



United States General Accounting Office  
Washington, DC 20548

Comptroller General  
of the United States

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## Decision

**Matter of:** Burns and Roe Services Corporation

**File:** B-282437.3

**Date:** November 30, 1999

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Lee Curtis, Esq., and Mitchel Neurock, Esq., Howrey & Simon, for the protester. Katherine S. Nucci, Esq., and Timothy Sullivan, Esq., Adduci, Mastriani & Schaumberg, for Kvaerner Process Services, Inc., an intervenor. Vicki E. O'Keefe, Esq., and Robert Roylance, Esq., Department of the Navy, for the agency. Linda S. Lebowitz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest of an alleged solicitation impropriety--that the agency improperly considered crew berthing costs in the evaluation of price proposals--is dismissed as untimely where the protester waited until after award to raise this issue.

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### DECISION

Burns and Roe Services Corporation (BRSC) protests the award of a contract to Kvaerner Process Services, Inc. (KPSI) under request for proposals (RFP) No. N62470-98-R-4510, issued by the Department of the Navy for base operating services at the U.S. Naval Base, Guantanamo Bay, Cuba. BRSC challenges the agency's decision to consider an offeror's proposed crew berthing costs in the price evaluation.

We dismiss the protest.

### BACKGROUND

#### Solicitation and Amendments

The RFP, issued on December 7, 1998, contemplated the award of a combination fixed-price/indefinite quantity award fee contract to the responsible offeror whose proposal was determined to represent the best value to the government, technical evaluation factors (past performance, corporate experience, work

accomplishment/staffing, and financial capability) and price considered. RFP at L-3, M-7.<sup>1</sup>

As relevant here, the RFP as initially issued contained a provision at section C1.6.8, captioned "Crew Berthing," which provided that the government would reimburse the contractor for actual crew berthing costs at \$6 per day per person at the Gold Hill Contractor Berthing Facility, operated by the Naval Station under a Memorandum of Understanding with the Morale, Welfare, and Recreation (MWR) Department, a non-appropriated fund instrumentality of the government. RFP at C.1-7. The RFP schedule, line item No. 0001AA, listed crew berthing as a direct cost at \$6 each. RFP at B-3. Under the RFP as initially issued, an offeror's proposed crew berthing costs would not be evaluated, at least up to the RFP's \$6 rate. Contracting Officer's (CO) Statement at 2.

During the conduct of this procurement, the agency issued several amendments addressing crew berthing costs. Amendment No. 1, issued on February 12, 1999, removed from section C1.6.8 any reference to the \$6 per day per person reimbursable crew berthing rate and removed line item No. 0001AA from the RFP schedule. RFP amend. 1, at C.1-7, B-3. Under amendment No. 1, crew berthing costs would be considered as part of an offeror's total proposed cost. CO Statement at 2. In section C1.6.8 of amendment No. 3, issued on February 28, the crew camp known as Hibiscus Hollow, currently owned and operated by KPSI, was added as a second location for crew berthing. RFP amend. 3, at C.1-7. This amendment also stated that the government would not reimburse the contractor for crew berthing costs, *id.*, and accordingly, these costs would be evaluated as part of an offeror's total proposed cost. CO Statement at 2.

Amendment No. 5, issued on March 19, made no changes to section C1.6.8, but amended section L.11 by requiring offerors to submit supplemental pricing information, including information on crew berthing costs. This amendment added the following provision:

NOTE. The Offeror must furnish the pricing information for the base year and four option years. Any significant price changes in the option years must be explained. Pricing for Crew Berthing will not be considered when evaluating price.

RFP amend. 5, at L-7.

Under amendment No. 5, "even though crew berthing was a factor in competitive pricing because it was no longer reimbursable, it was not being specifically evaluated for any purpose." CO Statement at 2.

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<sup>1</sup>The technical evaluation factors and price were equally weighted.

Amendment No. 6, issued on May 17, added language to section C1.6.8 that the current crew berthing rate at Gold Hill was \$6 per day per person. RFP amend. 6, at C.1-7. Amendment No. 6 also deleted page L-7 of amendment No. 5, see id. at 2 (list of deleted pages and replacement pages), which contained the supplemental pricing information requirement and note that crew berthing costs would not be considered when evaluating price, as quoted above. Therefore, the effect of amendment No. 6 “was to reinstate consideration of crew berthing in [the] evaluation of pricing.” CO Statement at 3.

On a separate page in amendment No. 7, issued on May 25, the agency stated the following:

PLEASE NOTE:

Amendment 0006 deleted the following paragraph on Page L-7 [of amendment No. 5]:

“NOTE: The Offeror must furnish the pricing information for the base year and four option years. Any significant price changes in the option years must be explained. Pricing for Crew Berthing will not be considered when evaluating price.”

RFP amend. 7, at 3.

Amendment No. 7 confirmed that amendment No. 6 removed the language in amendment No. 5 regarding the non-evaluation of an offeror’s proposed crew berthing costs. In other words, under amendment Nos. 6 and 7, such costs would be evaluated. CO Statement at 3.

### Proposal Submissions and Discussions

BRSC and KPSI, both incumbent contractors at the Guantanamo Bay site, each submitted initial proposals on April 5. BRSC proposed to house employees at the MWR Gold Hill facility, while KPSI proposed to use its Hibiscus Hill facility. In its initial proposal, BRSC stated that “[w]e have included berthing . . . per Amendments 0003 and 0005. We have priced berthing at a rate of \$[deleted].” Agency Report, Tab 3, BRSC’s Initial Price Proposal, at 4.<sup>2</sup> By letters dated May 25, the agency conducted technical and price discussions with both BRSC and KPSI.

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<sup>2</sup>In its initial price proposal, BRSC acknowledged amendment Nos. 1 through 5. Id. at Standard Form (SF) 33.

On June 8, BRSC and KPSI submitted their first revised proposals. (First revised proposals were submitted after the issuance of amendment Nos. 6 and 7 which, respectively, deleted and confirmed the deletion of language in amendment No. 5 that had provided for the non-evaluation of an offeror's proposed crew berthing costs; in addition, amendment No. 6 stated that the crew berthing rate at the Gold Hill facility was \$6 per day per person). In its submission, BRSC continued "per Amendments 0003 and 0005 . . . [to] price[] berthing at a rate of . . . \$[deleted]." Agency Report, Tab 9, BRSC's First Revised Price Proposal, at 1.<sup>3</sup> By letters of June 23, the agency conducted a second round of technical and price discussions with both BRSC and KPSI. The agency posed the following matter to BRSC:

(4) Your price revision for berthing costs is based on Amendments 0003 and 0005 at a berthing rate of \$[deleted]. Amendment 0006 specifically addresses this issue. Please clarify and acknowledge all amendments addressing berthing costs.

Agency Report, Tab 13, CO Letter to BRSC (June 23, 1999), encl. 1, at 3.

On June 24, the agency conducted oral discussions with both BRSC and KPSI. With respect to BRSC, the agency repeated discussion question (4), as quoted above. According to the agency's minutes of this discussion session, the agency advised BRSC to address "why [certain] price[s] [were] high or low rather than they [BRSC] will just take care of it. We [the agency] want to know how they [BRSC] will do the function. We want to see their economy, etc." BRSC advised that they were "in a unique position because they ha[d] accumulated a lot of materials and equipment [at Guantanamo Bay] that they [could] draw on." Agency Report, Tab 15, Agency Minutes of Oral Discussions with BRSC, at 6. According to BRSC's proposed project manager who attended this discussion session, representatives of BRSC stated that the firm "would review crew berthing costs and address it . . . in light of Amendment 0006." Declaration of [deleted] BRSC's Proposed Project Manager, attach. 2 to BRSC's Comments, at 2.

On July 6, BRSC and KPSI submitted second revised proposals. In its submission, BRSC continued "per Amendments 0003 and 0005 . . . [to] price[] berthing at a rate of . . . \$[deleted]." Agency Report, Tab 21, BRSC's Second Revised Price Proposal, at 1.<sup>4</sup> By letter dated July 14, in response to a phone call from the agency, BRSC answered three cost questions which it had failed to address in its July 6 submission. In response to the previously quoted discussion question (4), BRSC stated that it

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<sup>3</sup>In its first revised price proposal, BRSC acknowledged amendment Nos. 1 through 8. Id. at attachment to SF 33.

<sup>4</sup>In its second revised price proposal, BRSC acknowledged amendment Nos. 1 through 10. Id. at attachment to SF 33.

“acknowledges all amendments through 0010. We have based our estimate of berthing costs on our knowledge and ability to provide for berthing at this projected rate.” Agency Report, Tab 23a, BRSC’s Response to Discussion Questions, at 3.

By letters dated July 14, the agency advised both BRSC and KPSI that discussions were concluded and requested that each firm submit a final proposal revision by July 21. Concerning BRSC, the agency advised the firm that:

The following weakness[] relative to your proposal [is] noted:

[] Your revised price proposal indicates a berthing rate of \$[deleted]. Please price in accordance with paragraph C1.6.8 of the solicitation [i.e., amendment No. 6].

Agency Report, Tab 24, CO Letter to BRSC (July 14, 1999), at 1.

On July 21, BRSC and KPSI each submitted final proposal revisions. In its submission, BRSC stated, “We have included berthing in our supplemental cost detail per Amendments [sic] 0006. We have priced berthing at a rate of \$6.00 per day/per person.” Agency Report, Tab 26, BRSC’s Final Price Proposal Revision, at 1.<sup>5</sup>

The agency determined to award the contract to KPSI, the offeror submitting the technically superior, lower priced (by approximately \$[deleted] when crew berthing costs were considered) proposal. Agency Report, Tab 28, Price Evaluation Board Report, July 26, 1999, at 7.<sup>6</sup>

## ISSUES AND ANALYSES

BRSC argues that the agency wrongfully considered crew berthing costs in the price evaluation; wrongfully failed to take steps to normalize crew berthing costs; and wrongfully interfered with its competitive discretion by directing it to raise its proposed price for crew berthing. Protest at 11-16. BRSC explains that in 1997, in response to an agency-level protest on a prior procurement at Guantanamo Bay, the agency represented to BRSC that crew berthing costs either would not be considered

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<sup>5</sup>In its final price proposal revision, BRSC acknowledged amendment Nos. 1 through 11. Id. at attachment to SF 33.

<sup>6</sup>Our Office dismissed as untimely and for failing to state a valid basis for protest BRSC’s protest of the agency’s technical evaluation and source selection decision since specific challenges in these areas were raised for the first time in BRSC’s comments on the agency report, as opposed to in its initial protest based on information revealed during its post-award debriefing. Burns and Roe Servs. Corp., B-282437.4, Oct. 29, 1999 (unpublished decision).

or would be normalized in future procurements to eliminate any unfair cost advantage accruing to KPSI as a result of its being able to provide crew berthing at a lower rate since it owned and operated the Hibiscus Hill facility. BRSC's Comments at 2. BRSC states that it reminded the agency of this commitment early in the course of this procurement and, as a result, the agency issued amendment No. 5 which provided that an offeror's proposed crew berthing costs would not be considered in the price evaluation. Id. BRSC complains, however, that the agency reneged on its commitment to level the competitive playing field by considering, and by failing to normalize, crew berthing costs in the price evaluation and by directing the firm to price crew berthing in accordance with amendment No. 6 at \$6 per day per person.

Our Bid Protest Regulations require that protests based upon alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, be filed not later than the next closing time for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1999). Here, we conclude that BRSC's challenge of the agency's price evaluation, specifically, the agency's consideration of, and failure to normalize, offerors' crew berthing costs and the agency's direction to BRSC to price its proposed crew berthing costs in accordance with amendment No. 6, is untimely.

As a threshold matter, the resolution of which becomes dispositive as to the timeliness of BRSC's substantive price evaluation arguments, BRSC contends that amendment No. 7 "reinstate[d] the crew berthing cost provision [i.e., the pricing note that an offeror's proposed crew berthing costs would not be considered in the price evaluation] that had been left out of Amendment 0006." BRSC's Comments at 10. While amendment No. 5 contained a note on page L-7 stating that "[p]ricing for [c]rew [b]erthing [would] not be considered when evaluating price," this note was deleted in amendment No. 6 (when page L-7 of amendment No. 5 was removed), and the deletion of this note was confirmed in amendment No. 7 (where amendment No. 7 specifically stated that "Amendment 0006 deleted the following paragraph [i.e., the crew berthing price evaluation note] on Page L-7 [of amendment No. 5]"). Contrary to BRSC's position, there is nothing in the language in amendment No. 7 which "reinstated" the crew berthing pricing note from amendment No. 5 to preclude the evaluation of an offeror's proposed crew berthing costs.

Moreover, even if BRSC misread amendment No. 7, the record of written and oral discussions with BRSC reveals that the agency focused on the firm's proposed crew berthing costs, specifically its failure to provide any meaningful justification for its \$[deleted] rate, thereby rendering this rate, in the agency's view, a "weakness." In this regard, by letter of June 23 (issued approximately one month after amendment Nos. 6 and 7 superseded amendment No. 5), the agency requested that BRSC clarify its proposed crew berthing rate of \$[deleted] based on amendment Nos. 3 and 5, since amendment No. 6 addressed the crew berthing issue (i.e., as discussed above, amendment No. 6 deleted page L-7 of amendment No. 5 with the crew berthing price evaluation note and amendment No. 6 provided for a \$6 per day per person crew

berthing rate at the Gold Hill facility). On June 24, during oral discussions, the agency addressed this issue with BRSC and basically told BRSC that it would have to provide meaningful explanations of its pricing. As a follow-up to its second revised proposal, BRSC advised the agency that it continued to price crew berthing at \$[deleted] in accordance with amendment Nos. 3 and 5 based on “[its] knowledge and ability to provide for berthing at this projected rate.” The agency obviously rejected this unsubstantiated justification<sup>7</sup> because by letter of July 14, in requesting BRSC’s final proposal revision, the agency advised BRSC of “[t]he following weakness[] . . . Your revised price proposal indicates a berthing rate of \$[deleted]. Please price in accordance with paragraph C1.6.8 of the solicitation [*i.e.*, amendment No. 6].” In its final price proposal revision submitted on July 21, BRSC finally priced crew berthing in accordance with amendment No. 6 at \$6 per day per person.

Reading the record in the light most favorable to BRSC, we conclude that BRSC, which was concerned as early as 1997 with an unfair competitive advantage accruing to KPSI if an offeror’s proposed crew berthing costs were considered as part of the agency’s price evaluation, should have known that when its unsubstantiated \$[deleted] crew berthing rate was labeled a “weakness” in the agency’s letter of July 14 and that when the agency, in this same letter, directed BRSC to raise its crew berthing rate by approximately [deleted] percent to \$6 per day in accordance with amendment No. 6, that the agency, in fact, was evaluating offerors’ proposed costs for crew berthing. The evaluation of offerors’ crew berthing costs should have been protested, at the latest, by the July 21 closing time for receipt of final proposal revisions as announced in the July 14 letter to BRSC. Therefore, BRSC’s post-award

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<sup>7</sup>BRSC states in its protest and comments that it had an oral agreement with MWR to house employees at the Gold Hill MWR facility at a reduced rate of \$[deleted] in exchange for limited maintenance services. Protest at 16-17; BRSC’s Comments at 17-18; Declaration of [deleted] BRSC’s Contracts Manager, attach. 1 to BRSC’s Comments, at 4. However, despite being given numerous opportunities in proposal submissions and during discussions, BRSC did not refer to such agreement. The agency provided in its report declarations from the MWR Deputy Director and the MWR Facilities/Logistics Manager at Guantanamo Bay; each of these individuals stated that “[a]t no time while acting as an agent from MWR have I made any oral agreements with [BRSC] to exchange maintenance and custodial services for a discounted room rate at the Gold Hill berthing facility.” Agency Report, Tab 31, Declaration of [deleted] Deputy Director of MWR, at 1; Agency Report, Tab 32, Declaration of [deleted] Facilities/Logistics Manager of MWR, at 1. In its comments on the agency report, BRSC offered no meaningful rebuttal to the declarations filed by the MWR representatives (specifically, BRSC offered no rebuttal from its site manager who allegedly reached this agreement with the MWR officials).

protest of the agency's evaluation of crew berthing costs is untimely. 4 C.F.R. § 21.2(a)(1).<sup>8</sup>

To the extent BRSC believes that its \$[deleted] crew berthing rate was mischaracterized as a weakness and that it should have been able, since the RFP contemplated the award of a fixed-price contract, to submit a lower price for crew berthing at the Gold Hill facility than the \$6 per day rate called for by amendment No. 6 in order to retain its competitive position [*i.e.*, a "buy-in"], BRSC should have protested these matters prior to its submission of its final proposal revision on July 21, not after award. 4 C.F.R. § 21.2(a)(1).<sup>9</sup> Although BRSC continues to argue that the agency's final proposal revision instructions were not objectionable in the context of BRSC's understanding that an offeror's proposed crew berthing costs would not be evaluated or that such costs would be normalized, as previously discussed, the RFP, after the deletion in amendment No. 6 of the crew berthing pricing note in amendment No. 5, clearly contemplated the evaluation of an offeror's proposed crew berthing costs and there was no requirement in the RFP to normalize these costs.

Finally, BRSC contends that the source selection decision was arbitrary and irrational because it failed to consider the benefit to the government of housing contractor employees at the Gold Hill MWR facility. Protest at 16-17. In this respect, BRSC states that had it received the award, over the 5-year term of the contract, it would have generated revenue of approximately \$[deleted] million for the MWR program, thus positively affecting the financial position of this program at Guantanamo Bay.

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<sup>8</sup>The July 14 letters requesting final proposal revisions by July 21 were signed by a contracting official and sent to both BRSC and KPSI, and therefore constituted a solicitation amendment. See, e.g., Proteccion Total/Magnum Security, S.A., B-278129.4, May 12, 1998, 98-1 CPD ¶ 137 at 3.

In addition, we note that there was no requirement in the RFP for the agency to normalize crew berthing costs. Thus, the RFP's omission in this regard constitutes an alleged solicitation impropriety that should have been protested by BRSC prior to the appropriate closing time, not after award. 4 C.F.R. § 21.2(a)(1).

<sup>9</sup>In other words, if BRSC believed that the agency was treating crew berthing costs as a cost reimbursable-type item, in contravention of the fixed-price nature of the contract, based on the July 14 discussion question to the firm, BRSC should have raised this issue prior to award. Id.



However, we simply point out that any financial benefit to the Gold Hill MWR facility was not a stated evaluation factor and, therefore, would have been an improper consideration in the agency's best value award determination.

The protest is dismissed.

Comptroller General  
of the United States