DECISION

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

FILE: B-212675 DATE: May 25, 1984

MATTER OF: Harrison Systems Ltd.

DIGEST:

1. Contracting officer's determination that there is no significant technical difference between proposals with a 14.4-percent difference in technical point scores is not unreasonable.

2. Where solicitation states that technical factors will be weighted 70 percent and price 30 percent and award will be made to offeror with the highest combined point total, agency may properly award to lower technically rated, lower priced offeror with lower combined point total because contracting officer made a reasonable determination that there was no significant technical difference between proposals and award to lower priced offeror was most advantageous to government. RCA Service Company, B-208871, August 22, 1983, 83-2 CPD 221 is modified to the extent that it is inconsistent with this decision.

3. Protest that agency conducted negotiations, thus permitting awardee to improve its technical score, is denied because that is normal, proper conduct in negotiated procurements.

4. Protest that awardee has purposely underpriced its offer is dismissed, since that provides no legal basis for questioning award.

5. Issues raised after initial protest was filed are dismissed as untimely because they are new grounds of protest and were not raised within 10 working days of the protester's knowledge of them as required by GAO Bid Protest Procedures.

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Harrison Systems Ltd. (Harrison) protests the award of a contract to Hamilton Communications Consultants, Inc. (Hamilton), by the Voice of America, United States Information Agency (USIA), for design and installation of a studio/control room and technical operations facilities under request for proposals (RFP) No. 19-23-3-EA.

Harrison argues that USIA did not follow the RFP's evaluation criteria in making the award and brought Hamilton up to a higher technical rating through discussions. Harrison also contends that Hamilton cannot do the work for the price it offered. Additionally, Harrison contends that USIA changed its budget limitation for this contract in order to accommodate Hamilton.

We deny the protest in part and dismiss it in part.

The RFP stated that technical proposals would be given 70 percent of the weight and the price proposals 30 percent of the weight in determining the award most advantageous to the government. It stated further that award would be made to the offeror achieving the highest combined score. Harrison's combined score, after discussions and best and final offers, was 94.79 out of a possible 100; its price was $1,392,293 and its technical score was 70. Hamilton's combined score was 89.88; its price was $1,150,782 and its technical score was 59.88.

Notwithstanding Harrison's higher combined score achieved as a result of its higher technical rating, the contracting officer determined that Harrison's proposal was not technically superior in any meaningful way. The USIA Office of Engineering and Technical Operations concurred in this judgment. Consequently, USIA decided to award the contract to Hamilton because its lower price and technical equality made its offer more advantageous to the government.

Harrison contends that USIA was required to award it the contract under the stated evaluation criteria, since it received the highest point total.

In support of its actions, USIA relies on the following statement from our decision in RCA Service Company, B-208871, August 22, 1983, 83-2 CPD 221:

> "Even where the RFP evaluation factors indicated that award would be made to that offeror with the highest point score, we have held that, before the contracting agency can award to the higher priced (or higher cost), technically superior offeror, the contracting agency is required to justify such award in light of the extra expenditure required. See Todd Logistics, Inc., [B-203808, August 19, 1982, 82-2 CPD 157]; Timberland-McCullough, Inc., [B-202662; B-203656, March 10, 1982, 82-1 CPD 222]. Here not only was the contracting agency unwilling to make such a justification for award to the higher priced offeror, but the contracting agency actually determined that award to the lower priced, essentially technically equivalent offeror was in the government's best-interest. In view of the technical equality of the offeror, award to Talley at a cost-savings of approximately $945,000 was reasonable even though cost-related factors account for only 10 percent of the evaluation."

We agree with USIA that the present case fits within the above-stated rule. However, in Telecommunications Management Corp., 57 Comp. Gen. 251 (1978), 78-1 CPD 80, we indicate that where the solicitation sets forth a precise numercial evaluation formula including price and provides that the awardee will be selected on the basis of total score, the contracting agency must award to the highest scored offeror if the source selection official agrees with the scoring. However, we found that the solicitation did not state that the awardee would be selected on the basis of the highest total score, so the rule was not applied.

The statements in the two cases are somewhat inconsistent regarding the degree of discretion retained by the contracting agency to make cost/technical tradeoffs in awarding the contract when the RFP sets forth a precise evaluation formula including price or cost and states that award will be made to the offeror achieving the highest total point score. The RCA case holds that the agency retains the same degree of discretion in making cost/technical tradeoffs as it would have if the RFP did not state that award would be made on a total point score basis. In fact, the RCA case even requires a justification for awarding in accordance with the formula if award is to

be made to a higher cost or priced offeror. On the other hand, the Telecommunications Management Corp. case implies that the contracting agency relinquishes that discretion, and may not deviate from point scores if the source selection official does not alter the scoring.

While we think that both cases were decided correctly, the relevant statements went beyond what was necessary to decide the cases. We now think that both views are too extreme. The better view, which we adopt, is that when the RFP contains a precise numerical evaluation formula including cost/price and a statement that award will be made to the highest point scored offeror, the contracting officer or other source selection authority retains the discretion to examine the technical point scores to determine whether a point differential between offerors represents any actual significant difference in technical merit. If it does not, then award may be made to the lower cost or priced proposal, even though its total point score is lower. In effect, the contracting official would be rescoring the technical proposals conceptually, but not mechanically, and would not really be altering the predetermined cost/technical tradeoff. If, however, the source selection official determines that the point difference represents actual technical superiority and he agrees with the scoring, then he must abide by the formula and award to the offeror with the highest total point score. He may not decide that the technical superiority is not worth the cost difference. That would alter the predetermined cost/technical tradeoff. Additionally, we think that if the award is to be made to a more expensive higher total point scored offeror in accordance with the formula there is no necessity for the contracting agency to make a separate determination that the extra expense is justified, since that determination is made when the formula is devised.

To the extent that the RCA case and the cases cited therein are inconsistent with this decision they are modified. Moreover, the statement in the Telecommunications Management case is clarified.

Also, while using a precise numerical evaluation formula and stating in the RFP that award will be made to the offeror with the highest point total is not improper, we

think it is unwise and, therefore, recommend that contracting agencies consider not using such a scheme. Using the scheme limits the contracting agency's flexibility and discretion, and provides no significant benefit to the agency or potential offerors. Additionally, even a well-supported and justified deviation from the formula in making the award gives the appearance of arbitrary action and possible impropriety.

In the present case we find that the evaluation and award to Hamilton was proper. The contracting officer determined that the technical proposals were essentially equal even though there was a 14.4 percent difference in technical point scores. In Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325, we found a determination of technical equality to be reasonable where the point difference was 15.8 percent. In light of that, and the fact that Harrison has not pointed to anything other than the point differential in asserting its technical superiority, we find the determination of technical equality to be reasonable. As we stated above, the contracting officer has conceptually rescored the technical proposals by finding them to be technically equal. Consequently, the award to Hamilton, the lower priced, technically equal offeror is in accordance with the stated evaluation criteria because the 70/30 technical/cost tradeoff has been preserved. We do not think that Harrison was misled in the preparation of its proposal by the deviation from a strict application of the total points award criterion because that does not provide guidance in proposal preparation. Only the 70/30 cost/technical tradeoff statement provides such guidance, and that tradeoff was preserved by the finding of technical equality.

Harrison contends that by conducting negotiations, USIA improperly permitted Hamilton to improve its technical score, thus "equalizing" the technical proposals.

Generally, in negotiated procurements, meaningful discussions must be held with all offerors in a competitive range. To be meaningful, discussions should include the agency's pointing out those areas of an offeror's proposal that it considers deficient and the opportunity for the offeror to correct those deficiencies by revising its proposal. The Farallones Institute Rural Center, B-211632, November 8, 1983, 83-2 CPD 540. USIA determined that there were deficiencies in all of the initial offers that were

acceptable and, therefore, conducted discussions and permitted proposals to be revised. We see nothing improper in that action.

Concerning Harrison's allegation that Hamilton cannot perform the work for the price offered and is purposely submitting a low price, we have held that the offer of a price that a competitor feels is too low does not provide a legal basis for questioning a contract award. Swiss-Tex Incorporated, B-200809, B-200810, October 31, 1980, 80-2 CPD 333.

After filing its initial protest, Harrison raised two additional issues which we find to be untimely and, therefore, dismiss. Our Bid Protest Procedures, 4 C.F.R. part 21 (1983), do not contemplate piecemeal presentation of protests. Consequently, any new grounds of protest raised after the initial protest is filed must independently meet our timeliness standards. Annapolis Tennis Limited Partnership, B-189571, June 5, 1978, 78-1 CPD 412. On November 22, 1983, Harrison first alleged that, during discussions, USIA asked it a question which led it to increase its price to its detriment. Harrison knew the basis for this ground of protest at the time it filed its initial protest several months before it raised the issue. Since such protest must be filed within 10 working days of when the basis for the protest is known, it is untimely. 4 C.F.R. § 21.2(b)(2) (1983). Also, on November 22, 1983, Harrison argued that USIA tailored the budget for this project to accommodate Hamilton's price. This ground was based on information received by Harrison, pursuant to a Freedom of Information Act request, on October 20, 1983. Again, since more than 10 working days had elapsed, the issue is untimely.

for Milton J. Socolar
Comptroller General
of the United States