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Comptroller General
of the United States

Washington, D.C. 20548

1209277

Decision

Matter of: Sarasota Measurements & Controls, Inc.

File: B-252406.3

Date: July 15, 1994

Roland P. Piccone for the protester.
Gregory H. Petkoff, Esq., and Charles Felder, Esq., Department of the Air Force, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably selected a slightly higher-priced, technically superior, low risk proposal instead of the protester's lower-priced, acceptable proposal which was reasonably found to have a higher "proposal risk" because of legitimate safety and schedule concerns.

2. Agency reasonably selected a higher-priced, technically superior, low risk proposal instead of the protester's much lower-priced, acceptable proposal where the source selection authority was reasonably concerned that the protester's low price for a major item of work that accounted for the cost differential between the proposals may reflect a lack of understanding on the part of the protester and created an increased risk of nonperformance of this work.

DECISION

Sarasota Measurements & Controls, Inc. protests the awards to ITT Barton and Engineering Design Group under request for proposals (RFP) No. F41608-92-R-90658, issued by the Department of the Air Force for automatic tank gauging (ATG) systems for fuel storage tanks.

We deny the protest.[1]

[1]Since the record contains proprietary information and no protective order was issued, our discussion of such information is necessarily general.

The Air Force previously awarded contracts under this RFP to ITT Barton and Engineering Design on February 10, 1993. Sarasota (and another unsuccessful offeror) protested these awards. In Sci-Tec Gauging, Inc.; Sarasota Measurements & Controls, Inc., B-252406; B-252406.2, June 25, 1993, 93-1 CPD ¶ 494, we sustained Sarasota's protest that the agency used undisclosed evaluation factors in making the award selections. We recommended that the Air Force amend the solicitation to reflect all pertinent requirements and evaluation criteria, reopen discussions with all competitive range offerors, request best and final offers (BAFO), and proceed with the source selection process, terminating the awards if appropriate.

On August 27, the Air Force, consistent with our recommendation, amended and reissued the RFP. As amended, the RFP continued to contemplate the award of one or more firm-fixed-price requirements contracts for ATG systems for fuel storage tank types I, II, III, and IV.[2] A contract for an ATG system includes the gauging hardware and related software, installation, warranty, and long-term maintenance and repair of the system. The base term of the contract(s) is 3 years, with a 1-year option for ordering the basic installation work and ten 1-year options for the maintenance and repair effort. The RFP supplied price schedules divided into four groups--one for each tank type. The award for tank type IV was reserved as a small business set-aside.

The RFP described a best value evaluation scheme, listing the following evaluation factors in descending order of importance: technical, installation, cost/price, and experience. The RFP also stated subfactors for each factor except cost. The RFP stated that each evaluation factor (except cost/price) would receive a color/adjectival rating, a proposal risk rating, and a performance risk rating. The three ratings were of equal weight with respect to each other. The RFP also provided that cost realism would be evaluated to determine whether the offeror's pricing was realistic and reasonable, and indicated "that the offeror understands the nature and scope of the work to be performed." Finally, the RFP reserved the right of the government to award to other than the lowest-priced offeror, and stated that discussions and a request for BAFOs were contemplated.

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[2]The tank type classification describes the size and physical location--e.g., above or below ground--of the fuel storage tanks.

The due date for receipt of revised proposals was September 16. Four offerors submitted revised proposals. Sarasota, ITT Barton, and one other offeror submitted proposals on tank types I, II, and III. Sarasota and Engineering Design submitted proposals for tank type IV. The Air Force conducted discussions and requested BAFOs be submitted by January 25, 1994. All four offerors submitted BAFOs by the due date.

The Air Force evaluated the BAFOs[3] and, on February 23, awarded a contract for tank types I, II, and III to ITT Barton for a total price of $16,994,886,[4] and awarded a contract for tank type IV to Engineering Design for $3,853,269.[5]

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[3]Sarasota alleges that it was improper for ITT Barton to lower its prices in its BAFO from those it offered previously. However, a BAFO request necessarily implies an opportunity to make revisions to previously submitted proposals, including price changes, unless the RFP specifically restricts the scope of changes. See Oshkosh Truck Corp.; Idaho Norland Corp., B-237058.2; B-237058.3, Feb. 14, 1990, 90-1 CPD ¶ 274. We also note that Sarasota's BAFO made changes to its prior technical proposals in its BAFO. The protester has provided no explanation as to why changes to its technical proposal should be permitted but changes to pricing should be prohibited.

In addition, to the extent that Sarasota alleges that ITT Barton had an unfair competitive advantage because ITT Barton's counsel, who was admitted to a protective order issued during the process of resolving the prior protests of these awards and therefore received access to protected material, including Sarasota's pricing, disclosed to his client Sarasota's proprietary information, the allegation is mere speculation unsupported by any evidence and is insufficient to form a basis for protest. See Drytech, Inc., B-246276.2, Apr. 28, 1992, 92-1 CPD ¶ 398.

[4]ITT Barton offered the lowest prices for tank types I and II, and Sarasota offered the lowest price for tank type III. The prices offered by ITT Barton and Sarasota for each tank type are:

	I	II	III
ITT Barton	$5,371,892	$8,788,783	$2,834,212
Sarasota	6,984,577	9,155,009	2,584,482.

[5]Sarasota offered the lowest price for tank type IV of $2,702,034.

After Sarasota received a debriefing from the Air Force,[6] it filed this protest essentially alleging that the technical evaluation was flawed and the award selections were therefore unreasonable, particularly for those tank types for which Sarasota offered the lowest price. The agency has provided a responsive and documented report on the protest supporting its determinations that the proposals of ITT Barton and Engineering Design represent the best value to the government under the RFP evaluation scheme.[7]

We will examine an agency's technical evaluation to ensure that it is reasonable and consistent with the evaluation criteria. See Wellington Assocs., Inc., B-228168.2, Jan. 28, 1988, 88-1 CPD ¶ 85. The protester's disagreement with the agency does not render the evaluation unreasonable. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450. Further, in a negotiated procurement, there is no requirement that award be made on the basis of lowest cost unless the RFP so specifies. Spectra Tech., Inc.; Westinghouse Elec. Corp., B-232565; B-232565.2, Jan. 10, 1989, 89-1 CPD ¶ 23. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency

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[6]Sarasota alleges that its debriefing was inadequate. This is a challenge involving a procedural matter concerning agency actions after award which are unrelated to the validity of the award and are not generally reviewed by our Office. See Pan Am World Serv., Inc., B-215308.5, Dec. 10, 1984, 84-2 CPD ¶ 641.

[7]Sarasota complains of its failure to receive source selection sensitive information and/or proprietary information of its competitors as part of the agency's report on this protest. The Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (1988), prohibits competing contractors from receiving, and government officials from disclosing source selection sensitive and competitor's proprietary information. Our Bid Protest Regulations provide for the issuance of protective orders to permit parties to a protest to have independent counsel seek access to a protective order to review source selection sensitive and proprietary information on these parties' behalf. See 4 C.F.R. § 21.3(d)(1) (1994). Our Office advised Sarasota during this, as well as the previous protest, of this opportunity to retain counsel for admission to a protective order. Sarasota elected not to retain counsel. In any event, we reviewed the source selection sensitive and proprietary information withheld from Sarasota and find no basis to disturb the award to ITT Barton.

with the established evaluation factors." Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Awards to offerors with higher technical scores and higher prices are proper so long as the result is consistent with the evaluation criteria, and the procuring agency has determined that the technical difference is sufficiently significant to outweigh the cost difference. Aumann, Inc., B-245898.3; B-245898.4, July 22, 1992, 92-2 CPD ¶ 35; University of Dayton Research Inst., B-227115, Aug. 19, 1987, 87-2 CPD ¶ 178.

Based on our review of the record, we find both awards were reasonable and in accordance with the RFP evaluation criteria. We separately discuss the two awards below.

ITT BARTON AWARD

ITT Barton offered the lowest prices on tank types I and II, and the second-lowest price for tank type III (within 10 percent of Sarasota's lowest-priced offer). Both ITT Barton and Sarasota received green/acceptable ratings for each of the technical evaluation factors. However, Sarasota received "moderate" or "high" proposal risk ratings on all three tank types for the technical and installation factors, the two most important evaluation factors, and "low" proposal risk ratings for the experience factor, whereas ITT Barton received "low" proposal risk ratings on all factors. With regard to performance risk--the assessment of which was based largely on surveys of the references provided by each offeror--Sarasota received "moderate" or "high" risk ratings for all factors, whereas ITT Barton received "low" risk ratings.

In the source selection document, the source selection authority (SSA) stated that ITT Barton's proposal offered the best value on all three tank types, including tank type III for which it was higher priced. The source selection gave particular emphasis to the determination that ITT Barton's proposal "clearly provided an added benefit in the proposal risk analysis," when compared to Sarasota's riskier proposal. That is, in contrast to ITT Barton's proposal, which was considered to have a low proposal risk, the SSA determined that Sarasota's proposed approach contained significant proposal risks, in particular, a safety risk to installation and maintenance personnel, and a risk of delays during installation--these were the primary reasons that Sarasota received other than "low" proposal risk ratings.

With regard to the safety risk issue, Sarasota's ATG system uses a float attached to a strip of metal spanning the interior height of the fuel storage tank. Sarasota's floats are too large to fit through some of the existing openings on the tanks through which the ATG systems would be

installed. In such cases, Sarasota proposed installing the metal strip through the existing tank opening without the float attached. A person would then open a manway port elsewhere on the tank and, using a pole, would reach into the tank and snare the metal strip, retrieve the end of the strip, attach the float to the strip, and return the strip and float to the tank. This procedure is reversed to remove the system from the tank.

A hazard arises from this procedure because personnel reaching through an open manway are exposed to the tank's contents, e.g., jet fuel, thus increasing the risk of explosion or the risk of personnel falling into a fluid in which humans cannot float. This risk is present not only during initial installation, but also for every routine sampling of the tank which requires removal and subsequent reinstallation of Sarasota's float in order to properly conduct the sampling. Although Sarasota explains that the safety risk associated with the need for manway access can be lessened by taking such precautions as using safety lines attached to personnel at the open manway, such measures do not eliminate the inherent risk posed by the design of Sarasota's system related to installation and removal from the tank--this risk is not extant in other offered systems; for example, ITT Barton's system does not employ a float and can be installed and removed without manway access.

Next, the correct height of each tank is critical to the accuracy of Sarasota's ATG system. The metal strip, although providing for some adjustment, must be the correct height to match the height of the tank in which it will be installed. Unlike all the other offerors, Sarasota did not propose to perform pre-installation measurement of the tanks, but rather stated that it would rely on the agency's as-built drawings that would be made available to the contractor after award. The agency stated that it would not

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[redacted] In addition, the installation of the Sarasota floats on type II tanks would apparently require a new opening to be cut in a number of tanks. Although Sarasota generally offered to provide any new openings if needed, the Air Force was concerned that Sarasota did not understand the significant number of new openings required on type II tanks and the added time involved due to the required draining of the tank in order to permit cutting of the tank shell and/or the float pan. Sarasota disagrees that it did not understand this issue. We note that Sarasota did not appear to anticipate any significant need for cutting in its initial proposal and did not adjust its proposal price to account for added work after the agency addressed the issue in discussions. Sarasota's apparent approach regarding the type II tanks only heightens Sarasota's proposal risk.

accept the risk of the accuracy of the measurements of these drawings, which are insufficiently accurate for the precise measurements apparently necessary for installation of the Sarasota ATG system. Thus, although Sarasota presumably would assume the risk of errors in these drawings, its failure to propose pre-installation measurements could lead to delays in installation when metal strips of incorrect length have to be replaced where drawing errors are discovered during installation. In contrast, ITT Barton not only proposed pre-installation measurement, the design of its system incorporates a different technology, which does not use a float and is not dependent on the precise height of its apparatus for system accuracy.

The forgoing proposal risks were clearly envisioned by the RFP's evaluation scheme, which provided that the purpose of the proposal risk rating was to assess "the risks associated with the offeror's proposed effort as it relates to accomplishing the requirements" of the RFP. Also, safety is a stated subfactor of the most important evaluation factor (technical) and installation delay is directly related to a stated subfactor of the second most important evaluation factor (installation time). Since the Air Force reasonably found that Sarasota's ATG system design and proposed installation plan contained inherent risks related to accomplishing the RFP requirements, the SSA's decision that the relatively slight advantage in price of Sarasota's proposal on tank type III did not outweigh the overall proposal superiority of ITT Barton's proposal was reasonable and consistent with the stated evaluation scheme. It follows that since the same proposal risks apply to Sarasota's proposals on tank types I and II, where ITT Barton offered the lowest price, that the SSA's decision to award one contract to ITT Barton for tank types I, II, and III was reasonable and in accordance with the evaluation criteria.[9]

[9] Although Sarasota also alleges that the other than "low" performance risk ratings it received were unreasonably based on false statements provided by a few of the references contacted by the agency, the record indicates that these ratings were not significant in the SSA's source selection decision. At most, the comments from the references in question were viewed by the SSA merely as supporting his conclusions based on the evaluation of Sarasota's proposal. Therefore, even if we were to discard the challenged comments and assume that Sarasota should have received "low" performance risk ratings, this does not affect the underlying basis for the SSA's reasonably based decision. See TRI-COR Indus., Inc., B-252366.3, Aug. 25, 1993, 93-2 CPD ¶ 137, recon. denied, B-252366.4, Mar. 8, 1994, 94-1 CPD ¶ 185.

Sarasota also alleges that ITT Barton's proposal is based on nitrogen gas "bubbler" technology, which is allegedly unacceptable within the industry for ATG systems, and generally alleges that ITT Barton has inadequate experience for this project (although Sarasota offers no evidence to support this allegation). These allegations were raised in Sarasota's prior protest of the awards, and we addressed them in our initial decision, finding that they lacked merit. Specifically, we found that the RFP does not preclude and indeed recognizes the acceptability of the technology offered by ITT Barton, and that ITT Barton's proposal evidences acceptable experience. Sarasota has presented no evidence that causes us to change our views of these matters.

In sum, we find no basis to object to the ITT Barton award.

ENGINEERING DESIGN AWARD

Tank type IV involves generally smaller capacity service station storage tanks. As indicated above, this portion of the RFP was set aside for small businesses. Sarasota and Engineering Design received green/acceptable technical ratings and "low" proposal risk ratings. For performance risk, Sarasota received a "moderate" risk rating for technical, and "high" risk ratings for installation and experience, whereas Engineering Design received "low" risk ratings on all three factors. Sarasota's higher performance risk ratings were based on responses provided by past performance references listed in Sarasota's proposal.

In addition, although Sarasota's overall price for tank type IV was substantially lower than Engineering Design's price, there were concerns about Sarasota's pricing for maintenance and repair. A price analysis was conducted from which the contracting officer determined that Sarasota's price for its maintenance and repair was so low as to indicate that it may have misunderstood the nature of the RFP requirements for maintenance and repair. The proposal analysis report stated that, notwithstanding that this was a fixed-price contract, the potential extended term (10 years) of the maintenance and repair plan, when considered together with Sarasota's extremely low price for the plan, presented a risk that Sarasota would experience a significant operating loss and thus "there is a significant risk that this offeror could abandon the project, if it becomes too costly."

The perceived risk about Sarasota's pricing was not reflected in either the proposal or performance risk ratings, but was presented to the SSA as explained by the contracting officer:

> "[The evaluation of proposals] clearly showed that [Engineering Design's] price for the hardware and installation was approximately one half of [Sarasota's]. The significant difference was that [Engineering Design's] Maintenance and Repair Plan price was nearly 10 times that of [Sarasota's]. [Sarasota's] Maintenance and Repair Plan price appeared ridiculously low. There was a concern expressed that once installation was complete[d,] there might be very little incentive for [Sarasota] to continue performance, if in fact the cost to maintain the systems far exceeded the price proposed.
>
> "The contracting officer stated that the [m]aintenance and repair cost was a subject of discussion with [Sarasota], but was not a major concern. However, [Sarasota] was put on notice in the Request for [BAFOs] that there was concern that they had unaccounted costs in their proposal, and that they should consider their proposed price."

The source selection statement listed the subfactors on which Engineering Design's proposal exceeded the RFP requirements, including maintenance and repair, which was a stated subfactor of the most important evaluation factor (technical), and included the following justification:

> "[Sarasota] proposed a price 30 [percent] lower than that offered by [Engineering Design] for Tank Type IV. It was not clear that [Sarasota] had a thorough understanding of the requirements. Their proposal was often vague and lacked rationale and substantiation. There is clearly reason for concern in regard to their pricing on the Maintenance and Repair Plan. It was significantly lower, and in fact the entire 10 years was less than 9 [percent] of their total evaluated price. [Sarasota] received moderate and/or high performance risk ratings, based upon the feedback from their clients indicating concerns with their past reliability, warranty, and maintenance and repair performance. The similarity of concerns expressed in both the Contract Team's and Performance Risk Analysis Group's reports are a strong indication that this other offeror's proposal contains considerable risks. . . . In Tank Type IV the Engineering Design Group's clear proposal superiority, especially their superior Maintenance and Repair Plan, clearly outweighs its less than lowest price."

It is apparent that the SSA's primary reason for the selection of Engineering Design was the superiority of that firm's maintenance and repair plan as compared to Sarasota's; this relative superiority is largely attributable to the risk arising from Sarasota's extremely low price for this aspect of the work. That is, the SSA was far more concerned than the lower-level evaluators about Sarasota's extremely low price for, and real understanding of, the maintenance and repair work. Source selection officials are not bound by the recommendations of lower-level evaluators, and as a general rule, we will not object to the higher-level official's judgment, absent unreasonable or improper action, even when the official disagrees with an assessment made by a working level evaluation board or individuals who normally may be expected to have the technical expertise required for such evaluations. Oklahoma Aerotronics, Inc.--Recon., B-237705.2, Mar. 28, 1990, 90-1 CPD ¶ 337.

Our review of the record confirms that Sarasota's proposed price for maintenance and repair was significantly lower than Engineering Design's price.[11] However, but for the difference in maintenance and repair prices, Engineering Design's overall price would be lower than Sarasota's overall price, and thus the price advantage of Sarasota's proposal was reasonably found to be directly offset by the risk that Sarasota would not or could not perform the maintenance and repair portion of the contract at its very low price. See Systems & Processes Eng'g. Corp., B-234142, May 10, 1989, 89-1 CPD ¶ 441.

The SSA's consideration of the material distinction between the proposals with regard to the proposed maintenance and repair plans--a subfactor of the most important evaluation factor--is consistent with the stated evaluation plan, which envisioned that a "cost realism" evaluation would be performed of the price proposals to ascertain whether an offeror's proposal exhibited an understanding of the RFP requirements and which expressly provided for assessing the risk of an offeror accomplishing the contract requirements based on its proposal.

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[10]Thus, here too, Sarasota's allegation that the performance risk ratings are unreasonable is not a sufficient basis for disturbing this award as it did not materially affect the award. See footnote 9, infra.

[11]Sarasota's maintenance and repair price was significantly lower than any other offeror's price on each of the four tank types.

Thus, Sarasota's extremely low price for maintenance and repair, without reasonable justification, is sufficient reason for the agency to select a technically superior, higher-priced proposal that does not have such risk. Id. Sarasota has presented no evidence refuting the Engineering Design award selection, notwithstanding its receipt of the source selection decision document and the attached contracting officer's statement as part of the agency's report on its protest.

Instead, Sarasota opposed the award to Engineering Design based solely on its speculation that Engineering Design did not propose an end product manufactured by a small business and thus was ineligible to receive this award, which was set aside for small business. Here too, Sarasota raised this same issue in its previous protest. In our prior decision, we found that Engineering Design proposed an end product manufactured by a small business and that Sarasota's allegation[12] was mere speculation insufficient to challenge the award.

The protest is denied.

/s/ Robert H. Hunter
for Robert P. Murphy
Acting General Counsel

[12] In any event, the agency reraised this issue with Engineering Design during discussions after our original decision, and Engineering Design confirmed that the manufacturer of its ATG system was the same firm as originally proposed and that both Engineering Design and this firm are small businesses.

B-252406.3

July 15, 1994

The Honorable Bob Graham
United States Senator
P.O. Box 3050
Tallahassee, FL 32315

Attn: Becky Liner

Dear Senator Graham:

I am writing in response to your inquiry of February 1, 1994, regarding the protest filed by Sarasota Measurements & Controls, Inc. of Sarasota, Florida, in connection with request for proposals No. F41608-92-R-90658, issued by the Department of the Air Force for automatic tank gauging systems. Enclosed please find our decision of today denying the protest.

Sincerely yours,

/s/ Robert H. Hunter
for Robert P. Murphy
Acting General Counsel

Enclosure