

DECISION



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

FILE: B-214460

DATE: July 31, 1984

MATTER OF: Riggins Company, Inc.

DIGEST:

1. Where the RFP does not indicate in relative terms the importance of cost and technical factors, it must be presumed that each will be considered approximately equal in weight.
2. The presumption that cost and technical factors are equally important is not invalidated where the protester asserts that unidentified agency personnel stated that technical factors would be "most important" and the agency denies that such statements were made.
3. The selection official's decision to award the contract to the lower technically rated, lower priced offeror is not unreasonable when the protester's numerical scoring advantage is based on the advantages of incumbency and the RFP stated that the government would retain significant control over the project.
4. The requirement that discussions be meaningful is not violated by the agency's failure to inform the protester its estimated price for a time and materials contract is higher than that of the proposed awardee.
5. Protest alleging that the agency intends to use the protester's data to administer the contract is speculative.
6. A charge that the RFP overstated the number of required man-hours, at least with respect to the protester, should have been brought prior to the closing date of the solicitation and, therefore, is untimely.

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Riggins Company, Inc. (Riggins), protests the proposed award of a contract to Lockwood Brothers, Inc. (Lockwood), under request for proposals (RFP) No. 1-06-5626-9304, issued by the National Aeronautics and Space Administration (NASA). We dismiss the protest in part and deny the protest in part.

The RFP solicited proposals for a time and materials contract to reinstall a supersonic wind tunnel at the NASA Langley Research Center in Hampton, Virginia. The tunnel had been disassembled and removed from its original California location under an earlier contract with Riggins. The RFP stated that the government would maintain control over the project by the issuance of work orders stipulating the scheduling and staffing of the various tasks.

The RFP requested both technical and business proposals, each of which were to be evaluated independently. Technical proposals were evaluated on the basis of specific weighted criteria and awarded numerical scores; business proposals were not point-scored. Rate quotations for labor and equipment were part of the business proposals and estimated prices were calculated by applying the proposed rates to an agency-stipulated level of required hours.

After finding both Riggins and Lockwood within the competitive range, NASA conducted discussions and asked for best and final offers. NASA determined that Riggins' final offer contained the superior technical proposal, but found that Lockwood's price was more advantageous. The Evaluation Committee noted that Riggins' superior technical proposal reflected the knowledge it had gained in the earlier contract to disassemble the tunnel.

The selection official found that both companies were "clearly capable of effectively performing the required work." In the final analysis, he decided "the better technical proposal from Riggins did not offset the substantially lower price offered by Lockwood." Accordingly, he selected Lockwood as the proposed awardee.

Riggins protests that: NASA did not follow its stated evaluation criteria; NASA did not enter into "meaningful" discussions; NASA is improperly benefiting from the technical information submitted by Riggins; and the RFP overstated the required number of man-hours.

Evaluation Criteria

Riggins maintains that the language of the RFP indicated greater weight would be placed on the technical proposal than on the business proposal. In taking this position, Riggins relies heavily on the first sentence of the technical proposal, which states: "Your Technical Proposal will be important in the evaluation of your company and in contractor selection." Riggins points out that nowhere in the RFP did it state the business proposal was to be "important." Therefore, it argues that, when read as a whole, the RFP should be construed as placing greater emphasis on the technical proposal.

NASA responds that the RFP required that both proposals be afforded equal weight. It notes that although the business proposal did not use the word "important," it did state:

"[The business factors] . . . will be reviewed and analyzed for consideration in selection for negotiation.

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"Price will be considered together with other pertinent factors in determining the most acceptable source for this effort."

NASA points out that nowhere in the RFP was it stated the technical proposal was to be more important than the business proposal, or that cost was less significant than technical considerations. It maintains that, since the RFP was silent on this issue, each was to be given equal consideration.

Our Office has held that where the RFP indicates that cost will be considered, without explicitly indicating the relative importance of cost versus technical, it must be presumed that cost and technical considerations will be considered approximately equal in weight. Medical Services Consultants, Inc.; MSH Development Services, Inc., B-203998; B-204115, May 25, 1982, 82-1 C.P.D. ¶ 493; University of New Orleans, B-184194, May 26, 1978, 78-1 C.P.D. ¶ 401; 53 Comp. Gen. 686, 690 (1973).

We believe this principle is applicable to the situation presented here. The RFP stated that the technical proposal was "important"; however, it also stated that the business proposal contained factors which would be "considered." Neither statement contains any indication of the relative "importance" or "consideration" to be afforded each. In the absence of any comparative terms, we cannot conclude that either proposal was intended to be more important.

Riggins also states that, during the preproposal conference, NASA personnel said that the technical proposal was "most important." No specific speaker is identified and the agency denies that the statement was made.

We have stated that the burden of proof is on the protester, and we will not consider that burden met where the only evidence is conflicting statements of the protester and the agency. Systems Development Corporation and International Business Machines, B-204672, Mar. 9, 1982, 82-1 C.P.D. ¶ 218, at page 22. We conclude the RFP established that technical and business factors were to be given equal consideration.

Riggins maintains that notwithstanding the evaluation criteria established in the RFP, NASA gave greater weight to cost than to technical merit. Riggins contends that even if business and technical factors were afforded equal weight, Riggins should have been awarded the contract on the basis of its superior technical proposal.

In response, NASA points out that the selection official found both technical proposals to be acceptable and both offerors "clearly capable of effectively performing the tunnel installation work." NASA maintains that it weighed the additional expertise offered by Riggins against the additional price it would have to pay and decided that Lockwood's lower price was more advantageous. In support of this decision, NASA points out that the contract work will be performed under government guidance and direction. Therefore, additional technical expertise is not as valuable as if total control were to be turned over to the contractor.

Our Office has recognized that in a negotiated procurement, selection officials have broad discretion in determining the manner and extent to which they will make use of technical and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the

tests of rationality and consistency with the established evaluation factors. Information Network Systems, B-208009, Mar. 17, 1983, 83-1 C.P.D. ¶ 272. We have held that the decisions of selection officials were reasonable in similar situations where the agency determined the cost premium of a higher rated, higher priced offeror was not justified in light of the acceptable level of technical expertise available at a lower cost. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 C.P.D. ¶ 325. Further, our Office has recognized that where, as here, the numerical scoring advantage of an offeror is based on the advantages of incumbency (here, Riggins' prior experience in disassembling the tunnel), a selection official may conclude that the technical rating does not indicate a significant technical advantage which would warrant paying a substantially higher price. Bunker Ramo Corporation, 56 Comp. Gen. 712 (1977), 77-1 C.P.D. ¶ 427.

Since the contract has not yet been awarded, we are not at liberty to discuss the scores of, or prices quoted in, the two proposals. In this connection, however, we note that Riggins has erroneously concluded that the original technical scoring gave it a 950 to 350 edge and Lockwood's evaluated cost was only marginally better than Riggins'. After reviewing the agency record in camera and considering all of the facts presented, we conclude that the agency's tradeoff of cost and technical factors was not unreasonable.

Meaningful Discussions

Riggins maintains that if NASA considered its price so high as to outweigh its superior technical proposal, price should have been considered a deficiency in its proposal, and NASA should have disclosed that deficiency. Riggins argues that, by not making such a disclosure, NASA failed to engage in meaningful discussions.

NASA responds that although it did not consider Riggins' overall price to be so high as to constitute a deficiency, it did nonetheless engage in meaningful discussion with Riggins. By letter dated November 15, 1983, NASA asked Riggins questions concerning: the experience and qualifications of its in-house tradesmen; the need for, and cost of, a full-time onsite recordkeeper/purchasing agent; and the basis for forklift costs that NASA believed were excessive. In another letter, dated November 23, 1983, NASA asked what effect a postponed starting date would have on Riggins' proposed prices. NASA maintains that if it had

been more specific concerning Riggins' overall price, it would have violated NASA Procurement Regulations §§ 3.805-1(c) and 3.804-3(b)(5)(iii), which prohibit engaging in an auction.

We have held that while discussions must be "meaningful," the extent of discussions necessary to satisfy that requirement is a matter of judgment primarily for determination by procuring officials and is not subject to question by our Office unless shown to be clearly without a reasonable basis. Health Management Systems, B-200775, Apr. 3, 1981, 81-1 C.P.D. ¶ 2545. The essence of meaningful discussions is that the agency point out the offeror's deficiencies and permit it to revise its proposal to attempt to correct those deficiencies. We have held that requests for clarifications or amplifications which lead offerors to areas of their proposals that are deficient are sufficient to put them on notice of the deficiencies. Systems Sciences Incorporated, B-205279, July 19, 1982, 82-2 C.P.D. ¶ 53; Serv-Air, Inc., 57 Comp. Gen. 827 (1978), 78-2 C.P.D. ¶ 223.

We believe the agency's requests were sufficient to put Riggins on notice of the need to reevaluate its proposed prices. Three of the four questions asked dealt with price considerations. Further, as NASA points out, the other rates for labor and equipment were considered reasonable, even if higher than Lockwood's, and it had to guard against engaging in an auction. Accordingly, we find no basis for concluding that discussions were not meaningful.

Use of Technical Data

Riggins alleges that NASA is "now in a position to utilize" the information Riggins submitted in its technical proposal.

NASA denies any intention to use Riggins' technical proposal. NASA also notes that enclosure 1, paragraph (b), of the RFP contains a "Notice" provision whereby offerors may protect any technical data in proposals believed to be trade secrets. Riggins did not notify NASA that it wished any part of its proposal so protected.

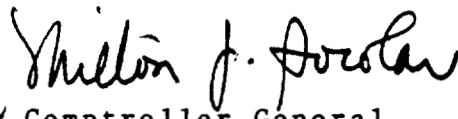
In any event, our Office has held that a protest which merely anticipates improper agency action is speculative. Afri-American Supply Company, B-206137, Feb. 17, 1982, 82-1 C.P.D. 141. Accordingly, we will not consider this issue.

Overstated Man-hours

Finally, Riggins states that NASA overstated the required man-hours in its RFP and failed to consider the efficiency that would be achieved by Riggins in view of its prior experience in disassembling the tunnel.

We believe that any charge that the requirements as stated in the RFP were excessive, at least with respect to Riggins, should have been brought prior to the closing date of the solicitation. The Bid Protest Procedures of this Office do not permit an offeror to accept an RFP's requirements during competition then, after selection, argue that the requirements were somehow defective. 4 C.F.R. § 21.2(b)(1) (1984). Accordingly, this issue is dismissed as untimely.

The protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States