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**Comptroller General
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Decision

Matter of: Johnson Controls World Services, Inc.; Meridian Management Corporation

File: B-281287.5; B-281287.6; B-281287.7

Date: June 21, 1999

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Jacqueline B. Gayner, Esq., Ross, Suchoff, Hankin, Maidenbaum, Handwerker & Mazel, and Richard Feldman, Esq., Feldman & Markman, for Citywide Office Management Services, the intervenor.

Joseph J. Cox, Esq., Department of the Army, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's evaluation of technical proposals was unreasonable under the best value evaluation plan stated in the solicitation where it failed to evaluate differences in technical merit of proposals beyond minimum requirements.

DECISION

Johnson Controls World Services, Inc. and Meridian Management Corporation protest an award to Citywide Office Management Services under request for proposals (RFP) No. DACA51-98-R-0007, issued by the U.S. Army Corps of Engineers, New York District, for base operations and maintenance services at Fort Hamilton, New York. The protesters allege that the agency conducted an unreasonable evaluation and award selection.

We sustain the protests.

The RFP, issued March 5, 1998, contemplated the award of fixed-price contract (with some cost reimbursable items) for 1 year with 4 option years. The performance work statement (PWS) stated that the scope of work includes the following major functional areas:

1. Work Reception and Management
2. Buildings and Structures and Utilities Systems
3. Roads and Grounds
4. Pest Control
5. Refuse Collection
6. Housing and [Unaccompanied Personnel Housing] Operations
7. Supply and Storage
8. Elevator Maintenance and Repair
9. Logistical Support
10. Personal Property Shipping Office (PPSO)
11. Transportation Motor Pool (TMP)

RFP § C.1.1, at 11, amend. 0002, at 34. The PWS stated the performance requirements for each of these major functions. RFP § C.5, at 67-203. The RFP stated that award would be made “based on the best overall proposal with appropriate consideration given to the evaluation factors stated below,” RFP amend. 0002, § M.1.b, at 1, and that technical “is more important than price.” RFP amend. 0002, § M.2.B, at 5. The RFP stated a total of 3 factors and 10 subfactors under technical. The RFP listed, in descending order of importance,” the technical factors: Factor I, Technical Approach, Factor II, Management, and Factor III, Quality Control. Each technical factor had either three or four subfactors “listed in descending order of importance” within each factor. *Id.* Factor I, Technical Approach, had the following three subfactors: (1) Technical Capability, (2) Labor qualifications/mix for projects, and (3) Past Performance. Factor II, Management, had the following four subfactors: (1) Organizational Procedures, (2) Operational Structure, (3) Sub-Contract Plans, and (4) Management Qualifications. Factor III, Quality Control, had the following three subfactors: (1) Quality Control Plan, (2) Corrective Action, and (3) Records and Reports. The RFP stated that offerors should prepare technical proposals in a format following the identified evaluation factors, and specified information to be addressed in proposals that would be considered by the agency for evaluation purposes. RFP amend. 0002, §§ L.9, at 2-5, M.2.A.1, at 2-5.

The agency received proposals by the June 5, 1998 closing date from Johnson (the incumbent contractor), Meridian, and Citywide. The agency’s evaluation team evaluated technical proposals on a 900-point scale with factor I, technical approach, being allotted 400 points; factor II, management, 300 points; and factor III, quality control 200 points; the subfactors under each factor received a share of the total

points allotted to the factor consistent with the descending order of importance evaluation scheme.

The agency conducted discussions and evaluated revised proposals. Citywide's proposal received the highest technical score and offered the lowest price, and the agency determined that it represented the best value to the government. On September 18, the agency awarded the contract to Citywide. Johnson protested that award to our Office. After reviewing the protest, the agency determined that corrective action was appropriate, which included a new evaluation of the proposals performed by a new evaluation team. In response to the corrective action, Johnson withdrew its protest.

The new evaluation team evaluated the proposals as previously submitted. In so doing, the evaluation team used the scoring breakdown as initially established and scored proposals under certain criteria designated on the evaluators' rating sheets for each of the subfactors stated in the RFP; there were 38 of these criteria.¹ Following the evaluation, the agency conducted discussions with the offerors and requested revised proposals. All three offerors submitted revised proposals by the February 12, 1999 due date.

Under the final evaluation, Citywide's technical proposal received a perfect score for every criterion and thus a perfect score overall of 900 points, while Johnson's and Meridian's proposals received near perfect overall scores of 884 and 878 points, respectively. Johnson's and Meridian's proposals both received perfect scores on 35 out of 38 criteria. Citywide proposed the lowest price; Meridian proposed a slightly higher price and Johnson proposed a significantly higher price. On February 24, the agency determined that Citywide's lowest-priced, highest-rated proposal represented the best value to the government and awarded the contract to Citywide. These protests followed.

Johnson and Meridian essentially contend that the evaluation was improper because the agency failed to evaluate proposals for relative technical merit beyond the minimum requirements under the best value plan stated in the RFP and unequally evaluated the proposals, and that this evaluation resulted in Citywide's proposal being overrated under various subfactors, even though its proposal was assertedly inferior to the protesters', and in Johnson's and Meridian's proposals effectively not being given credit for existing proposal strengths beyond the minimum requirements. We sustain the protests on this basis.

While the evaluation of proposals is primarily within the discretion of the contracting agency, the agency must conduct the evaluation in accordance with the terms of the

¹Only the past performance subfactor was not subdivided into criteria and is thus itself counted as one of the 38 criteria.

RFP; it does not have the discretion to announce in the RFP that one evaluation scheme will be used and then follow another in the actual evaluation. Trijicon, Inc., B-244546, Oct. 25, 1991, 91-2 CPD ¶ 375 at 5. Where, as here, the RFP states a best value evaluation plan--as opposed to selection of the lowest-priced, technically acceptable offer--evaluation of proposals is not limited to determining whether a proposal is merely technically acceptable; rather, proposals may be further differentiated to distinguish their relative quality by considering the degree to which technically acceptable proposals exceed the stated minimum requirements or will better satisfy the agency's needs. Israel Aircraft Indus., Ltd., MATA Helicopters Div., B-274389 et al., Dec. 6, 1996, 97-1 CPD ¶ 41 at 5-6.

Here, the RFP's best value evaluation scheme stated that technical would be more important than price and that the objective of the evaluation was to determine which proposal offered the best overall value considering all of the stated factors. RFP amend. 0002, §§ M.2.A.1, at 2, M.2.B, at 5. All three proposals received perfect scores under the overwhelming majority of evaluation criteria, and points were deducted only for aspects of a proposal considered less than satisfactory, as evidenced by the evaluators' comments, and no comments were provided under criteria for which proposals received perfect scores. Agency Report, Tab 41, Final Technical Findings, attach., Final Consensus Rating Sheets. The source selection decision document identifies only final point scores and price differences; it does not identify any differences in technical merit. The evaluation record overall simply does not evidence consideration by the agency of differences between the proposals in technical merit (other than the few comments which formed the basis for the limited score reductions). Consistent with this record, the agency does not contend that it evaluated for relative technical merit beyond the minimum requirements. See Contracting Officer's Statement on Johnson Protest at 29th unnumbered page. Absent a reasonable evaluation of relative technical merit, the record cannot support an award on other than a lowest priced, technically acceptable basis, which is contrary to the terms of the RFP and is improper. See Trijicon, Inc., supra, at 7.

The agency contends that the evaluation factors here were not written in terms of minimum standards that offerors could strive to exceed. See Contracting Officer's Statement on Johnson Protest at 29th unnumbered page. We disagree. Our review of the RFP shows that the evaluation factors were stated such that offerors reasonably could anticipate being rewarded in the technical evaluation for submitting a technically superior proposal.

For example, past performance was accorded a total of 100 possible points out of the overall total of 900 points.² Agency Report, Tab 10, Source Selection Evaluation Plan, at 7. The RFP's technical evaluation scheme stated that an offeror's technical proposal will demonstrate experience through past performance providing the 11 major functions which were listed in the PWS and sections L and M. RFP §§ C.1.1, at 11, amend. 0002, at 34, L.9, at 3, M.2.A.1.a, at 2-3. The RFP also stated that the Past Experience/Performance subfactor would be evaluated as follows:

The Offeror's capability to perform the requirements of this specification must be supported by previous and/or current experience detailed in the proposal. Proposals will be evaluated based upon past experience/performance on contracts with similar scope and complexity.

RFP amend. 0002, § M.2.A.1.a, at 3.

The RFP's proposal submittal instructions stated the same and added the following:

Cite specific examples of past work, which most closely resembles that required at Fort Hamilton.

RFP amend. 0002, § L.9, at 3.

Although the agency has the discretion under this evaluation factor to determine what contract experience is sufficiently similar in scope and complexity to the RFP requirements to be considered acceptable, see Saratoga Medical Ctr., Inc., B-281350,

²Johnson also alleges that the agency was required to give significantly more weight to the past performance subfactor than it actually did. Specifically, Johnson cites a publication of the Office of Federal Procurement Policy (OFPP), OFPP Guidance: Best Practices for Past Performance (May 1995), which offers guidance on the evaluation of past performance and states that past performance should be at least equal in importance to any non-cost factor or, if numerical weights are used, past performance should be allotted at least 25 percent. Johnson Protest at 13-14; Johnson Comments at 11-12. However, this OFPP publication discusses executive branch policy on past performance. The cited guidance on weight of past performance is not a statement of procurement law or regulation. See 10 U. S.C. § 2305(a) (1994); Federal Acquisition Regulation §§ 15.304, 15.305. Nor does Johnson allege a violation of any procurement laws or regulations pertaining to the evaluation weight accorded past performance. Protests alleging violations of OFPP statements of executive branch policy which, as here, do not violate procurement laws or regulations are not reviewed by our Office. See Systems Eng'g & Management Co., B-275786, Mar. 26, 1997, 97-1 CPD ¶ 133 at 7-8 n.8; Systems & Programming Resources Inc., B-192190, Aug. 16, 1978, 78-2 CPD ¶ 124 at 2.

B-281350.2, Jan. 27, 1999, 99-1 CPD ¶ __ at 3, the RFP did not give the agency discretion to give identical scores to offerors with significant differences in relevant experience. See Ogden Support Servs., Inc., B-270012.4, Oct. 3, 1996, 96-2 CPD ¶ 137 at 3 (under past performance evaluation factor in a best value procurement, proposal with more relevant successful past performance should be rated higher than a proposal reflecting less relevant past performance); Premiere Vending, B-256437, June 23, 1994, 94-1 CPD ¶ 380 at 8 (past performance evaluation factor for “similar experience” in a best value procurement renders more similar experience preferable to, and thus higher rated than, less similar experience).

Both Johnson’s and Citywide’s received perfect scores for past performance, even though the record demonstrates that Johnson’s proposal was more detailed and addressed specific experience with every one of the major functions. Agency Report, Tab 2, Johnson’s Technical Proposal, at 1-10, 1-15 to 1-17, 1-20 to 1-21, 1-25 to 1-26, 1-28 to 1-29, 1-32 to 1-34, 1-37 to 1-38, 1-40 to 1-41, 1-44 to 1-45, 1-47 to 1-48, 1-50, 1-52. As the incumbent at Fort Hamilton, Johnson had experience at Fort Hamilton under every function, and also had experience from other similar military base contracts under every function. Id.

In contrast, Citywide’s proposal was neither detailed nor specific under this subfactor, and did not identify experience for all of the major functions. Agency Report, Tab 3, at 126-29. The agency’s preliminary evaluation identified this lack of information and deducted points from Citywide’s score. The agency raised this issue in discussions with Citywide and requested a detailed discussion of the technical complexity of its past performance. In response, Citywide identified three non-governmental contracts involving commercial or residential facilities and stated that these “are projects with greater scope and complexity than Fort Hamilton.” Agency Report, Tab 34, Letter from Citywide to Source Selection Team, at 4th unnumbered page (Feb. 9, 1999). In this regard, Citywide’s final revised proposal stated:

[DELETED]

Agency Report, Tab 40, Citywide’s Final Proposal Revision, at 131-32. This statement by Citywide is general and fails to identify major functional experience under specific contracts; moreover, it fails to address two of the major functions stated in the RFP—PPSO and TMP services.³ Although Citywide’s final proposal provides a brief description of the services performed for each contract, all

³The agency now states that Citywide has its own motor pool. Contracting Officer’s Statement on Meridian Protest at 21st unnumbered page. However, this information was not presented in the past performance section of Citywide’s proposal, and there is no evidence that the motor pool includes transportation services, nor is there evidence in the evaluation record that such information was considered during the evaluation.

of these contract descriptions, both individually and collectively, fail to identify experience in many of the major functions.⁴ Agency Report, Tab 40, at 134. Considering that Johnson's proposal demonstrated successful prior performance on contracts of the same or greater complexity on every one of the major functions, and Citywide's proposal did not, the agency unreasonably scored both proposals the same under the past performance subfactor, which effectively removed the evaluation weight assigned this subfactor. See Ogden Support Servs., supra, at 3.

Moreover, we note that Meridian's proposal was slightly downgraded under this subfactor for not having PPSO contract experience, although its proposal indicated that it had apparently informally performed PPSO services under a contract at another base during base closure operations. However, Citywide's proposal, which contained no evidence of having performed such services, received a perfect score. Such an unequal evaluation is unreasonable. See Sci-Tec Gauging, Inc.; Sarasota Measurements & Controls, Inc., B-252406, B-252406.2, June 25, 1993, 93-1 CPD ¶ 494 at 11; J.M. Cashman, Inc., B-233773, Apr. 14, 1989, 89-1 CPD ¶ 380 at 8-11.

Another example is the evaluation of organizational procedures, the most important subfactor under the second factor (management), under which the agency evaluated the offeror's understanding of the work status report requirements. In pertinent part, the RFP required the contractor to use the agency's Integrated Facilities System (IFS) to record work status data. RFP § C.5.1.8, at 70. Johnson proposed using IFS and had experience using the system. Agency Report, Tab 2, Johnson's Technical Proposal, at 2-9. Both Citywide and Meridian essentially proposed using the IFS in conjunction with their own work control database systems. Meridian proposed its own system for internal use and proposed the IFS system for formal records; it apparently had experience doing this successfully. Agency Report, Tab 68, Meridian's Technical Proposal, at 1.4-1.4a. Citywide apparently did not have experience using the IFS system, and stated that it understood that IFS was inefficient and proposed to attempt to integrate the two systems in the first 3 months

⁴The agency states that the individual personnel proposed by Citywide have experience with the various components of work and that individual personnel with relevant experience proposed by Citywide should be considered in the evaluation. Contracting Officer's Statement on Johnson Protest at 33rd unnumbered page. Although the RFP does not preclude such an evaluation, the agency does not assert that it actually evaluated past performance in this manner and there is no evidence in the record suggesting that the agency performed the evaluation in this manner. Therefore, we will not consider this post hoc argument. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15 (alternate rationale offered in heat of adversarial process is given little weight). In any event, Johnson also proposed experienced personnel and, even if the experience of individuals was considered in the agency's evaluation of past performance, the record does not show that the two proposals reasonably deserve identical scores.

of the contract. Agency Report, Tab 40, Citywide's Final Revised Proposal, at 132. In the evaluation under this subfactor, Citywide's proposal received a perfect score, Johnson's proposal was downgraded for a reason unrelated to IFS, and Meridian was downgraded because of its IFS approach. The record does not indicate why Johnson's proposal was not considered superior to Citywide's proposal under this subfactor or why Citywide's proposal was not downgraded, particularly given how Meridian's proposal was rated.

As illustrated by the foregoing, the record evidences that the agency did not reasonably evaluate differences in technical merit between the proposals under the RFP's best value evaluation scheme, such that we cannot determine that the award selection based upon this evaluation was proper, and we sustain the protest on this basis.⁵

The protesters also allege that the agency's evaluation of Citywide's price did not reasonably account for the wage requirements of the Davis-Bacon Act and the Service Contract Act, which were incorporated into the RFP. Johnson Protest at 14-21; Johnson Comments at 14-18; Meridian Comments at 16-17. We do not find unreasonable the agency's contemporaneous evaluation of Citywide's price. Citywide's proposal did not take exception to this requirement; the firm confirmed during discussions that it intended to comply with the wage requirements. Citywide explained that [DELETED], and specified other factors that allowed it to offer such a low price. Contracting Officer's Report on Johnson Protest at 38th-40th unnumbered page. Based on its review, the agency could reasonably determine that Citywide's price was realistic and reasonable.⁶ See Milcom Sys. Corp., B-255448.2, May 3, 1994, 94-1 CPD ¶ 339 at 9-11.

We recommend that the agency either reevaluate proposals consistent with the RFP's existing evaluation scheme or amend that scheme to reflect the agency's actual needs, then request revised proposals, evaluate revised proposals, and make a new source selection decision. If an offeror other than Citywide is selected for award, Citywide's contract should be terminated. We also recommend that the agency reimburse the protesters their reasonable costs of filing and pursuing these

⁵While both protesters assert that the selection was based on the fact that Citywide was a "local" rather than a "non-local," company, they have provided no evidence to support this contention.

⁶We note that Johnson has submitted relevant information in the exhibits to its protest comments pertaining to [DELETED], which, though not previously known by the agency, may be relevant and considered by the agency upon the reevaluation.

protests, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). The protesters should file their claims for costs, detailing the time expended and costs incurred, with the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Comptroller General
of the United States