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Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Northern Virginia Service Corp.

File: B-258036.2; B-258036.3

Date: January 23, 1995

Timothy Sullivan, Esq., Katherine S. Nucci, Esq., and Martin R. Fischer, Esq., Dykema Gossett, for the protester.
Guy Arthur Herreman, Esq., for Morton's Janitorial Service, Inc., an interested party.
David L. Jordan, Esq., and Sherry L. Travers, Esq., Department of the Treasury, for the agency.
Paul E. Jordan, Esq., and Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency decision not to analyze cost data submitted with the awardee's proposal, and thus not considering direct labor rate contained in the data that appeared to be below the applicable Service Contract Act (SCA) minimum rate, where a fixed-price contract was contemplated, is unobjectionable where there was no solicitation requirement for submission of cost and pricing data, and nothing else on the face of the proposal which suggested that the awardee intended to violate the SCA.

2. Where evaluators assigned protester's proposed training plan a high, but not perfect, score (8 out of 10 available points), agency was not required to discuss this matter with the protester during negotiations.

3. Where contracting officer reasonably concludes that, notwithstanding a difference in technical rating scores, two proposals were technically equal, selection of lower-priced proposal is unobjectionable.

DECISION

Northern Virginia Service Corporation (NVSC) protests the award of a contract to Morton's Janitorial Service, Inc. (MJS) under request for proposals (RFP) No. IRS-SW-93-096, issued by the Internal Revenue Service (IRS), Department of the Treasury for custodial services at the IRS Ogden (Utah) Service Center. NVSC contends that the agency failed to properly evaluate the awardee's proposal, denied the

protester meaningful discussions, and made an improper cost/technical tradeoff in its award selection.

We deny the protest.

BACKGROUND

The RFP, issued September 14, 1993, contemplated award of a firm, fixed-price contract for a base period with 3 option periods, not to exceed 36 months in total. Offerors were required to submit technical proposals covering the offerors' responses to the requirements in the statement of work, and business proposals including offerors' responses to each requirement in RFP sections B and D through K. Pricing was to be proposed on a monthly and extended yearly basis for the base and option periods.

Proposals were to be evaluated on the basis of seven criteria: Prior Experience; Operating Plan; Management Plan; and Phase-In Plan (each worth 20 points); and Subcontracting Plan and Quality Assurance Plan (each worth 10 points). Award was to be made to the offeror whose proposal contained the combination of criteria offering the best overall value to the government through comparison of the values of technical features with differences in proposed prices. According to the RFP, the agency was more concerned with obtaining superior technical features than with making an award at the lowest overall price. The RFP advised that the agency might make an award at a significantly higher price to acquire significantly superior technical features, but would not make an award at a significantly higher price to achieve slightly superior technical features.

Twenty-five proposals were submitted by the October 28, 1993, closing date for receipt of proposals. Five proposals were eliminated immediately for failure to submit technical proposals. After evaluating the remaining 20, the agency conducted discussions with 9 of them, including NVSC and MJS. After reviewing the revised proposals, the IRS requested best and final offers (BAFO) from each of the offerors whose proposal was in the competitive range. The results of the evaluation of the protester's and awardee's BAFOs are as follows:

Offeror	Price	Technical Score
NVSC	$2,159,998.56	97
MJS	$2,128,507.20	90

Four other proposals also received technical scores over 90; all of them, including one which received a score higher than NVSC's, proposed prices higher than NVSC's. In reviewing the technical and price evaluations, the contracting officer determined that the point deductions between the scores of 99 and 90 did not represent substantial technical differences and so concluded that those proposals were technically equal. Specifically, with regard to the differences between the proposals of NVSC and MJS, the contracting officer reviewed the reasons for MJS's lower score and determined that all were minor and would not significantly impact contract performance. She concluded that no one proposal provided additional merit which would justify awarding at a higher price. Accordingly, she awarded the contract to MJS on July 19, 1994. NVSC then filed this protest. The agency issued a stop work order to MJS in August and NVSC, the incumbent, is performing the work pending this decision.

MEANINGFUL DISCUSSIONS

NVSC argues that the IRS failed to afford it meaningful discussions because the agency did not advise it of all weaknesses identified in its proposal. While the IRS discussed some weaknesses in areas where NVSC had one point each deducted from its evaluation score, the agency did not identify a weakness in the training programs aspect of its management plan. According to the evaluators, there were "Not a lot of references to types of training programs and recurring training," and scored this subfactor with 8 out of 10 possible points. NVSC contends that the failure to discuss the weakness was improper since the score represented the "most [points] deducted under any subfactor" and the weakness was easily correctable.

Agencies are required to conduct meaningful discussions with all competitive range offerors. Stone & Webster Eng'g Corp., B-255286.2, Apr. 12, 1994, 94-1 CPD ¶ 306. In order for discussions to be meaningful, contracting officials must advise offerors of deficiencies in their proposals and afford offerors an opportunity to revise their proposals to satisfy the government's requirements. Id. However, the agency is not obligated to discuss every aspect of an acceptable proposal that receives less than the maximum score. Id.; Veco/W. Alaska Constr., B-243978, Sept. 9, 1991, 91-2 CPD ¶ 228.

Section M of the RFP advised offerors that, under the management plan factor, proposals would be evaluated to determine the offeror's understanding of the statement of work and potential for accomplishment. Offerors were expected to include a description of all training programs used or maintained to improve, enhance, and ensure that all

personnel are capable of performing the assigned tasks, and recurring training to ensure up-to-date knowledge of skills. Here, the evaluators found the protester's proposal warranted 80 percent of the points allotted for this subfactor. While the lack of detail in training programs was an observed weakness, it was not viewed as a serious deficiency by the evaluators.[1] Instead, the evaluators assigned the proposal a high, but not perfect score. The 2-point reduction did not have a significant impact on the proposal's technical rating, and the IRS was therefore not required to discuss this matter with NVSC. See American Dev. Corp., B-251876.4, July 12, 1993, 93-2 CPD ¶ 49.

EVALUATION OF MJS'S COSTS

Pursuant to the Service Contract Act (SCA), 41 U.S.C. § 351 et seq. (1988), the RFP contained applicable Department of Labor (DOL) wage determinations. When issued, the RFP included wage determination No. 83-0812 (Rev. 8), dated June 11, 1992. Amendment No. 001 added wage determination No. 86-0465 (Rev. 11), dated September 14, 1993. Amendment No. 002 advised offerors that both determinations applied to the procurement with No. 83-0812 (based on a union collective bargaining agreement) covering cleaners, and No. 86-0465 covering pest controllers, refuse collectors, window washers/cleaners and laborers, and grounds maintenance and gardeners.

The RFP did not require submission of labor rates or cost and pricing data for the basic services under the contract. Instead, offerors were required to submit only their total per-month and extended prices for providing the required services, with the prices to include all costs of performance and profit. In addition to these prices, MJS submitted a 1-page "cost proposal" which included various job categories and their wage rates, subcontractor costs, overhead, general and administrative costs, and profit. The job category for janitors listed a wage rate which was below the wage rate for "cleaners" under wage determination No. 83-0812. The "cost proposal" also did not include all of the subcontractors which MJS proposed to perform certain of the contract requirements. Concluding that it had received adequate competition based on the prices proposed by the offerors, the IRS did not perform any additional cost

[1]The agency notes that, as the incumbent, the protester was well versed in the matter of training programs and should have known exactly what to propose. Thus, the IRS contends that it was the protester's lack of diligence in proposal preparation that led to its lower proposal score.

analysis on the offerors' proposals. See Federal Acquisition Regulation § 15.805-2(a). Since it did not review MJS's cost data, the IRS did not question MJS regarding this wage rate.

NVSC argues that the agency improperly failed to seek resolution of the "obvious" inconsistencies and uncertainties in MJS's proposal regarding the janitor wage rates and the cost of subcontractors. NVSC asserts that the cost of the unlisted subcontractors and appropriate janitor wages would raise MJS's costs by more than $300,000. The protester contends that such a large understatement of costs represented an unfair competitive advantage to MJS. We disagree.

Where, as here, a fixed-price contract is to be awarded and the agency concludes that adequate price competition has been obtained, the agency generally is not obliged to perform a cost analysis on the proposals even if offerors submit cost and pricing data. Research Management Corp., 69 Comp. Gen. 368 (1990), 90-1 CPD ¶ 352; SSDS, Inc., B-247596.2, Aug. 7, 1992, 92-2 CPD ¶ 90. Further, the RFP here did not inform offerors that the agency intended to conduct any detailed price analysis. Thus, as a general proposition, under this RFP the agency could have properly ignored the unneeded cost and pricing data submitted by MJS.

In situations where there is an indication on the face of an offer that the offeror does not intend to pay SCA mandated wage rates, that offer cannot be accepted, as is, without either an adjustment in the cost evaluation, if any is conducted, or some other method of ensuring that other offerors, who have in fact complied with the SCA, are not prejudiced. SSDS, Inc., supra. However, where the only indication of an intent not to comply with the SCA is in unsolicited cost and pricing data, we have found unobjectionable an agency's failure to analyze those data and raise the issue with the offeror. Id.

That is the situation presented here. MJS's initial proposal included unsolicited cost information which contained a wage rate apparently lower than that required by the applicable wage determination. Nowhere else in the proposal is there any suggestion that MJS did not intend to comply with both wage determinations, and the protester has not identified any such indication. In this regard, we note that MJS acknowledged amendments 001 and 002, which dealt specifically with the application of the wage determinations and in its proposal stated that it agreed with all provisions and requirements in sections B through K, which included section J, where the applicable wage determination appeared. Subsequently, in response to a request for verification of its intent to comply, MJS advised the IRS

that it would pay its employees the prevailing wage as set forth in the contract's wage determination guidelines. During the course of the protest, it also offered an explanation of how it would meet the required wages and cover all subcontractors through various line items in its cost breakdown.[2] We find no legal basis for objection to the agency's failure to analyze the cost and pricing data submitted with MJS's fixed-price proposal.[3]

NVSC also contends that MJS cannot afford to perform the contract at the proposed price using its proposed staffing levels. This is essentially a protest against the agency's affirmative determination of responsibility. We do not review such protests, where, as here, there is no showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the RFP may have been misapplied. 4 C.F.R. § 21.3(m)(5) (1994); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177.[4]

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[2]As a separate protest ground, NVSC challenges this post-award communication between MJS and the agency as being improper post-BAFO discussions. In the context of a bid protest, an agency is permitted to obtain post-BAFO, post-award clarifications from an offeror which do not provide an opportunity to revise or modify a proposal. Aquidneck Sys. Int'l, Inc., B-257170.2, Sept. 30, 1994, 94-2 CPD ¶ 122. Here, MJS merely verified that it intended to comply with the DOL wage determinations; it was neither provided the opportunity, nor did it attempt, to modify its proposal. Accordingly, this protest ground is without merit.

[3]The protester attempts to distinguish our decision in SSDS, Inc., supra, from this case by arguing that the cost data submitted in that case were on a standard Form 1411, while here MJS's cost data were on a sheet with other data, including job classifications and subcontractors. We see no meaningful basis to distinguish the cases based on the format of the cost information. In both cases, the cost and pricing data were unsolicited and not considered by the agency in its evaluation.

[4]Moreover, while NVSC argues that the MJS proposed price should have been more than $300,000 higher to account for inclusion of the proper wage rates and subcontractors, we note that the protester proposed to perform the same work for only approximately $32,000 more than the price proposed by MJS. In view of the closeness in price, we have no reason to infer that the MJS price is unreasonably low or that NVSC suffered any competitive disadvantage. Moreover, even if MJS price represents a below-cost offer, such offers

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COST/TECHNICAL TRADEOFF

NVSC finally argues that the contracting officer's decision to award to MJS, with a lower-scored technical proposal and lower price, was unreasonable because technical merit was given more weight in the evaluation criteria. In NVSC's view, it should have been awarded the contract since its proposal (with a score of 97 points) was technically superior to MJS's proposal (with a score of 90 points) and was only slightly higher in price (approximately 1.5 percent). NVSC thus challenges the contracting officer's determination that MJS's proposal was technically equivalent to its proposal.

The IRS was not required to award the contract to the offeror whose proposal received the highest technical score regardless of price. The solicitation did not say that price would not be considered if one proposal was technically superior to another. Instead, it said that award was to be made to the offeror whose proposal contained the combination of criteria offering the best overall value to the government through a comparison of the values of technical features with differences in proposed prices. In a negotiated procurement, even if price is the least important evaluation criterion, an agency properly may select a lower rated, lower-cost proposal if it reasonably determines that the premium involved in selecting a higher-rated, higher-priced proposal is not justified, given the level of technical competence available at the lower cost. Science Applications Int'l Corp., B-238136.2, June 1, 1990, 90-1 CPD ¶ 517.

Further, where source selection officials reasonably regard proposals as being essentially equal technically, price properly may become the determining factor in making an award decision notwithstanding that the evaluation criteria assigned price less importance than technical considerations. See Warren Elec. Constr. Corp., B-236173.4; B-236173.5, July 16, 1990, 90-2 CPD ¶ 34. Whether a given point spread between competing offerors indicates significant superiority of one proposal over another depends on the facts and circumstances of each procurement. While technical point scores and descriptive ratings must be considered by source selection officials in making this determination, these scores are not necessarily dispositive; rather, source selection officials must determine if they agree that the point scores are indicative of technical

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are not objectionable. Allen-Norris-Vance Enters., Inc., B-243115, July 5, 1991, 91-2 CPD ¶ 23.

superiority and what the difference may mean in contract performance. Arthur D. Little, Inc., B-243450, July 31, 1991, 91-2 ¶ 106; Merdan Group, Inc., B-231880.3, Feb. 28, 1989, 89-1 CPD ¶ 210.

In reviewing evaluations, our Office will examine the record to determine whether the agency's judgment was reasonable and consistent with the evaluation scheme. Merdan Group, Inc., supra. Here, our review discloses no basis to object to the IRS' determination that the technical proposals of MJS and NVSC were technically equal. The relative point scores, NVSC (97) and MJS (90), out of 100 points (a 7-percent difference), do not negate this conclusion. See Lockheed Corp., B-199741.2, July 31, 1981, 81-2 CPD ¶ 71 (contracting agency properly found proposals technically equal despite 15 percent difference in technical scores). In this regard, under the factors for Experience, Phase-In Plan, and Quality Assurance Plan, both proposals received the maximum score. For the Management Plan factor, NVSC's proposal received 18 of 20 points, while MJS's proposal received 17 points. For the Operating Plan factor, NVSC's proposal was scored at 19 of 20 points, while MJS's proposal received 3 points fewer. For the Subcontracting Plan factor, NVSC's proposal was scored at 10 of 10 points and MJS's was scored at 7.

The protester argues that the contracting officer's rationale lacks sufficient detail to support her decision. A source selection official's judgment must be documented in sufficient detail to show it is not arbitrary. KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447. Here, the contracting officer's source selection statement addresses MJS's less than perfect scores and adequately provides her rationale for considering its proposal technically equal with NVSC's.

Under the Operating Plan factor, the contracting officer concluded that MJS's 4 point deficit represented minor matters which would not significantly affect its projected ability to perform. For example, MJS's proposal was downgraded 1 point each in the subfactors of staffing and responsiveness because of its slightly weak description of its skill mix. However, the contracting officer found that MJS's skill mix was satisfactory overall. Similarly, while MJS's proposal received only 2 of 4 points for the equipment/supplies subfactor, the contracting officer observed that the awardee's response, referring back to the solicitation requirements, indicated that it would conform to the specifications. In this regard, we note that offerors were not required to respond on a paragraph-by-paragraph basis and could respond with a single statement of compliance with the terms of a solicitation section.

Concerning the 3 points deducted in MJS's supervisory controls score, the contracting officer again considered the deficit to be minor since MJS's proposal demonstrated its ability to perform. Further, as noted by the agency, MJS's point deductions are attributable to its weak response on only two of six components of the supervisory controls evaluation. As to the other four, MJS's proposal provided all requisite information.

With regard to the three points deducted for the MJS Subcontracting Plan, the contracting officer disagreed with the evaluators. She specifically found that MJS's proposal was fully responsive to all issues set forth in section M of the RFP concerning the subcontracting plan. NVSC has not shown her finding to be unreasonable or inconsistent with the solicitation. As a result of her finding, the C.O. disregarded the points deducted in this area, which effectively raised MJS's score to 93, making the point differential between the proposals even smaller.

Despite these findings, NVSC argues that MJS's proposal is not equal to its proposal. For example, NVSC contends that its perfect score on the Equipment/Supplies subfactor, based upon its detailed submission concerning these items, must be considered superior to the awardee's simple agreement to meet the requirements of the solicitation. The protester misses the point of a determination of technical equality. When a selection official determines that proposals are technically equal, it means that overall there is no meaningful difference in what the proposals have to offer. It does not mean that the proposals are identical in every respect; one may be superior to the other in a variety of areas. Here, for example, while NVSC's proposal scored 3 points higher on the equipment and supplies subfactor, MJS's proposal had a 2-point advantage over NVSC's proposal with regard to the training programs subfactor. Although, NVSC maintains that its proposal is superior to that of MJS, we find that its arguments amount to mere disagreement, which does make the contracting officer's determination unreasonable. See Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115.

Overall, the contracting officer concluded that MJS's proposal contained technical features equal to the other, highest scored proposals and that no proposal provided additional merit which would justify awarding at a higher price.[5] While the 1.5-percent price difference between the

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[5]In this regard, the agency contends that NVSC's higher proposal score is attributable to its status as the incumbent. According to the IRS, an incumbent would be

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proposals is relatively small, this does not provide any basis to find the contracting officer's conclusion unreasonable.

The protest is denied.

\s\ Paul Lieberman
for Robert P. Murphy
General Counsel

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[5](...continued)
expected to score higher than a non-incumbent in areas such as equipment/supplies, responsiveness, and supervisory control. A numerical scoring advantage based primarily on the advantages of incumbency may not necessarily indicate a significant technical advantage. See NUS Corp.; The Austin Co., B-221863, B-221863.2, June 20, 1986, 86-1 CPD ¶ 574.