Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: Mar, Inc; WHECO Corporation; Jensco Marine, Inc.

File: B-278929.2; B-278929.4; B-278929.5; B-278929.6

Date: September 28, 1998

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Charles W. Morrow, Esq., and Jerold Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of the evaluation of proposals as technically equal is denied where the record shows that the agency's determination was reasonable based on the similarity of competing proposals in terms of personnel and experience, past performance, and overall quality.

2. Protest that cost evaluation was improper because the agency failed to consider the realism of the awardee's proposed labor rates is denied where the protester was not prejudiced by the agency's failure to make certain upward adjustments to the awardee's rates.

3. Protester has not presented a basis to challenge the award where the agency downgraded the protester's proposal because its newly formed corporation failed to demonstrate corporate experience, but nonetheless considered the proposal to be technically equal to the other proposals and awarded the contract to a lower-priced offeror.

4. Award to successor in interest to the firm that submitted the initial proposal is proper where the successor in interest acquired the offeror's entire business.

DECISION

MAR, Inc., WHECO Corporation, and Jensco Marine, Inc. protest the award of a contract to General Offshore Corporation under request for proposals (RFP) No. CS-97-012, a small business set-aside issued by the Department of the Treasury, U.S. Customs Service, for marine vessel maintenance.

We deny the protests.

BACKGROUND

The RFP, issued on February 26, 1997, was to procure marine vessel maintenance (preventive and corrective) and related services and equipment in connection with a national marine maintenance program.[1] RFP, Statement of Work, § C.1. The RFP contemplated the award of a cost-plus-fixed-fee contract for a base period, with 4 option periods. RFP § B.2.

The RFP provided for award on a best-value basis, in which technical quality was more important than cost/price. The RFP advised, however, that if the technical features of proposals were determined to be essentially equivalent, cost/price might become the determining factor for the award. RFP § M.5.2. Further, the RFP stated that for purposes of the cost/price technical tradeoff analysis the agency would perform a comparative analysis of the proposals' discriminating features. RFP § M.5.1.

The technical evaluation factors and corresponding point values were as follows:

(1) Experience and Past Performance			60
(a) Key Personnel		(40)	
1 - Program Manager	(20)		
2 - Site Managers	(15)		
3 - Mechanics	(5)		
(b) Corporate		(20)	
1 - Experience	(10)		
2 - Past Performance	(10)		

[1]As part of the Marine Enforcement Program, the primary mission of which is to prevent the entry of drugs into the United States, Customs has a fleet of marine vessels located at offices throughout the United States and Puerto Rico engaged in drug interdiction and other law enforcement activities.

(2) Management Approach			40
(a) Soundness of Approach		(35)	
1 - Overall Plan	(10)		
2 - Transition Plan	(10)		
3 - Property Control Inv.	(10)		
4 - Environmental Controls/ Waste Disposal	(5)		
(b) Reporting Procedures		(5)	

Cost/price was not point scored, but each offeror's proposed costs were to be evaluated for realism and reasonableness, as well as the offeror's ability to attract and retain a qualified staff and any risk introduced by the offeror's cost/price proposal. RFP § M.4.

Seven proposals were received in response to the RFP by the July 31, 1997 closing date. A technical evaluation team (TET) then assigned point scores, and adjectival ratings based on the scores, to the proposals,[2] and a cost team evaluated the cost proposals. Eventually, five offerors' proposals were included in the competitive range: those of WHECO, MAR, Jensco, General Offshore, and Seaward Services, Inc.[3] With the exception of Jensco, whose proposal received a total point score of 90, all proposals received a total point score of 100.[4] Jensco's proposal was downgraded 10 points under the corporate factor because Jensco's newly formed company lacked a record of corporate experience. Discussions primarily relating to the cost proposals were held with offerors between January 21 and 26, 1998 and best and final offers (BAFO) were received on February 3. Customs reports that each offeror was informed during discussions that the technical scores were essentially technically equal and that cost/price would be the determining factor for the award. The final evaluation was as follows:

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[2]The ratings were excellent 95-100, very good 85-94, good 65-84, fair 35-64, and poor 0-34. Technical Evaluation Plan at 4.

[3]WHECO initially was excluded on the basis of a high cost/price but, after WHECO filed a protest at this Office, Customs decided to include the firm's proposal in the competitive range.

[4]The technical evaluation plan described a 95-100 excellent rating to be warranted when the "offeror's response meets or exceeds each component of the evaluation standard. In addressing the evaluation subfactor/element, it is complete, comprehensive and in clearly defined detail. It demonstrates exceptional merit." Technical Evaluation Plan at 4.

Offeror	Score	BAFO	Most Probable Cost Adjustment
General Offshore	100	$20,056,742	$21,012,335
Jensco	90	$20,976,079	$21,046,696
MAR	100	$22,725,805	$23,553,909
Seaward	100	$21,790,769	$22,223,299
WHECO	100	$22,651,067	$23,234,098

Based upon the final evaluation, the TET found the proposals to be technically equal and did not find any discriminators among the technical proposals. Chairman's May 28 memo to the contracting officer. For instance, the TET noted that many of the same key personnel were proposed by the offerors and that where differences existed the proposed personnel were highly qualified for the positions. Further, the TET found that all offerors were highly qualified under the corporate factor, with the exception of Jensco, who was marked down (10 points) in this area but was still believed to be capable of performing the contract. Also, the TET found that all offerors were "outstanding" under the soundness of approach criterion. Id.

The source selection official independently reviewed the evaluation, concurred in the TET's assessment, and determined that General Offshore's proposal represented the best value on the basis of its lower evaluated cost/price. Final Source Selection Decision at 9-10, 20. In doing so, the source selection official performed a cost and technical tradeoff analysis between General Offshore's proposal and each of the other competitive range offerors' proposals, in which the official concluded that General Offshore's proposal offered substantially less performance and operational risk at the best value. Customs made award to General Offshore on June 12. These protests, on various bases, followed.[5]

[5]Seaward, MAR, and Jensco each also filed a size protest with the contracting officer, alleging that General Offshore was other than a small business. The protests were referred to the Small Business Administration (SBA), which has conclusive authority to determine matters of small business size status for federal procurement. See 15 U.S.C. § 637(b)(6) (1994). The SBA denied the protests; the matter is under appeal.

MAR'S PROTEST

MAR protests the evaluation of its proposal and the source selection decision.[6] MAR argues that the determination that its proposal was technically equal to General Offshore's was arbitrary and capricious; the firm asserts that Customs should have found the proposal superior in the areas of key personnel and past performance, given that MAR is the incumbent, and that General Offshore should have been downgraded due to a weak performance record under the preceding contract.[7] MAR alleges that Customs did not make a best-value determination as prescribed by the RFP but actually improperly made award on the basis of the lowest-cost, technically acceptable offer, since all proposals were rated essentially equal despite allegedly obvious technical distinctions.

A hearing was conducted to receive testimony from the chairman of the TET, the source selection official (contracting officer), the Director of the National Marine Support Center, and two officials from MAR, regarding the agency's technical and cost evaluations. The record reflects that for purposes of the technical evaluation the proposals were evaluated by a three-member TET in which each proposal was examined individually by the evaluators under the various technical evaluation factors, resulting in an individual narrative and point score for each proposal.[8] The chairman testified that, after the members discussed the information presented in each proposal, it was determined that each proposal in the competitive range with the exception of Jensco's was entitled to a perfect score. Tr. at 227-230, 243. The chairman testified that during the course of the process at least three references

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[6]MAR also protests that Customs failed to give it advance notice of the proposed award as required by Federal Acquisition Regulation (FAR) § 15.503(a)(2), which is designed to give unsuccessful offerors the opportunity to challenge the small business status of the proposed awardee. Since MAR nevertheless still was able to do so, the purpose of the provision was realized and MAR was not prejudiced.

[7]General Offshore held the contract preceding MAR's, and MAR alleges that Customs was aware of several problems associated with General Offshore's transition to the follow-on contract, such as missing inventory, computer files, and deletions to major portions of the on-site database.

[8]The source selection official testified that the individual scoring sheets and narratives were destroyed prior to the award, but the substance of the information contained in these documents was incorporated into the final source selection document. Hearing Transcript (Tr.) 314-315. Since a procuring agency has the responsibility to adequately document its source selection decision in order to demonstrate that it is not arbitrary, it is premature for an agency to destroy source selection documents prior to the award. See Dimension Int'l/QSOFT, Inc., B-270966, B-270966.2, May 28, 1996, 96-1 CPD ¶ 257 at 4.

from each offeror were contacted to verify and evaluate each offeror's past performance record. Tr. at 227-228, 233, 261. In addition, he testified that he was familiar with the performances of General Offshore and MAR under their prior contracts and that he considered their records to be equal. Tr. at 236. The chairman testified that it was determined that the proposals were entitled to similar scores because all the offerors had proposed to staff the contract with a majority of the personnel from the incumbent contract. Tr. at 237-238, 249-253.

The record also reflects that prior to determining that the proposals were technically equal the source selection official met with the chairman of the TET to discuss the perfect scores assigned to the various proposals. Tr. at 248. The chairman affirmed the propriety of the scores, and advised the official that all the proposals were technically equal notwithstanding the one different point score. Tr. at 248-253; see chairman's May 28 memo. The selection official testified that she independently reviewed the proposals after consulting with the chairman, and agreed that the proposals each warranted the score that had been assigned by the TET, and were technically equal. Tr. 308-312.

MAR disputes that General Offshore should have been rated so highly because the agency's evaluation of General Offshore's past performance record did not include consideration of the firm's most recent experience involving the preceding contract for these exact services. The record does confirm that Customs failed to evaluate this most recent experience of General Offshore, which should have been considered. See International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. However, the source selection official testified that, prior to making the award, she contacted the Director of the Marine Support Center, who had knowledge of General Offshore's most recent past performance, in connection with her responsibility determination, and that he reported positively on General Offshore's past performance.[9] Tr. at 329-330. On the record before us, we cannot reasonably find that the evaluation of MAR's past performance vis-à-vis General Offshore's would have been different had the agency evaluated the most recent performance of General Offshore during the evaluation process. Both the chairman of the TET, and the Director with direct experience with both General Offshore's and MAR's past performance, testified that the performance record of each

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[9]The officials from MAR testified that this same Director, in a post-award meeting, expressed a contrary view of General Offshore's recent past performance and that there were significant problems associated with the transition of the contract. Tr. at 87-131, 191-202. However, the Director disputed the substance of the conversation and testified that the problems associated with the transition were as much the fault of Customs as of General Offshore, that the problems were minimal, and that he considered the transition to constitute the least significant aspect of General Offshore's performance. Tr. at 24-28, 44, 72-74 .

contractor was essentially equal and that each was competent to perform the contract. Tr. at 16, 236.

Save for past performance, MAR has not pointed to any other technical distinction between its proposal and General Offshore's that should have distinguished MAR's proposal as technically superior. As noted above, each offeror's technical approach involved utilizing a majority of the key personnel currently performing vessel maintenance for the agency, and each has a variety of vessel maintenance experience. Thus, we find no basis to question the agency's conclusion that the proposals were technically equal.

Finally, MAR asserts that Customs improperly penalized it for developing its cost proposal based upon the instructions in RFP § L.7. That section required offerors to utilize the agency estimate of staff-hours for certain labor categories and of costs for parts and subcontract services in preparing their cost proposals for unscheduled corrective maintenance. MAR complains that as a result of its following § L.7's direction Customs, in analyzing the firm's proposal, incorrectly concluded that MAR proposed to staff the contract with employees working on a part-time basis, made upward cost adjustments, and erroneously determined that there were operational and financial risks with MAR's approach.

The record shows that Customs did increase the hours in MAR's proposal to reflect full-time site managers, resulting in a most probable cost adjustment of $502,958 to the firm's proposed cost, Price Negotiation Memorandum at 7, and concluded for purposes of the tradeoff analysis that there were operational and financial risks associated with the offer. Final Source Selection Decision at 18-19. MAR, however, was not prejudiced even if this was not justified. The source selection was made from among technically equal proposals, and MAR's proposed costs, without any cost adjustments, were more than General Offshore's. Since MAR has not challenged the cost evaluation of General Offshore's proposal, even accepting MAR's argument the source selection would have remained the same.

WHECO'S PROTEST

WHECO protests the cost realism evaluation of General Offshore's proposal. The proposal indicates that the offeror proposed to retain most of the incumbent's personnel but at pay levels lower than they were currently being paid. WHECO argues that Customs did not perform a cost realism analysis of General Offshore's labor rates and that it did not judge whether General Offshore actually would be able to attract and retain a qualified staff.

When agencies evaluate proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not controlling because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. The agency is in the best position to make that assessment; our Office therefore will review such a determination only to ascertain whether it had a reasonable basis. Computer Prods., Inc., B-271920, Aug. 9, 1996, 97-1 CPD ¶ 97 at 4-5.

The record reveals that Customs evaluated the cost proposals for realism and reasonableness by analyzing the individual cost elements in each offeror's proposal. These elements included direct labor, overhead, other direct costs, general and administrative (G&A), travel, G&A on travel, and profit. Price Negotiation Memorandum at 6. In addition, Customs examined each offeror's proposed labor rates for each labor category required to perform the contract and compared the offerors' individual labor rates. Tr. at 321. Cost adjustments were made where deemed appropriate to derive a most probable cost for each offeror's proposal. No cost adjustments were made to General Offshore's proposed labor rates as part of the cost evaluation, but the source selection official who examined the labor rates recognized the lower rates associated with the proposal before making the award. For example, in the Final Source Selection Document the official noted (at 11):

> Although [General Offshore] proposes the lowest labor rates, [General Offshore's] key personnel proposed are either currently or were previously employed by [General Offshore] at or below the current rates proposed. Also, the labor rates proposed by [General Offshore] are not considered to be so much lower than those rates proposed by other contractors as to pose a risk of not being able to attract and retain a qualified staff. In fact, [General Offshore] submitted with its proposal, commitment letters for each key personnel named in its proposal.

There is no evidence in the record that the agency directly considered General Offshore's ability to attract and retain a qualified staff from the perspective of the firm's proposal to pay employees at levels below the current contract rates. (As noted above, General Offshore proposed to retain most of the current employees under the contract.)[10] However, the source selection official testified that she believed that General Offshore could attract and retain staff and that the rates were realistic because they were not below those in the applicable Department of Labor wage rate determination. Tr. at 321-323. The official also testified that she believed that General Offshore had the ability to attract and retain a qualified staff because the firm submitted letters of intent for all employees it proposed for the contract, Tr. at 326; the official characterized the letters as commitment letters. She further testified that given her knowledge of the marketplace she felt confident that General Offshore could attract and retain a qualified staff. Tr. at 332.

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[10][DELETED]

Irrespective of the limited evaluation as evidenced by the selection official's testimony, and whether in evaluating General Offshore's proposal Customs in fact should have viewed the firm's rates vis-à-vis those currently being paid more critically, there was no technical evaluation factor in the RFP that required downgrading the proposal on the basis argued by WHECO. Rather, Customs at most should have upwardly adjusted General Offshore's proposal to account for the discrepancy in labor rates. As the agency reports, however, an adjustment to account for the lower wage rates would have been approximately $500,000--consequently, adjustment would not have affected WHECO's standing relative to General Offshore. See CHP Int'l, Inc., B-266053.2, Apr. 29, 1962, 96-2 CPD ¶ 142 at 6.

JENSCO'S PROTEST

Jensco protests that Customs unreasonably evaluated its proposal under the corporate factor by deducting 10 points for lack of experience and past performance. Jensco argues that Customs failed to properly rate the experience of its president and vice president (the site manager), proposed as key personnel, who Jensco argues possessed relevant experience that the agency should have considered as corporate experience. Jensco argues that it should have received a point score equal to the other competitive range offerors under this factor, particularly since the vice president had worked in a key position on the previous contract for these services.

While the agency did downgrade the proposal on this basis, the record indicates that Customs specifically noted that the combined experiences of Jensco's corporate officer's made the firm capable of managing the contract, and Customs specifically considered Jensco's proposal to be technically equal to the other offerors, ultimately making award on the basis of price. Final Source Selection Decision at 8, 10. Since Jensco has not asserted that its proposal was technically superior to General Offshore's lower-priced proposal, the downgrading of the proposal under the corporate factor provides no basis for challenging the award.

Jensco also challenges the award to General Offshore because General Offshore was acquired by another business prior to award. Jensco asserts that General Offshore did not properly notify the agency of this material change in its status; the protester objects to the "casual manner" in which General Offshore informed Customs of its new situation, and the agency's "acceptance with no due diligence whatsoever."

Customs reports that General Offshore did notify the agency on March 9 (the contract was awarded on June 12) that substantially all of its assets had been acquired by General Offshore Specialized Services (GOSS), and that GOSS is a successor in interest which had acquired all of General Offshore's right, title and interest to the proposal. In addition, Customs advises that GOSS became the complete successor in interest with respect to the entire portion of the business embraced by the proposal, as well as other substantial General Offshore business interests. Accordingly, and since there is no evidence of a sham transaction regarding the value of assets transferred other than the proposal (i.e., that nothing of real value apart from the proposal was transferred), we find no reason to object to the award on this basis. See J. I. Case Co., B-239178, Aug. 6, 1990, 90-2 CPD ¶ 108 at 3-5.

CONCLUSION

We find that the record reflects that Customs properly made award to General Offshore in accordance with the evaluation scheme set out in the RFP. The protests are denied.

Comptroller General
of the United States