



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Ventura Petroleum Services, Inc.

File: B-281278

Date: January 21, 1999

Joseph A. Cagianut for the protester.

William E. Hughes, III, Esq., Whyte, Hirschboeck & Dudek for Laidlaw Environmental Services, Inc., an intervenor.

George N. Brezna, Esq., Lis B. Young, Esq., and Frank Kotarski, Esq., Department of the Navy, for the agency.

Linda C. Glass, Esq. and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against award based on higher technically rated, lower-priced proposal alleging that proposed price is unreasonably low is denied where the agency reasonably determined that the proposed price was reasonable on the basis that the awardee, which was experienced and knowledgeable with respect to the work to be performed, proposed a price that was substantially comparable to the government estimate and to another offeror's price.
 2. Protester's contention that agency misevaluated its proposal with respect to past performance is denied where the record shows that the evaluation was reasonable and in accordance with the stated evaluation factors.
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DECISION

Ventura Petroleum Services, Inc. (VPS) protests the award of a contract to Laidlaw Environmental Services, Inc. under request for proposals (RFP) No. N68711-98-R-4008, issued by the Department of the Navy for hazardous waste management services for the Naval Air Weapons Station, Point Mugu, California. VPS challenges the agency's evaluation of its proposal and the reasonableness of the awardee's proposed price.

We deny the protest.

The RFP, issued February 20, 1998, provided for the procurement of various hazardous waste management services through the award of a fixed-price contract with an indefinite-quantity component for a 1-year base period with four 1-year options. Award was to be made to the offeror whose proposal represented the best value in accordance with solicitation factors and subfactors. RFP § L.2(f). The RFP further stated that the government intended to award a contract without discussions. RFP § L.2(f)(4). The RFP identified price and technical as evaluation factors to be weighted approximately equal, with price to be evaluated for realism and reasonableness. RFP § M.1(a). The technical evaluation factors consisted of past performance, key personnel and commitment to small business, in descending order of importance. Under the past performance subfactor, the RFP required offerors to provide information on past performance in the public and/or private sector, including any proposed subcontractors' past performance over the last 3 years in providing the services required by the solicitation. The RFP also stated that the government may contact clients other than those identified. RFP § M.1(II)(1)(a).

VPS submitted written questions concerning the solicitation requirements 15 days after a March 11 cutoff date for questions and only a day before the amended closing date for receipt of proposals. VPS's questions were responded to orally by the agency on March 27. Agency Report at 2. The agency received five proposals by the March 27 amended closing date, which were evaluated as follows:

<u>Technical Rank</u>	<u>Technical Rating</u>	<u>Risk</u>	<u>Price</u>
Laidlaw	Exceptional	Low/None	\$2,780,150
VPS	Good	Low/None	\$8,690,996
Offeror A	Acceptable	Med/Low	\$9,879,200
Offeror B	Capable	Medium	\$3,514,982
Offeror C	Capable	High	\$3,531,537

Agency Report, Tab 7, Business Clearance Memorandum, at 5.

The government estimate for this effort was \$3,669,815. Agency Report at 1. The Laidlaw proposal, ranked first technically, received an exceptional rating under all technical evaluation factors. The evaluators determined that Laidlaw had notable strengths in that its past and current contract work on government contracts as a prime contractor was very similar to the work required by the solicitation. Agency Report, Tab 7, at 6. Laidlaw's references stated that Laidlaw's timeliness, quality control, cooperation and customer satisfaction were above average and it received exceptional ratings for all factors. *Id.* The evaluators especially noted Laidlaw's above average performance and outstanding customer service in identifying and fixing major compliance problems at Public Works Center San Francisco.

The VPS proposal, ranked second technically, was considered by the evaluators as having done an excellent job of explaining VPS's past performance at Point Mugu as the subcontractor for the waste management services contract, and as demonstrating knowledge of the work requirements since VPS has performed them for the last 5 years. However, the contracting officer's technical representative (COTR) for the hazardous waste portion of the Point Mugu contract stated that although VPS's timeliness and quality control had improved with time, its timeliness and correction of inventory reports on the hazardous waste database were slow at the beginning of the contract. Id. VPS's performance was considered acceptable, but the COTR believed that VPS's cost proposal was moderately inflated and not reasonable. The evaluators also interviewed the customer for the underground tank construction at San Nicolas Island. On a scale of 1-10, the customer rated VPS's overall performance as a 3. This customer stated that VPS's work was untimely, its quality control was unsatisfactory, and that VPS was uncooperative with the customer with respect to certain severe differences of opinion. Id.

In its price analysis, the evaluators found that the data available for the price analysis made it difficult to determine the reasonableness of the total proposals. Price Evaluation Board Report at 2. However, the evaluators determined that an analysis of the fixed-price component of the contract established that Laidlaw's proposed prices compared favorably to those of another offeror and to the government estimate and, primarily on this basis, determined that Laidlaw's prices were reasonable. Laidlaw's fixed-price proposal component was for \$1,526,400, while VPS's comparable proposal was for \$1,744,573.60. The indefinite-quantity component of the RFP consisted of contract line items (CLIN) for work that exceeded the fixed-price component, for which the RFP provided detailed estimates, including the specific quantity of tasks to be performed for a listed range of services for removal, disposal and cleaning of hazardous waste materials. RFP § B. For example, under CLIN No. 0002AA, Pumping and Transportation for Bulk Fluid Waste, the RFP required offerors to provide prices for the following estimated quantities:

<u>Supplies/Services</u>	<u>Estimated Quantity</u>	<u>Unit</u>
0 to 1,000 Gallons	4	Hauls
1,001 to 2,000 Gallons	4	Hauls
2,001 to 3,000 Gallons	4	Hauls
3,001 to 4,000 Gallons	4	Hauls
4,001 to 5,000 Gallons	4	Hauls

RFP § B.

The proposed prices for each estimated quantity were to include the cost of all material, labor and equipment necessary to perform the work. RFP § C.6. The CLIN price consisted of the total of the prices for each of the estimated quantities.

Thus, all offerors were proposing fixed prices for the identical estimates of work, and the variations in the proposed prices appear to have resulted from the offerors' use of different approaches, such as varying mixes of labor, material and equipment, to satisfy the specified requirements. The offerors' total proposal prices were determined by adding the prices for the fixed-price component of the proposal to all of the CLINs under the indefinite-quantity portion. RFP § B at B-17.

The source selection board (SSB) recommended award to Laidlaw based on Laidlaw's exceptional technical rating coupled with its low and reasonable price. The SSB concluded that although Laidlaw's total price was 24 percent lower than the total government estimate, it was apparent from Laidlaw's proposal that it had performed these types of services before, had extensive knowledge of the work required, and was in a good position to accurately assess what costs were associated with the work requirements. As a result, the SSB found that Laidlaw's proposed prices were reasonable. Agency Report, Tab 7, at 9.

On September 14, the source selection authority (SSA) determined that discussions would not be necessary, that Laidlaw's proposed price was reasonable, and that award based on the initial proposals should be made to Laidlaw as offering the best value to the government because Laidlaw had submitted the lowest priced, highest rated technical offer. Memorandum From the SSA at 1. Award was made to Laidlaw on September 24.

VPS takes exception to the agency's determination that Laidlaw's price was reasonable. VPS maintains that Laidlaw cannot perform all the tasks required by the solicitation successfully and effectively at its proposed price. The protester takes the position that, as indicated in the agency's price evaluation report, the indefinite-quantity portion of the contract generated massive price differentials between offerors, so that the price reasonableness of the proposals cannot be determined.¹

¹VPS also protests that the solicitation contained non-biddable task description/pricing and that the agency failed to answer certain written questions. Both of these issues were required to have been raised prior to the March 27 closing date for receipt of proposals. Protests alleging improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (1998). In addition, VPS initially objected to the award having been made on the basis of initial proposals. The agency addressed this allegation in its protest report, explaining that the solicitation specifically provided for award on the basis of initial proposals. Because VPS did not respond in its comments, we consider VPS to have abandoned this allegation. D & M Gen. Contracting, Inc., B-259995, B-259995.2, May 8, 1995, 95-1 CPD ¶ 235 at 2 n.2.

Where, as here, the award of a fixed-price contract is contemplated, a proposal's "cost realism" is not ordinarily considered, since a fixed-price contract places the risk and responsibility for contract costs and resulting profit or loss on the contractor. HSG-SKE, B-274769, B-274769.3, Jan. 6, 1997, 97-1 CPD ¶ 20 at 5. However, since the risk of poor performance when a contractor is forced to provide services at little or no profit is a legitimate concern in evaluating proposals, an agency in its discretion may, as it did here, provide for a price analysis in the solicitation of fixed-price proposals. Volmar Constr., Inc., B-272188.2, Sept. 18, 1996, 96-2 CPD ¶ 119 at 5. The Federal Acquisition Regulation (FAR) provides a number of price analysis techniques that may be used to determine whether prices are reasonable and realistic, including a comparison with other prices received in response to the solicitation, FAR § 15.404-1(b)(2)(i), and with independent government cost estimates, FAR § 15.404-1(b)(2)(v). The depth of an agency's price analysis is a matter within the sound exercise of the agency's discretion, and we will not disturb such an analysis unless it lacks a reasonable basis. Ameriko-OMSERV, B-252879.5, Dec. 5, 1994, 94-2 CPD ¶ 219 at 4; Ogden Gov't Servs., B-253794.2, Dec. 27, 1993, 93-2 CPD ¶ 339 at 7.

Here, the RFP simply stated that price proposals would be evaluated for reasonableness and realism, without specifying the manner or degree of analysis to which proposals would be subjected. The record in this case shows that the price evaluation board compared Laidlaw's price with the other offerors' prices, and with the government estimate--techniques which are explicitly recommended by the FAR, and which constituted a legally sufficient price analysis under this RFP.

The price evaluation board examined Laidlaw's price and determined that Laidlaw's price was 24 percent below the government estimate, and that Laidlaw's price for the fixed portion of the work was next to the lowest received and 6 percent higher than the government estimate. Price Evaluation Board Report at 2. Laidlaw's proposal for the hourly rate for the environmental technician is \$30, compared to the government estimate of \$27.96 and the other offerors' proposed rates ranging from \$24.18 to \$55.00 per hour. Based primarily on its analysis of the fixed-price portion of the requirement, the agency concluded that Laidlaw's price was reasonable.

VPS's objection to the price analysis is essentially based on the premise that the indefinite-quantity portion of the requirement is such that it is not possible to accurately determine the reasonableness of proposed prices. However, the estimated quantity structure was set forth in the solicitation. To the extent that the crux of VPS's protest in this regard is that the requested pricing structure under the solicitation was defective, this constitutes an untimely filed allegation of an apparent solicitation impropriety because the protest was not filed prior to the time set for the receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).

To the extent that VPS also appears to question Laidlaw's ability to perform the contract at its proposed price, that allegation concerns Laidlaw's responsibility. Our Office will not review the agency's determination that Laidlaw was responsible absent a showing of possible bad faith by government officials, or the misapplication of definitive responsibility criteria, none of which are present here. 4 C.F.R. § 21.5(c); Oshkosh Truck Corp., B-252708.2, Aug. 24, 1993, 93-2 CPD ¶ 115 at 6 n.3. Further, VPS's allegation that Laidlaw submitted a below-cost offer provides no basis for protest because there is no prohibition against an agency accepting a below-cost offer on a fixed-price contract. Shel-Ken Properties, Inc.; McSwain and Assocs., Inc., B-261443, B-261443.2, Sept. 18, 1995, 95-2 CPD ¶ 139 at 3. In sum, the agency's determination that Laidlaw's proposed price was reasonable is unobjectionable.

VPS next argues that the agency improperly downgraded its past performance from exceptional to good because VPS was improperly appraised for weaknesses in its performance as a subcontractor on the basis of requirements that were actually the responsibility of the prime contractor. VPS also objects to the agency's use of references that were not listed in VPS's proposal.

In reviewing a protest challenging an agency's evaluation of proposals, including the evaluation of past performance, we will examine the record to ensure that the agency's evaluation was reasonable and consistent with stated evaluation factors. Eagle Design & Management, Inc., B-275062, Jan. 21, 1997, 97-1 CPD ¶ 79 at 4. We have reviewed VPS's proposal and the evaluation documents and see no basis to question the reasonableness of the agency's evaluation of VPS's past performance. In its proposal, VPS listed the work it performed as a subcontractor for the hazardous waste management services at Point Mugu, California. VPS specifically stated that it managed the hazardous waste services portion of the contract and that its scope of work included, but was not limited to, the following: pre-collection and identification hazardous waste; collection of hazardous waste for removal; maintenance of hazardous waste staging areas; preparation for disposal of hazardous waste; removal of hazardous wastes from San Nicolas Island and Santa Cruz Island; and administration, tracking and data processing. VPS technical proposal, vol. II, § 1.A.1. As noted above, the COTR for the hazardous waste portion of that contract advised the evaluators that although VPS's timeliness and quality control improved with time, VPS's timeliness and correction of inventory reports on hazardous waste database were slow at the beginning of the contract, and that while VPS's performance was acceptable, he felt that VPS's cost proposal was moderately inflated and not reasonable. Thus, contrary to the protester's allegation, the record establishes that the protester was properly downgraded for performance that its proposal specifically stated was VPS's responsibility.

The record shows that the evaluators also interviewed the customer for the underground storage tank construction at San Nicolas Island. This reference expressed extreme dissatisfaction with VPS's work, stating that the work was

untimely, the quality control was unsatisfactory and that VPS was uncooperative with the customer with which it had severe differences of opinion. VPS's main objection is that this reference should not have been used by the agency as part of the evaluation because it was not included in VPS's proposal. However, the RFP specifically advised offerors that in evaluating an offeror's past performance, the government might contact clients other than those identified. RFP Amendment No. 0003 § M.1(II) (1). Accordingly, there was nothing improper in the agency using references other than those provided by VPS. George A. and Peter A. Palivos, B-245878.2, B-245878.3, Mar. 16, 1992, 92-1 CPD ¶ 286 at 6. In short, the record confirms the reasonableness of the "good" rating assigned to VPS's proposal under the past performance factor--the agency had a legitimate concern about the mix of negative and positive past performance reference responses received, and the negative responses justified an assessment of less than exceptional under the factor.

The protest is denied.

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