evaluation score for availability was based on the degree to which the offeror demonstrated that all the contract positions could be staffed with personnel meeting the requirements of the SOW by the contract start date. Loral proposed 11 employees who were not currently employed by Loral, 7 of them for OCONUS positions. The agency asserts that the time associated with processing employees from one company to another, transferring the required clearances, and relocating employee families to OCONUS locations presented a significant risk that the employees would not be available and performance would not begin as required. NSA also points out that two of the proposed personnel are in the military and could not be available by the contract start date. In addition, NSA was concerned that Loral proposed four persons without the required clearance because the time to process the clearances would delay the start of performance from 6 to 12 months. Based on these findings, NSA asserts that it properly evaluated Loral's proposal for personnel availability and reasonably determined that Loral's proposal presented a significant risk to achieving the required manning of the various OCONUS and CONUS sites upon Loral achieving site support responsibilities.

We find nothing unreasonable in NSA's evaluation in this area. The RFP specifically provided that availability of personnel would be evaluated from the standpoint of risk in achieving the required manning levels upon assuming site

⁷Loral also complains that the solicitation did not specify how risk would be evaluated. This issue is untimely since it was apparent from the face of the solicitation and not raised until after the closing date for the receipt of proposals. See 4 C.F.R. § 21.2(a)(1) (1993).

support responsibilities. In our view, it was clearly reasonable to find that, in contrast to a contractor with staff already hired and cleared, a contractor that has yet to hire staff will present a risk in achieving the required manning levels upon assuming responsibility for contract performance. Thus, NSA reasonably concluded under the personnel availability subfactor that Loral's proposal presented a performance risk since Loral had yet to hire 30 percent of its OCONUS work force and obtain clearances for four of them.⁶ While Loral asserts that the agency did not consider that Loral had trained, qualified, and cleared personnel available to staff the sites or available by air on 24 hours notice or the historical evidence that a successor contractor ultimately hires at least 50 percent of the predecessor's employees, we simply note that Loral did not propose its current staff or the incumbent's staff. In fact, Loral did not provide an interim plan in its proposal for the time period it takes to hire or clear new personnel.

PERSONNEL QUALIFICATIONS

The solicitation provided for the evaluation of personnel qualifications as a subfactor of the technical/personnel factor. NSA downgraded Loral's proposal under this

⁶Loral asserts that NSA now concedes that two of the four persons in fact had the required clearances. In addition, according to Loral, the other two could obtain clearances quickly because one is currently employed by the CIA and had a TS/SI clearance and the other had previously worked on NSA contracts and needed only to have her clearance reactivated. NSA concedes that two of the employees had the required clearances but argues that it properly evaluated Loral's proposal because the clearance status was not properly indicated on the proposal resumes. Regarding the remaining two employees, NSA asserts that the individual now employed by the CIA has only a top secret clearance and the other is beyond the time period in which she could have her clearance reactivated. NSA asserts that in each case it would take 6 to 12 months to obtain the TS/SI clearance required for performance. Looking at this in the light most favorable to Loral, we have no basis to challenge the agency's conclusion that the Loral employee with no clearance and outside the reactivation period would take 6 to 12 months to obtain a clearance. The other employee would take at least a short time to obtain the clearance. Thus, the agency was properly concerned that performance would be delayed due to the unavailability of personnel. NSA points out that the sites where these persons would be located are only staffed with two or three people and failure to adequately staff these locations would have a significant impact on the agency's mission.

subfactor because Loral proposed four employees who did not have a current TS/SI security clearance. Loral explains that while such clearances were clearly required for contract performance, the solicitation did not state that the proposed personnel must have the clearances at the time of the evaluation or for evaluation purposes. Loral further argues that the evaluation of security clearances was not encompassed by or otherwise reasonably related to the personnel qualifications evaluation subfactor. Loral asserts that the personnel qualifications subfactor only addressed the acceptability of proposed candidates in relation to a specified minimum number of years experience and a skill mixture, not in terms of whether the personnel had TS/SI clearances. Loral asserts that there is no intrinsic relationship between the clearances and the required skills or experience and concludes that NSA improperly considered this issue when it evaluated Loral's proposal.

NSA maintains that it properly evaluated whether Loral's proposed personnel had current TS/SI clearances under the personnel qualifications subfactor because clearance status is encompassed by that subfactor. NSA points out that the solicitation required that offerors perform the contract with TS/SI cleared personnel. In addition, offerors were required to submit resumes for their proposed personnel which included clearance status. NSA therefore reasons that because it takes 6 to 12 months to obtain a TS/SI clearance, once amendment No. 4 deleted the phase-in plan, offerors should have been on notice that all proposed personnel were required to have a TS/SI clearance since the awardee would begin full performance immediately and would no longer have the phase-in period to obtain clearances for personnel that would not be needed until full performance of the contract began. NSA therefore concludes that offerors should have been aware that the clearance status of their proposed personnel would be evaluated as an element of personnel qualifications.

A procuring agency may properly consider an evaluation factor or subfactor that is not specifically stated in the solicitation if it is reasonably related to or encompassed by the evaluation factors that are specifically stated. AWD Technologies, Inc., B-250081.2; B-250081.3, Feb. 1, 1993, 93-1 CPD ¶ 83. Our concern in considering an objection to the use of an evaluation factor not specifically stated in the RFP is whether it is so reasonably related to the specified criteria that the correlation is sufficient to put offerors on notice of the related factors to be evaluated. See Service Ventures, Inc., B-233318, Feb. 15, 1989, 89-1 CPD ¶ 162.

In this case, we cannot conclude that the evaluation of the clearance status of proposed personnel was reasonably related to the evaluation of proposed personnel under the qualifications subfactor. Personnel qualifications was listed as an evaluation subfactor of the technical/personnel factor. Under the heading "evaluation approach," the solicitation provided that personnel qualifications would be evaluated based on the personnel qualifications criteria established in the RFP. The personnel qualifications specified in the RFP included a specified number of years experience and a skill mix for each labor category. Similarly, amendment No. 4 provided that if an offeror's proposed personnel did not meet the requirement for the minimum number of years experience and the skill mix, the proposal would be considered unacceptable. Given how specifically the solicitation defined what would be considered in the evaluation of personnel qualifications, offerors were not on notice that clearance status also would be evaluated under that subfactor. We thus agree with Loral that the evaluation of the security clearance status of proposed personnel was not reasonably related to the evaluation of personnel qualifications.

Despite this conclusion, we find that Loral would not have received the award if its proposal were properly evaluated and thus that Loral was not prejudiced by the faulty evaluation. In reaching its award recommendation, the evaluation panel used the total scores achieved by each offeror--94.03 (HRB) and 86.15 (Loral)--and recommended award to HRB on the basis of its higher overall technical/cost score. Loral's overall score was 89.90 before the personnel qualifications score was reduced based on consideration of security clearance status under the qualifications subfactor. Since HRB's score of 94.03 is higher than Loral's corrected score, there is no reason to assume that the panel would have recommended Loral for award even if the points had not been improperly deducted.

More importantly, in reaching his award decision, the source selection authority specifically considered the scores as well as the type of contract (cost-plus-award fee), the likelihood of cost overruns associated with Loral's proposal, the significant risks to performance and the possibility of interruption in service presented by Loral's proposal, and the fact that HRB's proposal was strong, met or exceeded the requirements of the contract, and presented very little risk to the government. The specific risks with which NSA was concerned and, thus, that the source selection official considered, were the possibility of delayed performance and interruption in service that could result because all of Loral's proposed personnel did not have TS/SI clearances and the fact that Loral did not yet have all the personnel it proposed to

perform the contract at the contract date. As discussed above, when NSA evaluated Loral's proposal under the personnel availability subfactor, it properly concluded that Loral had not yet hired all its proposed employees and that all the employees did not have clearances and, thus, that Loral's proposal presented a performance risk. In a reevaluation, none of the factors that resulted in the award decision would change. That is, the likelihood of cost overruns associated with Loral's proposal and the merit of HRB's proposal would not change even if clearance status had not been evaluated under the personnel qualifications subfactor. Accordingly, our Office will not disturb the award because, on the record before us, the award decision would not have been different if Loral's proposal had been properly evaluated. See Central Air Serv., Inc., B-242283.4, June 26, 1991, 91-2 CPD ¶ 8.

ADJUSTMENT of HRB's COST REALISM SCORE

Loral protests that NSA improperly changed HRB's weighted cost realism score from 18.9 to 20 between the first and second BAFOs even though HRB did not change its cost proposal. In response, NSA explains that the cost panel initially downgraded HRB's cost realism score because the cost information in HRB's proposal was difficult to identify and track. However, the contracting officer advised the cost panel that since the information was in the proposal, and met or exceeded the requirements of the solicitation, it was improper to downgrade the cost realism score simply because information was difficult to find. The cost panel therefore was instructed to add back in the points that were deducted for difficulty in finding information and did so, giving HRB 20 points for cost realism. Based on this explanation, and the fact that Loral does not otherwise challenge the cost realism of HRB's proposal or the resulting score, we have no basis to question the cost realism score of HRB's proposal.

PROCUREMENT INTEGRITY

Loral protests that NSA failed to follow applicable procurement regulations in awarding the contract to HRB in the face of an alleged violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (1988 and Supp. IV 1992). Loral explains that in September 1993, after the first BAFOs had been evaluated, a Loral employee informed Loral management that an HRB employee stated that he had been told by HRB management that Loral's proposal was approximately \$8 million lower than HRB's and that a second round of BAFOs would be requested. Loral states that it informed the agency of this "rumor" and was told that the alleged violation was being investigated by the Inspector General.

Loral complains that the agency improperly made award to HRR before the investigation was completed. Loral further complains that even if the agency could properly award the contract to HRB while the investigation was pending, it failed to obtain approval from a level higher than the contracting officer before doing so as required by the Federal Acquisition Regulation (FAR). Finally, Loral argues that since its proposal was in fact about \$8 million lower in cost than HFB's and since a second round of BAFOs was requested, it is clear that there was a violation of the act and that HRB had Loral proprietary information. According to Loral, HRB thus should not have received the award because HRB was able to use this information to revise its cost and technical proposals to offset Loral's lower cost.

Under FAR § 3.104.11(a), if the contracting officer learns of a violation or possible violation of the procurement integrity provisions of the act, he or she must determine if the violation has an impact on the pending award. If the contracting officer determines that there is no impact, he or she may proceed with the procurement with the concurrence of a designated official. FAR § 3.104.11(a)(1). The designated official must then refer the matter to the head of the contracting agency who reviews all available information and determines what action to take, including whether to advise the contracting officer to continue with the procurement, initiate an investigation, refer the matter for criminal investigation, or determine if a violation occurred. FAR § 3.104.11(b). If the head of the contracting agency determines that a violation occurred before an award was made, he or she may cancel the procurement, disqualify an offeror, or take other appropriate action. FAR § 3.104.11(d). If the head of the contracting agency decides that a violation occurred after an award has been made, he or she may void the contract, effect appropriate contractual remedies, or refer the matter to the debarment official. Id.

The regulations specifically provide the head of the contracting agency with a number of options when a possible violation is reported. These include advising the contracting officer to continue with the procurement and initiating an investigation.

We find that the agency acted consistently with the FAR in conducting the procurement once it was aware of the alleged violation. When Loral informed the agency that it had heard a rumor that HRB knew its cost was \$8 million lower than Loral's and that a second round of BAFOs would be requested, the agency referred the matter to the Chief of the Maryland Procurement Office, an official higher than the contracting officer. The chief instructed the contracting officer to

request both offerors to execute special procurement integrity certificates stating that they were not aware of any violations of the procurement integrity provisions of the act. Finally, he determined that there was no reason to stop the procurement because at the time the alleged violations were classified only as rumors. Thus, as required by FAR § 3.104.11(a)(1), the contracting officer continued with the procurement only after being advised by a higher level official to do so. Also as required by the FAR, the matter was referred to the head of the contracting agency who considered the matter before the contract was awarded to HRB. Before the award was made, the head of the contracting agency, with the contracting officer and the Chief of the Maryland Procurement Office, reviewed the issue and determined, as permitted by FAR § 3.104.11(b), that there was no basis to conclude that there was a violation of the act.⁷ They reached this conclusion because HRB had not acted on the information--that is, HRB did not raise its price, because Loral never provided any further information, and because the offerors executed the special procurement integrity certificates. They also considered that the issue was still under investigation. Thus, the agency followed the requirements of the FAR in deciding to award the contract. Finally, while Loral argues that the facts show that there was a procurement integrity violation, NSA reports that the investigation is still pending before the Defense Criminal Investigation Service. Accordingly, we will not consider this issue further.

The protest is denied.

Robert P. Murphy

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⁷Although FAR § 3.104.11(b) requires referral to the head of the contracting agency and leaves it to that official to determine what action to take, we see no basis to object to the decision of the head of the contracting agency to make this determination in conjunction with other procurement officials.