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AYER

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-199407.2 DATE: September 23, 1982

MATTER OF: The Jonathan Corporation

DIGEST:

1. Agency properly awarded contract to the lower technically rated, lower priced offeror notwithstanding protester's slightly higher combined cost and technical score where determination was made by contracting officer that higher technical score was not worth cost difference.

2. Protest is denied where protester has failed to establish either that awardee's proposal was improperly evaluated or that awardee's proposed costs were "unrealistic" and where uncontested agency calculation of the scoring impact of the protester's allegations concerning deficient personnel resumes shows that, even if true, protester's standing would remain the same vis-a-vis technical equality.

The Jonathan Corporation (Jonathan) protests the Navy's source selection procedure and contract award to Milcom Systems Corporation (Milcom) under request for proposals (RFP) No. N00612-80-R-0230 issued by the Naval Supply Center (NSC), Charleston, South Carolina. The RFP is for "services and materials [involving] design/ engineering, installation, repair, overhaul, and field changes of electronic and electrical equipment and systems" in support of the Naval Electronic Systems Engineering Center (NESEC), Charleston, South Carolina. The services and materials are furnished under an "indefinite quantity time and materials" contract.

The thrust of Jonathan's protest is that the Navy erred in deciding that the technical proposals of Johnathan and Milcom were essentially equal and that the award could properly be made to Milcom on the basis of lowest total evaluated cost.

At the time of the Navy's decision, the awardee and the protester were ranked as follows:

		"Total Evaluated Cost	Max Cost Score	Raw Tech Score	Max Tech	Total Tech & Cost
1.	Milcom	$3,738,157.19	19.60	78.25	78.54	97.94
2.	Jonathan	3,897,234	18.61	79.7	80	98.51"

The RFP's award clause provided that:

> "Selection of the successful offeror will be made on the basis of price and other factors considered. Therefore, award may not necessarily be made to the offeror submitting the lowest price. Other factors will be weighted approximately four (4) times as much as price.
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> "Offers received will be evaluated by the Government on the basis of price and on the basis of information provided by the offeror in * * * [its technical proposals]."

Jonathan believes that, under the above clause, its high combined technical and cost score of 98.61, as opposed to Milcom's combined score of 97.94, entitled Jonathan to the award.

We deny the protest.

Initially, we note it is not our function to conduct a de novo review of technical proposals, nor is it our function to independently determine their relative merit, since the evaluation of proposals is properly the function of the procuring agency. E-Systems, Inc., B-191346, March 20, 1979, 79-1 CPD 192. Procuring agencies are relatively free to determine the manner in which proposals will be evaluated so long as the method selected provides a rational basis for source selection and the

actual evaluation is conducted in accordance with the established criteria. See Francis & Jackson Associates, 57 Comp. Gen. 224 (1978), 78-1 CPD 79. Thus, our function is not to select one of several proposals as most advantageous to the Government, but rather to decide whether the procuring agency's selection has been shown to be legally objectionable. INTASA, B-191877, November 15, 1978, 78-2 CPD 347. Finally, where there is an irreconcilable conflict between the agency's and the protester's versions of the facts, in the absence of probative evidence (other than statements from each side), we must accept the agency's version of the facts. Contract Support Company, B-184845, March 19, 1976, 76-1 CPD 184.

Jonathan, citing the oft-stated proposition that once offerors are advised of the evaluation criteria, agencies should either follow the criteria or inform offerors that changes have been made in the criteria, contends the Navy failed to comply with this rule in several respects in awarding to the lower ranked technical, lower priced proposal of Milcom. Jonathan argues that (1) there must be a valid and substantial cost difference between contending proposals before a procuring agency can make cost the determinative factor; (2) since the RFP did not advise offerors that cost could be determinative, the Navy is estopped from making such a determination; and (3) the Navy is estopped from making the award based on low cost where the requiring activity (NESEC) has "recommended that award be based on a total score of technical and pricing points combined."

In support of its contention, that a valid and substantial cost/price difference is necessary for cost to become the determining factor between essentially equal technical proposals, Jonathan cites several of our decisions where the cost differential was substantial and there was a reason to believe that it was "valid." Here, Jonathan asserts that its proposed cost is only 4 percent or $159,000 greater than Milcom's. We will address the "validity" of the cost differential later when we review the factual basis of the Navy cost realism determination. Regarding whether the cost differential must be substantial, we think that it need not be. In our opinion, it is sufficient in a situation of substantial technical equality that one offeror's cost is lower than the oth 's.

We are unaware of any decision holding otherwise and believe that the requirement of 10 U.S.C. § 2304(g) (1976) (that price be given appropriate consideration) necessitates this conclusion. Work System Design,Inc.--Reconsideration, B-200917.2, September 29, 1981, 81-2 CPD 261.

Jonathan's argument that the Navy is estopped from making the award based on cost is predicated on the failure of the RFP to include what Jonathan terms a "tie-breaker"clause. The typical "tie-breaker" clause reads as follows:

> "Although cost is the least important evaluation factor, it is an important factor and should not be ignored. The degree of its importance will increase with the degree of equality of the proposals in relation to the other factors on which the selection is to be based."

In support of its position, Jonathan has submitted the affidavits of Jonathan's president and executive vice president to the effect that a Navy official expressed surprise that a tie-breaker clause had not been included in the protested procurement as it was customary to include such a clause in a negotiated procurement. Jonathan has also submitted the affidavit of its contracts manager, a former Government employee, that "when the 'tie-breaker' clause was omitted from a solicitation, the procuring office intended to select the winning proposal on the basis of the announced criteria, without regard to tie-breaking criteria."

Jonathan recognizes that we have found the notice provided by paragraph 10 of standard form 33A sufficient warning that cost could become the tie-breaker or determinative factor in an award selection. Grey Advertising Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. That notice reads: "The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered." Here, the award clause in the protested RFP provides the same advice, "Selection of the successful offeror will be made on the basis of price and other factors considered." We do not

believe that the fact that offerors are further advised that the "other factors" will be weighted "approximately four times as much as price" operates to remove cost as the tie-breaker when the procuring agency has determined that the "other factors" are essentially equal.

We have recognized that where cost is assigned points as an evaluation factor along with other factors, the fact that a proposal receives the highest number of points does not in itself justify acceptance of the highest scored proposal without regard to price. Automated Systems Corporation, B-184735, February 23, 1976, 76-1 CPD 124, and Timberland-McCullough, Inc., B-202662; B-203656, March 10, 1982, 82-1 CPD 222. However, as we have noted, where the evaluation factors indicate the highest point score will receive the award, a determination should be made that the difference in technical scores did not justify award to the higher scored, higher priced offeror. The University Foundation, California State University, Chico, B-200608, January 30, 1981, 81-1 CPD 54.

We find the Navy complied with this requirement here.

While Jonathan argues that the requiring activity (NESEC) had "recommended that award be based on a total score of technical and pricing points combined" and, therefore, Jonathan should have received the award, we disagree.

The contracting activity sought NESEC's advice regarding whether actual technical equality existed. NESEC never directly answered the question regarding equality, but replied "an award under subject solicitation to either firm in line for award technically is acceptable," in addition to the above quotation.

While it is certainly permissible for the contracting activity to seek the technical advice of the requiring activity where, as here, there is a relatively small point difference between the two contending technical proposals, Analytic Systems, Incorporated, B-179259, February 14, 1974, 74-1 CPD 71, we have recognized that selection officials are not bound by the recommendations made by groups such as NESEC. Grey, at 1120. Here, in

the Post Negotiation Business Clearance memoradum, the contracting officer made "a finding that the technical difference between Milcom and Jonathan is so insignificant (1.45 points) that the Government would not benefit in an award to a higher-priced contractor." Accordingly, we find the Navy complied with our prior decisions in this area and deny the above basis of protest.

The balance of Jonathan's protest addresses the factual issues of technical equality and cost realism. Jonathan argues that there was "no genuine technical equality" between its technical proposal and the technical proposal of Milcom. With regard to cost realism, Jonathan believes that had the Navy properly followed the cost realism clause, Milcom would have received a higher evaluated price and, consequently, a lower cost score.

With regard to technical acceptability, Jonathan contends that Milcom's proposal was deficient in four areas: (1) the resumes which accompanied Milcom's technical proposal, although purporting to represent 80 people, actually represented only 64 people; (2) Milcom unrealistically elected not to charge the Government for some items; (3) Milcom proposed unrealistic supervisory wages; and (4) Milcom never properly addressed the Navy's challenge to the quality of Milcom's calendar year 1977 experience.

We have held that in explaining the basis for a determination that competing technical proposals are essentially equal, procuring agencies may not rely on bare conclusionary statements, but must provide factual explanation as to why the proposals are perceived as essentially equal. Applied Financial Analysis, Ltd., B-194388.2, August 10, 1979, 79-2 CPD 113. We have also held that a determination of cost realism requires more than the acceptance of proposed costs as submitted. Joule Technical Corporation, B-192125, May 21, 1979, 79-1 CPD 364. However, the amount of factual explanation provided regarding technical equality and cost realism will, of course, vary from case to case depending on the circumstances. We have held that an agency's evaluation of competing cost proposals involves the exercise of informed judgment which we will not disturb, even where the record does not provide a full explanation or rationalization for cost differences between proposals, if it is supported by a reasonable basis. Grey, at 1133.

Further, the procuring agency's evaluation is entitled to great weight because an agency is in the best position to determine the realism of costs and corresponding technical approaches. It is for these reasons that our review is limited to deciding whether the record before us reasonably supports a conclusion that the award was rationally founded. Grey, at 1119.

The Navy reports that it performed a cost and price analysis on all proposals. As a matter of policy, NSC does not obtain audits of submitted cost proposals on time and material contracts if Defense Contract Audit Agency (DCAA) "auditors are familiar with the company so that a rate check can be made." Although DCAA recommended that an audit be conducted on Milcom because of the potential impact of this contract on Milcom's overhead and labor rates, the Navy decided to rely on a price analysis and rate check instead. The Navy compared the price offered to the prices found in several current Milcom contracts for similar services. Three of the contracts used for the comparison had been audited by DCAA and approved. Based on the comparison with the previously audited contracts, the overhead rate was found reasonable. While some of Milcom's initial labor rates were out of line with the wage determined and conformed rates (rates developed by the Navy to fill in missing rates in the Wage Determination), Milcom's final rates complied in both categories.

We find the cost realism determination had a reasonable basis and that the Navy did not merely accept the proposed cost, but took adequate steps to assure that the proposed costs were realistic.

The RFP's Personnel Qualifications evaluation factor required the submission of "resumes showing minimum qualifications for 100% staffing of each labor category." Under the evaluation scheme, "personnel" was assigned a weight of 10 percent (out of 100 percent). Although Jonathan asserts that the "Navy interpreted the RFP's straight time hours * * * to require 96 persons to achieve 100% staffing," the Navy advises that no specific number of resumes was required by the RFP. Offerors only had to submit enough resumes in each labor category to accomplish 100 percent staffing based on the estimates of hours in each category. Scoring was based on a required number of resumes for each labor category.

Jonathan argues that Milcom included a chart showing 80 entries when, in reality, only 64 individuals were proposed after allowances are made for duplications and

repetitions of identical and virtually identical resumes. The Navy, however, reports that the evaluators did not rely on the chart, but instead evaluated personnel by comparing resumes supplied by each offeror to the required minimum qualifications for each labor category.

> "* * * One point was awarded for each resume that met or exceeded the required qualifications. Zero was awarded if the person was not currently employed or was not committed to employment in writing. Then 1/2 point was deducted for each resume less than the required number for each labor category. For example, if 20 resumes were required but only 10 qualified resumes were submitted, the score for that labor category would be 5 points = (10 (provided) - 1/2 (10) (resumes under requirement))."

Milcom's resumes did not disclose the actual identities of its proposed employees, but instead gave employee identification numbers.

Jonathan has argued that Milcom's resumes contained four duplicate resumes; two resumes describing one employee with two separate employment histories; and several nearly identical resumes. The Navy notes that Milcom claims that the nearly identical resumes represented different people who were in Milcom's employ at the time they were listed. However, the Navy observes that because of the lack of actual identification "[i]t can not be said with certainty under which labor category the allegedly duplicated resumes were counted." The Navy was aware of deficiencies in Milcom's proposed personnel and initially downgraded its proposal in this area. Milcom cured the deficiency substantially in its best and final offer by including additional and corrected resumes and the Navy reports that Milcom now has an individual employee corresponding to each resume. In any event, the Navy has provided a calculation showing the maximum scoring effect of all of the alleged duplications. The net effect is that Milcom's raw technical score drops two points from 78.25 to 76.25. Consequently, the difference between Jonathan's raw technical score (79.7) and Milcom's

increases from 1.45 points to 3.45 points. The Navy does not regard this difference as a sufficient showing of Jonathan's technical superiority over Milcom's proposal to warrant the conclusion that they are not equal.

Jonathan has not challenged the Navy's calculation or its conclusion that such a small point spread would not change the Navy's opinion, that the firms were technically equal, aside from remarking that mere mechanical comparison of numerical scores can lead to superficial and misleading results. See Computer Sciences Corporation, B-189223, March 27, 1978, 78-1 CPD 234. Even if Jonathan's allegations are correct, we do not believe the matter was prejudicial to Jonathan's position since it would not alter the Navy's opinion that the contending proposals were technically equal and, consequently, the technical standing of the offerors remained unchanged. Datapoint Corporation, B-194277, September 14, 1979, 79-2 CPD 198.

Jonathan argues that Milcom's technical proposal is questionable because Milcom elected not to charge the Government for overtime incurred in several labor categories and for rental vehicles. The Navy reports that it did not question Milcom regarding the overtime because the labor categories for which Milcom indicates no charge carried relatively low estimates of overtime hours and, in any event, the Government could not be charged for the overtime in those categories. The Navy did not question the "no charge" for rental vehicles because Milcom did not intend to use rental vehicles. We find the Navy's actions reasonable.

Jonathan also questions Milcom's technical proposal because Milcom proposed paying a supervisor less per hour than it proposed to pay the workers that the supervisor was to supervise.

The Navy responds that the labor category description allows the contractor to use the "supervisor" as either a supervisor or as a worker and the supervisor would only be supervising from 6 to 12 percent of the individual's full estimated time. We again find the Navy's actions to be reasonable.

Jonathan takes issue with the fact that Milcom did not refute the Navy's criticism of Milcom's 1977 experience as being of only "average complexity." Jonathan charges that Milcom's best and final offer was wholly evasive in replying to the criticism.

The Navy notified Milcom of the deficiency in Milcom's initial proposal. Milcom responded to it in its best and final offer. The amount and complexity of Milcom corporate experience was an historical fact which Milcom could not alter. It appears that the Navy was correct in its reading of the facts and that Milcom's experience was of only "average complexity" during that year. Consequently, Milcom's position remained the same. Since Milcom received no additional points because of its response, we see nothing objectionable in the foregoing.

Accordingly, the protest is denied.

Harry R. Van Cleve
Comptroller General
of the United States