**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Ralph G. Moore & Associates

File: B-270686; B-270686.2

Date: February 28, 1996

Janice Davis, Esq., and Philip H.M. Beauregard, Esq., McKenna & Cuneo, for the protester.
David R. Smith, Esq., for Information Support SVRS, an intervenor.
James P. Fuerstenberg, Esq., and Gena E. Cadieux, Esq., Department of Energy, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee engaged in "bait and switch" tactics with regard to one of its proposed key personnel is denied where the record does not support this allegation.

2. Agency reasonably evaluated the past performance of the awardee--a recently formed joint venture--in accordance with the solicitation's requirements where the agency considered the recent experience of one of the joint venture partners.

3. Agency did not conduct unequal discussions where it did not advise the protester that its costs were considered too high because the costs were not unreasonable, and where it conducted appropriate cost discussions with the low cost awardee.

DECISION

Ralph G. Moore & Associates (RGMA) protests the award of a contract to Information Support SVRS (ISS) under request for proposals (RFP) No. DE-RP02-95CH10619, issued by the Department of Energy (DOE) for federal information processing support services for its Chicago Operations Office. RGMA challenges various aspects of DOE's evaluation of the awardee's technical proposal and its conduct of discussions.

We deny the protests.

The solicitation was issued April 21, 1995, as a set-aside for small disadvantaged businesses under the Small Business Administration's section 8(a) program. DOE anticipated awarding a cost reimbursement, level-of-effort contract to be performed over 1 base year, with up to 4 option years. Award would be made to the offeror whose offer was most advantageous to the government, cost and other factors considered. This determination would be based upon an evaluation of the offerors' technical, business management, and cost proposals.

The technical proposals, which were significantly more important than the business management and cost proposals, would be point-scored under three evaluation factors: key personnel, past performance, and management plan. The business management proposals, not at issue here, would be adjectivally rated. The cost proposals would be evaluated for reasonableness and realism, and to establish the probable cost to the government.

Four proposals were submitted by the June 5 closing date, including RGMA's and ISS'. RGMA is the incumbent contractor providing these services, and ISS is a newly-formed joint venture consisting of Columbia Services Group, Inc. and Eztech Manufacturing, Inc. After all offerors submitted revised proposals in response to a material amendment, the agency evaluated proposals and established a competitive range of three proposals, including RGMA's and ISS'. Discussions were conducted, and revised cost proposals were submitted by all offerors by October 18. Each firm submitted its best and final offer (BAFO) and a signed draft contract by November 6.

ISS' technical proposal received 986 points and RGMA's proposal 952 points; both firms received outstanding ratings for their business management proposals. ISS' probable cost for the total contract period was $8,634,848, and RGMA's probable cost was $9,962,355.[1] The source selection official concluded that both firms' proposals were essentially technically equal, and that the significant difference between their probable costs made ISS' proposal the best value to the government. Offerors were notified of this decision by letter dated November 27, and these protests followed.[2]

---

[1]The third proposal in the competitive range is not at issue here.

[2]RGMA raised several issues in its protests which were fully addressed by the agency in its report, and unrebutted by the protester in its comments. We deem these issues to be abandoned and will not consider them. Litton Sys., Inc., Data Sys. Div., B-262099, Oct. 11, 1995, 95-2 CPD ¶ 215. In addition, in its comments, RGMA argued for the first time that DOE improperly failed to conduct a cost realism analysis of ISS' proposal, citing numerous alleged inadequacies. Under our

(continued...)

RGMA first argues that ISS engaged in improper "bait and switch" tactics with regard to its proposed senior programmer/analyst. The protester proffers the fact that an ISS employment advertisement for this position was running on the Internet after award of the contract as evidence that the firm did not intend to actually utilize the individual it proposed.

Offeror "bait and switch" practices, whereby an offeror's proposal is favorably evaluated on the basis of personnel that it does not expect to use during contract performance, have an adverse effect on the integrity of the competitive procurement system and provide a basis for rejection of that offeror's proposal. Free State Reporting, Inc., B-259650, Apr. 14, 1995, 95-1 CPD ¶ 199. The record here does not support RGMA's allegation that ISS has engaged in such practices.

After ISS was informed, during discussions, of deficiencies with respect to its then-proposed senior programmer/analyst, the firm ran recruiting advertisements for this position in the Chicago Tribune on October 8 and 15. According to the business opportunity manager for one of ISS' constituent firms, this arrangement included a provision for posting this same advertisement on the Internet Bulletin Board. The firm recruited the individual it proposed in its November 6 BAFO through internal recruiting sources, and included his letter of intent to take the position. We do not view the advertisement's continued presence on the Internet Bulletin Board as evidence that ISS did not intend to utilize the individual it proposed. See Combat Sys. Dev. Assocs. Joint Venture, B-259920.6, Nov. 28, 1995, 95-2 CPD ¶ 244.

RGMA next argues that DOE failed to evaluate ISS' past performance in accordance with the RFP's requirements. RGMA asserts that the RFP required the agency to evaluate only the past performance of "the offeror"--ISS--and that DOE instead considered the past performance of the joint venture's constituent firms. DOE's position is that the RFP contemplates the evaluation of the past performance of both the joint venture itself and its constituent firms.

Where, as here, there is a dispute between the protester and the agency as to the meaning of a particular solicitation provision regarding the evaluation scheme, our Office will resolve the matter by reading the solicitation as a whole and in a manner

---

[2](...continued)
Bid Protest Regulations, protests based on other than solicitation improprieties must be filed within 14 days of when the protester knew or should have known their bases. Section 21.2(a)(2), 60 Fed. Reg. 40,737, 40,740 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.2(a)(2)). RGMA was provided at least some of the information that should have put it on notice of this basis of protest--the agency's final cost proposal analysis of both offerors--on December 28. This new argument, filed 39 days later, is untimely and will not be considered. Id.

that gives effect to all of its provisions. Ace Van and Storage Co., B-238281, May 1, 1990, 90-1 CPD ¶ 440; Ebasco Constructors, Inc., B-231967, Nov. 16, 1988, 88-2 CPD ¶ 480. Applying this standard, we find that RGMA's interpretation is unreasonable.

With respect to past performance, section M of the RFP states that "the offeror will be evaluated as to recent experience (within the last three years), overall quality of performance and depth of experience on contracts directly relevant to the statement of work. . . . All examples of recent relevant work experience will be evaluated as described above." RGMA relies upon this provision to support its position that only the experience of "the offeror"--the joint venture ISS--can be considered here. However, section L.35 of the RFP, the proposal preparation instructions, states, "[i]f you are submitting a proposal as a joint venture, it is important that you give full, complete and responsive information on each of the participating firms, as well as the proposed joint venture organization itself. . . ."

Since RGMA's interpretation of the RFP wholly ignores section L.35, which contemplates the consideration of information concerning both a joint venture offeror and each of its participating firms, its interpretation is unreasonable. It is apparent that when these two provisions are read together, the RFP permits consideration of the past performance of both the joint venture itself and its constituent firms. Dynamic Isolation Sys., Inc., B-247047, Apr. 28, 1992, 92-1 CPD ¶ 399; see MR&S/AME, An MSC Joint Venture, B-250313.2, Mar. 19, 1993, 93-1 CPD ¶ 245.

The rating plan for this acquisition instructs the evaluators to consider the relevant work experience of both the joint venture and of each entity prior to forming the joint venture where the joint venture has been operating for less than 3 years, consistent with the RFP. RGMA argues that DOE failed to evaluate ISS' past performance in accordance with the rating plan by only according weight to the relevant experience of Columbia Services Group, Inc. and not that of Eztech Manufacturing, Inc.

Allegations of deviations from an agency's rating plan do not constitute a basis for questioning the validity of an award selection. Rather, such plans are internal agency instructions and, as such, do not give outside parties any rights. See National Steel & Shipbuilding Co., B-250305.2, Mar. 23, 1993, 93-1 CPD ¶ 260; Robert E. Derecktor of Rhode Island, Inc.; Boston Shipyard Corp., B-211922; B-211922.2, Feb. 2, 1984, 84-1 CPD ¶ 140. In any event, the evaluation was consistent with both the RFP and the rating plan. As noted above, the RFP required the agency to evaluate the recent experience--of both the joint venture and its constituent firms--on contracts "directly relevant to the statement of work." As RGMA recognizes, the evaluators scored ISS' proposal under this factor on the strength of Columbia Services Group's past performance, as it found that Eztech Manufacturing, Inc. had little or no recent experience directly relevant to the

statement of work. However, contrary to RGMA's belief, nothing in the RFP required the agency to downgrade a joint venture offeror under this factor solely because one constituent firm had no relevant past experience; rather, the agency was required to consider all relevant experience and make an appropriate assessment. That the agency considered Columbia Services Group's recent experience to be sufficient to merit the exemplary ratings ISS' proposal received is unobjectionable, considering that RGMA does not otherwise challenge the evaluation.

RGMA finally contends that DOE's conduct of discussions in this procurement was improper because the agency failed to inform the protester that its proposed costs were unreasonably high, but informed ISS that its proposed costs were unreasonably low.

While agencies are required to tailor discussions to each particular offeror, they may not conduct misleading or prejudicially unequal discussions. South Capitol Landing, Inc., B-256046.2, June 20, 1994, 94-2 CPD ¶ 3. The content and extent of discussions are within the discretion of the contracting officer, since the number and type of deficiencies, if any, will vary among proposals. Consequently, the agency should individualize the evaluated deficiencies of each offeror in its conduct of discussions. See Dept. of the Navy--Recon., 72 Comp. Gen. 221 (1993), 93-1 CPD ¶ 422. Our review of the record shows that DOE's conduct of discussions here was proper.

DOE conducted a cost realism analysis of RGMA's proposed costs and determined that they were reasonable--a determination that RGMA does not contest. That various RGMA employees state that DOE representatives informed it, after award, that its proposed costs were unreasonably high is flatly disputed by those representatives, whose accounts are supported by the contemporaneous documentation. An agency has no responsibility to inform an offeror during discussions that its proposed costs are too high unless the government has reason to think that the costs are unreasonable. Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63; E.J. Richardson Assocs., Inc., B-250951, Mar. 1, 1993, 93-1 CPD ¶ 185. Since the agency here did not think RGMA's costs were unreasonable, it was not required to inform the firm that its proposed costs were too high. To the extent that RGMA is arguing that the agency should have informed it during discussions that its proposed costs were too high relative to those proposed by ISS, such advice during discussions is prohibited. Federal Acquisition Regulation (FAR) § 15.610(e)(2)(ii); Applied Remote Technology, Inc., B-250475, Jan. 22, 1993, 93-1 CPD ¶ 58.

RGMA complains that ISS' discussion questions signaled ISS that its proposed costs were unreasonably low. However, an agency is permitted to inform an offeror during discussions that its cost or price is considered to be unrealistic. FAR

§ 15.610(e)(2)(ii). Our review indicates that the discussions conducted with ISS reflected the deficiencies present in its proposal and were entirely appropriate.

For example, in its initial proposal, ISS stated both that it would pay its non-key personnel in accordance with a Department of Labor wage determination, and that it would hire the incumbent non-key personnel and pay them their current salaries. Because there were differences between the wage determination rates and the current salaries being paid these personnel, DOE could not calculate a probable cost for ISS' proposal. During discussions, ISS was advised that the wage determination rates represented average pay rates, and might or might not accurately reflect the incumbent contractor's current rates--these might be higher than the wage determination rates. DOE asked the firm to either confirm its intent to hire the incumbent personnel and review and support its estimated labor costs, or to abandon that intent and provide detailed and supported salary information. These discussions were entirely appropriate.

In its revised cost proposal, ISS maintained its stated intent to hire the incumbent personnel at their current rates, and reestimated its labor costs using various commercial compensation surveys. DOE concluded that the rates were reasonable, but because they were still below those currently paid the incumbent personnel, the contracting officer decided to set a ceiling on ISS' direct labor rates for its non-key personnel to avoid the risk of cost overruns or buying-in.[3] A clause containing this ceiling was included in ISS' contract document sent to ISS in its BAFO request. No such ceiling was included in RGMA's contract document because none was deemed necessary--the incumbent firm had demonstrated a stable rate history and proposed actual labor rates, and DOE had no reason to believe that its proposed rates would increase in excess of its annual escalation factor. While RGMA suggests that the ceiling clause in ISS' draft contract improperly signaled the firm to lower its prices (which ISS did), we think DOE's proferring of this clause during discussions, if anything, suggests that there was concern about the lowness of the proposed costs. In this regard, a cost ceiling establishes a maximum cost for a given cost category to protect the government's interests in a cost-reimbursement environment by, for

[3]As a general rule, the maxim that the government bears the risk of cost overruns in the administration of a cost reimbursement contract is reversed when a contractor agrees to a cap or a ceiling on its reimbursement for a particular category or type of work. Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202. "Buying-in" means submitting an offer below anticipated costs, expecting to, among other things, increase the contract amount after award. FAR § 3.501-1(a).

example, preventing an offeror from submitting a below-cost offer in the hopes of increasing the contract amount after award. See FAR § 3.501-1(a); Halifax Technical Servs., Inc., B-246236.6 et al., Jan. 24, 1994, 94-1 CPD ¶ 30.

The protests are denied.

Comptroller General
of the United States