Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Morrison Knudsen Corporation

File: B-270703

Date: April 11, 1996

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Rochelle L. White, Esq., Brown & Root, Inc., an intervenor.
David C. Rickard, Esq., Defense Nuclear Agency, for the agency.
Sylvia Schatz, Esq., David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against award to offeror whose proposal received a lower technical score from the source selection evaluation board than protester's and only offered a slightly lower evaluated cost is sustained where a primary basis for the source selection authority's decision to disregard the evaluation scores was not supported by the record.

DECISION

Morrison Knudsen Corporation (MK) protests the award of a contract to Brown & Root (B&R) under request for proposals (RFP) No. DNA001-95-R-0026, issued by the Defense Nuclear Agency (DNA) for the dismantlement and elimination of intercontinental ballistic missile (ICBM) silos at four sites in the Republic of Kazakhstan. MK argues that the source selection decision was based on a misreading of the proposals.

We sustain the protest.

The RFP contemplated the award of a 39-month cost-plus-fixed-fee contract for elimination of the missile and launch control complexes, supporting structures, and underground facilities, burial or removal of the debris and removal of salvageable materials, and general restoration of the sites to their original topography so as to facilitate civilian use. The RFP stated that the contractor could either buy new equipment that would become the property of the U.S. government or use contractor-owned or leased equipment.

The solicitation provided for award to the offeror submitting the most advantageous proposal, to be determined primarily on the basis of technical/management superiority, with cost being "carefully considered." The technical/management area consisted of three subfactors (in descending order of importance): (1) technical approach; (2) experience, record of performance and personnel; and (3) support capabilities. The technical approach subfactor consisted of nine elements, including management of subcontractors. The solicitation also provided for past performance to be evaluated as a general consideration as it related to the above subfactors.

Among the proposals received were MK's and B&R's; both were included in the competitive range. Following site visits and written and oral discussions, the agency requested and received best and final offers (BAFO). The source selection evaluation board (SSEB) evaluated BAFOs as follows:

	TECHNICAL SCORE/RATING	PROPOSED COST	EVALUATED COST
MK	87.6 /100 very good	$29,854,118	$31,624,000
B&R	81.7 very good	$31,531,912	$31,531,912

Both MK and B&R proposed to use Kazakhstani subcontractors to provide required equipment and logistics support. The SSEB found that this approach represented an unacceptable risk for the "equipment intensive project" contemplated by the statement of work because (1) generally, "in-country equipment" in the successor states to the former Soviet Union is usually either broken or cannibalized for spare parts, and (2) specifically, Kazakhstani subcontractors could not necessarily be relied on to furnish promised equipment since they have previously made "exaggerated claims of the numbers, types and availability of equipment and supplies, spare parts and consumables." The SSEB therefore recommended award to one of the higher-cost offerors proposing to import equipment into Kazakhstan.

The SSA rejected the SSEB's recommendation, concluding that the lower risk associated with these latter proposals did not warrant their substantially higher cost. DNA reports that the SSA then selected B&R's proposal over MK's higher-scored proposal on the basis of several considerations, including two which were "crucial aspects of MK's proposal" which "weighed more heavily in the final selection": (1) B&R's superior subcontractor approach; and (2) the fact that MK had incurred a 133-percent cost overrun under a prior DNA contract for services in the Ukraine similar to those required here, "[t]he primary cause" of the cost growth being, according to DNA, the "disparity between prices quoted by Ukrainian

subcontractors and actual negotiated prices." In addition, the SSA questioned MK's proposal for the program manager to work in a program office in Ohio rather than on-site in Kazakhstan, and noted that MK's cost estimate for silo elimination was significantly lower than other offerors' and the independent government estimate. Upon learning of the resulting award to B&R, MK filed this protest.

MK argues that the reasons for selecting B&R are not supported by the record, and that the award therefore was improper.

In reviewing an evaluation and source selection decision, we will consider whether the evaluation was reasonable and consistent with the stated solicitation evaluation factors. Main Bldg. Maintenance, Inc., B-260945.4, Sept. 29, 1995, 95-2 CPD ¶ 214. We find that the SSA's selection of B&R's proposal over MK's was based in significant part on an unreasonable comparison between the proposals such that the award decision lacked a reasonable basis.

In his September 29, 1995, source selection decision, the SSA--after discounting the possibility of selecting an "imported" equipment approach--largely focused on the perceived contrast between B&R's and MK's proposed approaches to subcontracting. Although, as noted above, MK and B&R both proposed to provide the required construction equipment through Kazakhstani subcontractors, the SSA determined that B&R's subcontractor approach was superior to MK's because only B&R: (1) stated in its BAFO that it intended to use three subcontractors--Montazhspetsstroy, Katep, and the National Nuclear Center--whose performance the SSA considered excellent under prior DNA contracts for similar services, and (2) identified the specific equipment available to its proposed subcontractors.

The record shows that, in fact, the two proposals were not fundamentally different in their proposed subcontractor approach. First, notwithstanding the SSA's impression as to B&R's approach, B&R did not commit to using specific subcontractors; B&R's BAFO did reference five potential subcontractors, but it stated that "[b]esides the subcontract quotations discussed above, we have received other subcontract offers for discrete portions of the work," and that "[a]s stated in our original proposal, our intention, in the event of contract award, is to recompete these contracts to multiple subcontractors on a competitive basis." This is the same approach proposed by MK; its BAFO listed 15 potential subcontractors, stated that it had "interviewed additional companies," and indicated that MK intended "to place all the construction work with Kazakhstani subcontractors who will be selected based on a competitive bidding process." Further, MK's BAFO identified as potential subcontractors to be selected through this competition the same three Kazakhstani subcontractors the SSA cited as the basis for preferring B&R's approach. B&R's BAFO, unlike MK's, included written estimates from the three potential subcontractors, but we fail to see how this could be a legitimate technical

discriminator given that their selection as subcontractors was contingent on their winning the proposed competition.

The SSA's reliance on B&R's identification of equipment available to its subcontractors--while MK's proposal failed to do so--in distinguishing between the proposals also was unreasonable. Since B&R's subcontractor approach was based on the competitive selection of subcontractors, the value of a subcontractor equipment list for evaluation purposes appears to be illusory. Thus, specifically, although B&R's BAFO included a list of the equipment available to one potential subcontractor, Montazhspetsstroy, it is not clear how meaningful weight could be given this list, since Montazhspetsstroy might or might not ultimately be selected as a subcontractor. Further, the SSEB found that "[n]either of the bidders [MK or B&R] had physically verified that the quantities of equipment needed for this project actually existed in-country and were available for use on the first day of this contract, stating that verification would take place after contract award." In light of this finding, and the absence of any evidence of a contrary finding by the SSA, it is not apparent how significant weight could be assigned to B&R's identification of subcontractor equipment.

In any case, if DNA viewed MK's failure to list equipment available to its potential subcontractors as a significant weakness in its proposal, it was required to advise MK of its concern in this regard during discussions. In this regard, procuring agencies are generally required to conduct meaningful discussions with all offerors in the competitive range, CBIS Fed. Inc., 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308; in satisfying this obligation, they generally must point out weaknesses that, unless corrected, would prevent an offeror from having a reasonable chance for award. Pressure Technology, Inc., B-265793, Dec. 29, 1995, 95-2 CPD ¶ 288. The obligation for meaningful discussions is not satisfied where discussions are misleading or prejudicially unequal. CBIS Fed. Inc., supra. Here, the record indicates that the agency did not adequately bring its concern with respect to MK's failure to list the equipment available to its subcontractors to MK's attention during discussions. Rather, the agency only asked MK during discussions to "[p]lease provide a detailed discussion of what procedures will be implemented to maintain, transport, and provide training for all of the equipment to be provided for this contract." In contrast, the SSEB's discussion question to B&R specifically pointed out the perceived weakness in its proposal with respect to the identification of subcontractor equipment: "[p]lease list the equipment being provided by subcontractors." By failing to treat the offerors equally in notifying them of this weakness, the agency improperly denied MK the opportunity to make its proposal more competitive in this regard.

Where an agency clearly violates procurement requirements, we will resolve any doubts concerning the prejudicial effect of the agency's action in favor of the protester, The Jonathan Corp.; Metro Mach. Corp., B-251698.3; B-251698.4, May 17, 1993, 93-2 CPD ¶ 174; United Int'l Eng'g, Inc.; Morrison Knudsen-Dynamics Research; PRC Inc.; and Science Applications Int'l Corp., 71 Comp. Gen. 177 (1992), 92-1 CPD ¶ 122, and a reasonable possibility of prejudice is a sufficient basis for sustaining the protest. Intermetrics, Inc., B-259254.2, Apr. 3, 1995, 95-1 CPD ¶ 215; Foundation Health Fed. Servs., Inc.; QualMed Inc., B-254397.4 et al., Dec. 20, 1993, 94-1 CPD ¶ 3.

In this case, the "crucial," significant reason--B&R's evaluated superior subcontract approach--relied on by the SSA for disregarding MK's higher evaluation score and selecting B&R's proposal for award is not supported by the record, which shows that, in fact, the two proposals were not fundamentally different in their proposed subcontractor approach. Although the SSA found other aspects of MK's proposal to be areas of concern, the September 29 source selection decision largely focused on B&R's superior subcontract approach. Indeed, while DNA reports that the cost overruns on MK's Ukrainian contract were also a crucial factor in the SSA's decision, and the contemporaneous evaluation record indicates the existence of agency concern in this regard, we note that the SSA in the source selection decision does not specifically refer to this as a significant concern with respect to MK. DNA does not indicate, and it is not clear from the record, that considerations other than subcontractor approach would have been sufficient by themselves to support disregarding MK's higher evaluation score and selecting B&R for award. Further, we decline to speculate on what would have been the results if proposals were properly evaluated and discussions properly conducted; speculation concerning the results of such an analysis and discussions is no substitute for the required analysis and discussions. See Moon Eng'g Co., Inc.--Recon., B-251698.6, Oct. 19, 1993, 93-2 CPD ¶ 233. In these circumstances, we conclude that MK could have been in line for award, and thus was prejudiced by the agency's unsupported selection rationale and by the failure to conduct proper discussions.

We recommend that DNA reevaluate proposals in light of the discussion above. In the event the agency determines that award should be made to an offeror other than B&R, the agency should terminate B&R's contract. We also recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, section 21.8(d)(1), 60 Fed. Reg. 40,737, 40,743 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.8). The protester

should submit its certified claim for costs to the contracting agency within 90 days of receiving this decision. Section 21.8(f)(1), 60 Fed. Reg. supra (to be codified at 4 C.F.R. § 21.8(f)(1)).

The protest is sustained.

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