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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: PharmChem, Inc.

File: B-291725.3; B-291725.4; B-291725.5

Date: July 22, 2003

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Tenley A. Carp, Esq., and Karen Yankosky, Esq., McGuire Woods, for Scientific Testing Laboratories, Inc., an intervenor.

Rafael A. Madan, Esq., John L. Pensinger, Esq., and Linda Fallowfield, Esq., Department of Justice, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's evaluation of offeror's proposal of [deleted] to staff three key personnel positions as acceptable was unobjectionable where solicitation did not prohibit proposed staffing plan, agency ensured offeror understood requirements, and agency considered performance risk.
2. Protest that contracting agency conducted inadequate and unequal discussions as between the protester and awardee is denied where record shows that agency properly tailored discussions to each offeror, and provided each the opportunity to revise its proposal.
3. Awardee's proposal of a labor rate of \$0.00 for certain personnel in procurement for award of time-and-materials contract was unobjectionable where agency conducted price realism evaluation that encompassed consideration of awardee's ability to perform while furnishing the affected personnel at no cost to the government.
4. Where agency reasonably determined that offerors' proposals were technically equivalent notwithstanding protester's slightly higher rating under single technical factor, agency properly considered evaluated price as the determining factor in its "best value" determination.

DECISION

PharmChem, Inc. protests the award of a contract to Scientific Testing Laboratories, Inc. (STL) under request for proposals (RFP) No. OJP-2002-R-002, issued by the Department of Justice (DOJ) for laboratory testing and technical assistance. PharmChem challenges the technical and price evaluations and the adequacy of discussions.

We deny the protest.

BACKGROUND

The RFP sought proposals to provide all personnel, equipment and materials necessary to support the National Institute for Justice's (NIJ) Arrestee Drug Abuse Monitoring (ADAM) Program. The NIJ is the research and development agency for DOJ and is authorized to conduct research, development, evaluation, and dissemination programs to improve and strengthen the systems of criminal justice programs in the United States. Tasks to be performed in support of the ADAM program include data analysis, results interpretation, and on-time delivery of data results to the NIJ and ADAM data collection contractor (DCC). The data comes primarily from the collection and analysis of voluntary and anonymous interviews and urine specimens from adult and juvenile arrestees. Each specimen will be screened for a minimum of 10 drugs.

The RFP contemplated the award--on a "best value" basis--of a fixed-price, indefinite-delivery, indefinite-quantity, and time-and-materials contract for a base year, with 3 option years. Proposals were to be scored on an adjectival basis--outstanding, good, acceptable, marginal or unacceptable--under three factors, listed in descending order of importance: technical capability, past performance, and price. Technical capability was to be evaluated on the basis of three equally weighted subfactors: organization and management approach; technical approach/quality assurance; and staff qualifications. The non-price factors combined were significantly more important than price, but the degree of importance of price was to increase if the proposals were relatively equal.

Four offerors, including PharmChem and STL, submitted proposals. The source evaluation board (SEB) rated the two firms' proposals good overall. The other two proposals were rated acceptable. STL proposed the lowest price, approximately 18 percent lower than PharmChem's. The agency subsequently resolved certain weaknesses in STL's proposal through clarifications, but did not communicate with PharmChem or the other offerors. Based on the SEB's evaluation of PharmChem's and STL's proposals as technically equal, the source selection authority (SSA) determined that STL's low price was the determining factor and awarded it the contract.

After receiving notice of the award and a debriefing, PharmChem filed a protest with our Office in November 2002. PharmChem raised a number of assertions, including that the agency improperly allowed STL to submit a revised proposal and that the best value determination was flawed. The agency proposed corrective action in the form of reopening the procurement, conducting discussions, obtaining revised proposals, and making a new best value determination. Based on this proposed action, PharmChem withdrew its protest (B-291725, B-291725.2, Dec. 20, 2002).

The agency conducted discussions with PharmChem, STL and a third offeror, and received revised proposals from them. The final evaluations were as follows:

	PharmChem	STL	Offeror 3
Technical Capability (overall)	Good	Good	Acceptable
Organizational & Mgmt Approach	Outstanding	Good	Acceptable
Technical Approach	Good	Good	Acceptable
Staff Qualifications	Good	Good	Good
Past Performance	Excellent	Excellent	Excellent
Evaluated Price	\$4,030,787	\$3,968,230	\$4,303,722

In making the new award determination, the SSA considered that both PharmChem and STL offered a large number of value-added strengths, with no weaknesses or deficiencies, and that they remained essentially equal technically. The SSA therefore again determined that STL's proposal represented the best value based on its low price. After receiving notice of the award and a debriefing, PharmChem filed this protest.¹

TECHNICAL EVALUATION

In reviewing a protest of an agency's proposal evaluation, it is not our role to reevaluate proposals. Rather, we will consider only whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. CWIS, LLC, B-287521, July 2, 2001, 2001 CPD ¶ 119 at 2.

Key Personnel

PharmChem asserts that the agency should have downgraded STL's proposal, or rejected it as noncompliant, under the staffing qualifications subfactor. Specifically, noting that the RFP identified three key personnel positions--data manager, chemist, and technical writer--and the fact that STL proposed [deleted] to fill [deleted]

¹ PharmChem raises a number of arguments. We have reviewed them all and find that none has merit. This decision addresses only the more significant issues.

positions, PharmChem maintains that the proposal violated the terms of the RFP, and that this should have been reflected in the evaluation.

PharmChem's argument is without merit. While the RFP identified three positions that were considered to be key personnel, it neither required the proposal of [deleted] to fill them, nor prohibited offerors from proposing [deleted]. RFP §§ C-100.7; H.2A. Rather, the RFP required only that offerors propose personnel who met the stated qualifications; provide an adequate work force; and provide fully qualified back-up staff. RFP §§ C-100.8, C-100.10. The resume of the individual STL proposed for [deleted] indicated that he was qualified to perform [deleted], since he met or exceeded the experience and education requirements in the RFP. STL also proposed [deleted] "to ensure uninterrupted contract performance." STL Revised Proposal at TCP 3. The agency verified STL's proposed staffing plan during discussions, and the SEB ultimately rated STL's proposal good under the staff qualifications subfactor. Since there is nothing in the record to indicate that STL violated or otherwise failed to meet the RFP's staffing requirements, the evaluation was reasonable.

Performance Risk

PharmChem asserts that the agency failed to consider the performance risk associated with STL's proposal to fill [deleted] positions with [deleted], maintaining that the [deleted]; PharmChem notes in this regard that the RFP prohibited the contractor from charging more than 40 hours per week for any individual. PharmChem also points out that the [deleted] proposed and the [deleted] have other company responsibilities at STL: the proposed [deleted] is the company's research director, and the proposed [deleted] is a co-owner, officer, corporate director, and part-time forensic laboratory director.

This argument is without merit. The SEB considered each offeror's proposed staffing plan to determine if it met the RFP's requirements or posed any performance risks. Second Supplemental Agency Report (AR) at 4. As part of that evaluation, the contracting officer reviewed STL's staffing plan and observed that [deleted] would provide the support required in the NIJ statement of work . . . [and would] be assisted by a team of support personnel." Source Selection Decision at 6. The agency also points out that the combined level of effort for the [deleted] was estimated at 1,800 hours for the base year, 1,000 hours for the first option, 900 hours for the second option, and 800 hours for the third option. Based on a 2,080-hour work year (40 hours x 52 weeks), the agency reasons, [deleted] can perform [deleted] with time left over, and the proposed [deleted] will be available to perform if unforeseen difficulties arise. We find nothing unreasonable in the agency's findings; accordingly, there is no basis for us to object to this aspect of the evaluation.

Evaluated Strengths

PharmChem asserts that the SEB arbitrarily assigned 33 strengths to both its and STL's proposals, and that STL's proposal was not entitled to some of the identified strengths. For example, the protester alleges that the SEB double-counted the same strength under two subfactors for STL and gave STL credit for proposing to subcontract a sweat patch test to PharmChem, but did not assign a strength to the protester for using its own test.

The evaluation was reasonable. First, regarding the alleged double counting, the agency noted STL's emphasis on [deleted] under both the organization/management and ability to meet deadlines subfactors. There is nothing improper in an agency's finding that the same strength has value under multiple subfactors, Teledyne Brown Eng'g, B-258078, B-258078.2, Dec. 6, 1994, 94-2 CPD ¶ 223 at 4-5, and the protester has not shown that STL's proposed [deleted] will not have a positive effect under both subfactors. Further, PharmChem itself received the benefit of a similar double counting of its strength regarding [deleted] under both the quality control and quality control/assurance plan subfactors.

The record does not support PharmChem's claim that the SEB failed to assign its proposal a strength for its sweat patch test. In this regard, under the same subfactor--urinalysis, data reporting, and formats--under which STL's proposal received its sweat patch strength, the SEB assigned PharmChem's proposal the following strength: "[t]he proposer is well known for having developed certain new technologies in the drug testing area (Attachment 4)." SEB Report at 12. Attachment 4 of PharmChem's proposal is entitled "Urine, Saliva and Sweat Patch Collection Procedures." PharmChem Proposal at 84. Thus, although the SEB did not specifically reference the sweat patch test, it is apparent that it accorded PharmChem's proposal credit for this technology.

PharmChem also asserts that the agency irrationally rated as a strength STL's proposal to [deleted] test results by using [deleted] immunoassay test, [deleted].² PharmChem maintains that [deleted] in fact will provide no benefit to the government, since [deleted] would be similar, and thus likely would produce similar results. To the extent they produced different results, PharmChem continues, [deleted] would skew the statistical results because only [deleted] would be tested [deleted]. Further, use of the [deleted] would deprive the government of confirmation of amphetamines by the more accurate gas chromatography/mass spectrometer (GC/MS) testing method.

² Immunoassay screening tests are based on reactions between an antibody and a target drug. Supplemental AR at 9.

The evaluation was reasonable. The agency determined that [deleted] would be beneficial because [deleted], may eliminate certain false positive results attributable to an assay's cross-reaction with chemically-similar substances. While the agency acknowledges that [deleted], it maintains that it would not necessarily do so, and also points out that the government would have the flexibility either to select [deleted] for detecting drugs of abuse, or to use [deleted] for research analysis. With regard to GC/MS confirmation testing of amphetamine-positive specimens, STL explains, and its proposal specifically provides, that it will "[c]onfirm all specimens screened positive for amphetamines . . . by GCMS." STL Second Supplemental Comments at 12; Proposal at 18. In fact, STL further explains, [deleted]. STL Second Supplemental Comments at 12. Since the agency was fully aware of both the potential statistical impact of [deleted] and the need for flexibility in determining when and whether such tests and results will be considered, we think it reasonably rated the proposed [deleted] as a strength based on the potential benefit of eliminating [deleted] test results.

DISCUSSIONS

PharmChem asserts that the agency provided it with inadequate and unequal discussions with regard to the data manager, a key personnel position. Specifically, the protester notes that, during discussions, the agency provided STL with a "description of the requirement" (AR, Tab 50), after which STL revised its price proposal to eliminate any cost for the data manager. From this, PharmChem deduces that the agency must have provided STL with information that allowed STL to determine that it could cover the data manager position in its overhead costs instead of billing for it separately. PharmChem maintains that the agency was required to provide the same information to it when the agency reopened negotiations.

In negotiated procurements, the scope and extent of discussions with offerors in the competitive range are a matter of contracting officer judgment. Federal Acquisition Regulation (FAR) § 15.306(d)(3); Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 5. While offerors must be given an equal opportunity to revise their proposals, and the FAR prohibits favoring one offeror over another, discussions need not be identical; rather, discussions are to be tailored to each offeror's proposal. FAR §§ 15.306(d)(1), (e)(1); WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 5-6.

We find no improprieties in the discussions here. The record shows that, prior to the original award decision, the agency sought clarification of STL's proposal of \$0.00 for the chemist position and the accuracy of other figures. AR, Tabs 46-47. In a subsequent contact with STL, the agency clarified the role of the data manager and STL determined that it could absorb data manager costs in its overhead without charging the government. AR, Tab 9 at 2. According to the agency and STL, the agency's communication in this matter consisted of simply confirming that STL

understood the data manager's role in the ADAM requirement; it did not involve discussion of the appropriate labor rate to charge. Second Supplemental AR at 2; STL Second Supplemental Comments at 4. Based on this record, there is no basis to conclude that STL's proposal regarding the data manager was the result of any coaching by the government; rather, STL's decision to reduce the rate for the data manager appears to have been based on its own business judgment. This being the case, and since PharmChem, as the incumbent, was well aware of the requirements for the data manager, there was no need for the agency to provide PharmChem with discussions in this area.

PRICE EVALUATION

PharmChem asserts that the agency failed to perform a proper price realism analysis of STL's proposed labor rates, in accordance with RFP § M.5. Specifically, citing the RFP's requirement for total compensation plans and fully loaded rates for all key personnel, the protester concludes that STL's proposed rate of \$0.00 for the data manager and chemist should have been found unrealistic.

As with fixed-price contracts, where, as here, the award of a fixed-rate contract is contemplated, the "realism" of offerors' proposed labor rates is not ordinarily considered, since a fixed-rate contract, like a fixed-price contract, places the risk and responsibility for contract costs and resulting profit or loss on the contractor. See WinStar Fed. Servs., B-284617 et al., May 17, 2000, 2000 CPD ¶ 92 at 9. However, an agency may, at its discretion, provide for the use of a price realism analysis in a solicitation for the award of a fixed-rate or fixed-price contract to assess the risk in an offeror's approach. Id.; PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, B-251799 et al., May 4, 1993, 93-1 CPD ¶ 366 at 5. The nature and extent of an agency's price realism analysis are matters within the sound exercise of the agency's discretion. Cardinal Scientific, Inc., B-270309, Feb. 12, 1996, 96-1 CPD ¶ 70 at 4.

The price realism evaluation here was reasonable. The agency evaluated each line item and the total price for each proposal and compared them with its independent estimate and with other offerors' prices. The agency noted STL's proposal of a \$0.00 rate for the two personnel positions and specifically raised the matter in discussions. In response, STL's revised proposal explained:

STL's decision not to charge the government directly or indirectly in the base year or in any of the option years for CLINs 1014 and 1015 is a business decision and it is based on a realistic understanding of the work to be performed under this contract. STL is not [deleted] to obtain this particular contract or any future contract.

STL Proposal at TCP 1. STL also included the requisite total compensation plan, as well as salary and benefit packages for the proposed labor categories. The contracting officer reviewed this information and concluded that, overall, the

proposed compensation was fair and in line with market prices. AR, Tab 34, at 5. Proposal of below-cost rates—including a rate of \$0.00—for certain labor categories, is permissible in a fixed-rate environment, even where, as here, the RFP requires offerors to propose fully-loaded rates. GTSI Corp., B-286979, Mar. 22, 2001, 2001 CPD ¶ 55 at 5; ORI, Inc., B-215775, Mar. 4, 1985, 85-1 CPD ¶ 266 at 4. Having reviewed STL’s labor pricing and having ensured that STL understood the ramifications of its pricing strategy, the agency fulfilled its responsibility to conduct a reasonable analysis of the challenged prices.

Unbalanced Pricing

In a related argument, PharmChem asserts that the agency should have rejected STL’s proposal as unbalanced. Again, noting that STL proposed \$0.00 for some labor rates, PharmChem concludes that other line items were necessarily overstated to compensate for these understated rates.

This argument is without merit. Unbalanced pricing exists where the price of one or more contract line items is significantly overstated, despite an acceptable total evaluated price (typically achieved through underpricing of one or more other line items). Ken Leahy Constr., Inc., B-290186, June 10, 2002, 2002 CPD ¶ 93 at 2; see FAR § 15.404-1(g)(1). Where an agency determines that a firm’s pricing is unbalanced, it is required to conduct a risk analysis to evaluate whether award to the firm will result in the government’s paying an unreasonably high price for contract performance. FAR § 15.404-1(g)(2).

There is no basis for concluding that STL’s pricing is unbalanced. PharmChem does not identify any specific prices that it believes are significantly overstated and the record does not indicate that any of STL’s prices are overstated. In this latter regard, for example, in the base year, STL’s line item prices exceed the government estimate under only 4 of 13 line items. Further, while STL’s proposal of \$0.00 for [deleted] labor categories could be considered “understated,” such labor rate proposals alone do not establish that a bid is unbalanced. See SMC Info. Sys., B-224466, Oct. 31, 1986, 86-2 CPD ¶ 505 at 5. In any case, even if STL’s labor rate pricing evidenced unbalancing, it is clear that the agency considered the risk involved; it specifically inquired about STL’s \$0.00 labor rate pricing, and had no concern that these rates would result in a higher contract price. Source Selection Decision at 6-7.

SOURCE SELECTION

PharmChem asserts that the agency’s determination that its and STL’s proposals were technically equivalent was unreasonable, and that the source selection therefore was flawed. Specifically, PharmChem cites the fact that technical factors were significantly more important than price, the fact that its proposal received a higher rating under the organization/management technical subfactor, and the fact that its price is less than 2 percent higher than STL’s. PharmChem concludes that

the agency should have conducted a price/technical tradeoff and determined that its proposal's technical advantage outweighed STL's insignificant price advantage and represented the best value.

Source selection officials are vested with broad discretion to determine the manner and extent to which they will make use of evaluation results. Resource Mgmt. Int'l, Inc., B-278108, Dec. 22, 1997, 98-1 CPD ¶ 29 at 4. Although evaluation ratings are useful as guides, they do not mandate automatic selection of a particular proposal. PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 12. Whether a given spread between two competing proposals indicates a significant superiority of one proposal over the other depends on the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency. Resource Mgmt. Int'l, Inc., *supra*, at 4. Where selection officials reasonably regard proposals as being essentially equal technically, price will become the determining factor in making award, notwithstanding that the evaluation criteria assigned price less importance than technical factors. *Id.*; The Parks Co., B-249473, Nov. 17, 1992, 92-2 CPD ¶ 354 at 4.

The agency reasonably evaluated the proposals as technically equal. While PharmChem's proposal was rated outstanding, and STL's only good, under the organization/management subfactor, this advantage was mitigated both by the fact that this was only one of three equally-weighted subfactors under the technical factor, and the fact that both proposals received a significant number of strengths under the subfactor (12 for PharmChem versus 8 for STL). Further, it appears that three of PharmChem's evaluated strengths duplicated other strengths.³ In view of these considerations and the fact that, as discussed above, the SEB assigned the

³ The three, near verbatim, duplicate strengths concerned [deleted].

proposals an equal number of strengths overall, there is no basis to question the agency's conclusion that the proposals were technically equivalent. It follows that the agency reasonably determined that STL's low price made its proposal the best value.⁴

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ PharmChem also asserts that the SSA improperly considered STL's small business status in making the award, even though it was not an evaluation factor. PharmChem concedes that size status was not an evaluation factor considered by the SEB, but observes that the agency report included a notation that the contracting officer "considered" STL's small business status and its financial responsibility in the best value determination. AR at 20, n. 12. While the source selection decision includes the statement that "STL is a small business," when read in context, it is clearly a matter of factual background and not an indication that it formed an additional basis for the SSA's finding that STL's proposal was the best value.