



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Orkand Corporation

File: B-224541

Date: December 31, 1986

DIGEST

1. Offeror was not prejudiced by agency's determination that two competing proposals were essentially equal technically where both proposals received superior overall technical evaluation ratings even though protester's proposal was not rated quite as highly as awardee's in all technical areas.

2. A proposal is ambiguous only when it is susceptible to more than one reasonable interpretation, and where awardee's best and final cost proposal clearly indicated the specific manner in which the firm would apply the different proposed fixed hourly rates for contractor and subcontractor personnel in performing the work, the proposal was not ambiguous and was properly evaluated by the agency as the low cost offer.

3. Although, as a general rule, a contracting agency conducting a negotiated procurement set aside for small business concerns must notify all unsuccessful offerors prior to contract award of the identity of the apparently successful offeror, the governing regulation excuses this requirement upon a written determination by the contracting officer that the urgency of the procurement necessitates that award be made without delay.

DECISION

The Orkand Corporation (Orkand) protests the award of a contract to Diversified Data Corporation (DDC) under request for proposals (RFP) No. DAAB07-86-R-F126, issued as a total small business set-aside by the Department of the Army. The procurement is for the acquisition of management support services for the Army's Night Vision & Electro-Optics Center at Fort Belvoir, Virginia. Orkand asserts that the award to DDC was improper because the Army erroneously evaluated the proposals of Orkand and DDC as being essentially equal technically. Moreover, Orkand contends that DDC's cost

proposal was ambiguous, thereby resulting in an improper determination by the Army that it was lower than Orkand's. Finally, Orkand complains that the Army's failure to provide the required preaward notice that DDC was the apparently successful offeror prevented Orkand from filing a timely status protest.

We deny the protest.

The solicitation contemplated the award of a time-and-materials contract^{1/} for an 18-month base period plus an 18-month optional period of performance. The level of effort necessary to perform the work was estimated by the government to be a maximum total of 42,360 man-hours for each 18-month period, divided into the following labor categories, which were identical for each period:

	<u>Estimated Maximum Hours</u>
Senior Programmer	5,430
Technical Writer	2,010
Programmer	8,160
Junior Programmer	1,560
Data Entry Clerk	17,100
Clerk	6,240
Typist	1,860

Offerors were required to furnish separate fixed hourly rates for these categories in both the base and option periods.

The RFP advised that the contract award would be based on the best overall proposal considering technical, cost, and management factors, in that order of importance. Specifically the RFP provided that the technical factor was of greater weight than the two other factors combined. The solicitation

^{1/} A time-and-materials contract is essentially a contract in which the labor provided is at a fixed hourly rate including overhead and profit. Federal Acquisition Regulation, 48 C.F.R. § 16.601 (1985).

also noted that cost was more important than management and would be evaluated on the basis the total cost for both the base and option periods.

The RFP was issued on July 8, 1986. Four proposals were received in response to the solicitation, and the proposals of Orkand (the incumbent), DDC, and Advanced Design Corporation (Advanced) were determined to be within the competitive range. Orkand and DDC were both rated as "Superior" overall in the technical area and as "Acceptable" with regard to management considerations. Advanced received "Acceptable" ratings in both areas. No technical or management discussions were conducted.

DDC submitted the lowest cost proposal with a total cost (base and option) of \$1,326,526. Orkand's proposed cost was \$1,369,770. Cost discussions were held, and all firms reduced their costs somewhat upon the agency's request for best and final offers (BAFOs). However, the cost ranking among the firms remained the same, with DDC low at \$1,312,091, followed by Orkand at \$1,356,248.

The Army determined that DDC's proposal represented the best overall proposal since it was rated as "Superior" for its technical aspects and was lowest in cost. The contract was awarded to DDC on September 29, 1986, and Orkand was advised of this award by letter of the same date. On October 6, Orkand protested to the contracting officer DDC's status as small business entitled to an award under the set-aside because of its intent to subcontract a portion of the work to Systematics General Corporation (SGC), a large business. Following a debriefing held on October 9, Orkand then filed this protest against the award to DDC.

PROTEST POSITION

Orkand challenges the award on several grounds. The firm complains that both its proposal and that of DDC were generally rated as "Superior" in the technical area, no precise numerical scores being utilized for evaluation purposes, and that the contracting officer, in selecting DDC for the award on the basis of lowest cost, failed to make a specific determination that the proposals were, in fact, essentially equal technically.

Moreover, Orkand argues that the Army failed to recognize that DDC's cost proposal was ambiguous because the firm proposed two sets of labor rates (both its own and those of its subcontractor, SGC) for three of the labor categories required by the RFP. Since the rates of DDC and SGC

differed appreciably, Orkand urges that the Army's determination that DDC's proposal was low was in error because the proposal was not properly evaluated on the basis of the higher applicable rate for each category in question. Therefore, Orkand contends that even if the Army legitimately found the proposals to be technically equal, so that cost, in consequence, became the determinative factor, it was entitled to the award as the low offeror.

Finally, Orkand contends that the Army violated the applicable procurement regulation by not advising the firm prior to award that DDC was the apparently successful offeror. Orkand contends that this failure was prejudicial because it prevented the firm from filing a timely size status protest challenging DDC's eligibility for an award under the set-aside due to its subcontracting relationship with SGC, a large business.

ANALYSIS

Improper Technical Evaluation

We find no merit in Orkand's argument that the Army erred in evaluating both proposals as equally "Superior" overall in the technical area.

The technical evaluation factor was comprised of five subcriteria, ranging in descending order of importance from knowledge and understanding of the contract requirements to completeness of the proposal. Both proposals received the rating of "Superior" for technical knowledge and understanding, the most important subcriterion, but DDC's proposal was rated "Superior" in two other technical subcriteria areas as well, whereas Orkand's was rated "Superior" in only one other area. The other subcriteria ratings for both proposals were "Acceptable."

Since Orkand's proposal, in fact, was not rated quite as highly as DDC's, we fail to see how the agency's overall rating of both proposals as "Superior" had any prejudicial impact on Orkand's competitive standing. Moreover, we see nothing in the record to suggest, nor has Orkand directly alleged, that DDC's proposal received a higher rating than was reasonable and consistent with the specified evaluation criteria. See APEC Technology Ltd., 65 Comp. Gen. 230 (1986), 86-1 CPD ¶ 81. Because both proposals were judged

be technically superior overall, it is unquestioned that the proposals were properly viewed as essentially equal in terms of technical merit. Cf. Lockheed Corp., B-199741.2, July 3, 1981, 81-2 CPD ¶ 71 (proposals with 15 percent technical scoring difference reasonably determined to be essentially equal technically). Hence, cost became the determinative factor for source selection purposes even though the evaluation criteria had originally assigned it less importance than technical considerations. See SETAC, Inc., 62 Comp. Gen. 5 (1983), 83-2 CPD ¶ 121; Assoc. for the Education of the Deaf, Inc., B-220868, Mar. 5, 1986, 86-1 CPD ¶ 220.

Improper Cost Evaluation

We also reject Orkand's argument that DDC's cost proposal was ambiguous and resulted in an erroneous determination that DDC was the low cost offeror.

It is undisputed that DDC had entered into a subcontracting arrangement with SGC, whereby SGC would provide its own personnel to complete the man-hour requirements for three of the seven required labor categories. For this reason, DDC's proposal contained different sets of fixed hourly rates for these three categories for both the base and option periods.

	<u>DDC RATES</u>		<u>SGC RATES</u>	
	<u>Base</u>	<u>Option</u>	<u>Base</u>	<u>Option</u>
Technical Writer	\$22.40	\$23.41	\$17.90	\$18.68
Programmer	17.86	18.67	19.88	20.74
Data Entry Clerk	11.10	11.60	13.23	13.80

It is Orkand's view that because these different sets of rates were proposed by DDC, the firm, and not the government controls the final cost of the contract because DDC can determine which particular mix of DDC and SGC personnel are to be used for the three labor categories in question. Hence, Orkand contends that DDC's proposal was ambiguous as to cost and that the Army was required to obviate the prejudicial effect of this circumstance by evaluating the proposal at the higher of the two sets of proposed rates (both base

and option) for each of the three categories. Orkand calculates that if these higher rates are extended by the government's estimated maximum hours for these categories, DDC's best and final evaluated cost increases from \$1,312,091 to \$1,385,520, making it higher than Orkand's.

However, we believe that Orkand's argument overlooks the fact that DDC expressly indicated in its best and final offer the specific number of man-hours that would be furnished by either DDC or SGC for these three categories. In this regard, the firm's best and final offer contained a "Pricing Summary" which provided that SGC would furnish the entire 2,010 estimated hours required for the Technical Writer category, 6,240 of the 8,160 Programmer category hours, and 6,240 of the 17,100 Data Entry Clerk category hours.^{2/} We have analyzed DDC's cost proposal on the basis of this labor hour mix, and our results fully agree with DDC's proposed total cost of \$1,312,091 for the base and option periods.

^{2/} DDC's "Pricing Summary" was as follows:

<u>"Category</u>	<u>Hours*</u>	<u>Basic Cost</u>	<u>Option Cost</u>	<u>Total --</u>
Sr. Programmer	5,430	142,972	149,434	292,406
Tech Writer	- 0 -*	- 0 -	- 0 -	- 0 -
Programmer	1,920*	34,291	35,846	70,137
Jr. Programmer	1,560	24,040	25,132	49,172
Data Entry Clerk	10,860*	120,546	125,976	246,522
Clerk	6,240	59,592	62,275	121,867
Typist	1,860	<u>17,763</u>	<u>18,563</u>	<u>36,326</u>
Total Labor		399,204	417,226	816,430
Subcontractor Portion		<u>242,585</u>	<u>253,076</u>	<u>495,661</u>
GRAND TOTAL LABOR		641,789	670,302	1,312,091

*Hours do not include subcontractor hours."

DDC's best and final proposal stated that:

"In categories for which DDC and SGC have both submitted proposed rates, it is intended that there will be both DDC and SGC personnel in those labor categories. Their hours and costs will be readily distinguishable and auditable"

In our view, this statement, when read in conjunction with the DDC/SGC man-hours breakdown provided in the "Pricing Summary," clearly means that DDC was offering to perform the contract with the specific labor hour mix delineated in the summary, and not that the firm intended to alter the mix of DDC and SGC personnel in the three labor categories as the contract was being performed. Since we believe that the proposal reasonably was susceptible of only one interpretation, it was not ambiguous and, accordingly, was correctly evaluated by the government as being the low offer. See Energy Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234.

Orkand also argues that it would not make any difference if DDC included a DDC/SGC man-hours breakdown in its proposal because the proposal was not incorporated into the contract. Orkand contends that this is the case because Block 17 and not Block 18 of Standard Form (SF) 26 was completed upon award of the contract.^{3/} Block 17 of SF 26, entitled "Contractor's Negotiated Agreement," provides that the rights and obligations of the parties are governed by:

". . . (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein."

In contrast, Block 18, entitled "Award," provides that completion of the block consummates the contract "which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. no further contractual document is necessary." (Emphasis supplied.) Orkand urges that DDC's proposal, and, therefore the "Pricing Summary," are not part of the contract because Block 18, expressly providing for incorporation of the "offer," was not utilized. We do not agree.

^{3/} Block 17, as here, is completed when the contractor is required to sign the SF 26 and return two copies of the document to the contracting officer. Block 18 is used when the offeror's signature is not required.

Clause H.1 of the contract provides that section M of the solicitation, "Evaluation Factors for Award," is "incorporated in and form[s] a part of the resultant contract" Section M in turn provided that a critical aspect of the government's cost evaluation for award purposes was the offeror's compliance with clause L.107 of the solicitation, which required the offeror's submission of complete cost breakdown data on SF 1411, the "Contract Pricing Proposal." With its offer, DDC furnished a complete SF 1411 which attached the "Pricing Summary" document at principal issue here. Therefore, it is our view that clause H.1 of the contract effectively operates to incorporate by reference the DDC/SGC man-hours breakdown set forth in the "Pricing Summary" and which was part of DDC's submitted SF 1411. See Reliable Building Maintenance, Inc., B-211598, Sept. 19, 1983, 83-2 CPD ¶ 344. Moreover, we believe that the clear intent of the parties to be bound by the condition of the "Pricing Summary" is readily apparent through the government's acceptance of the offer and award of the contract to DDC. See Laurence Hall d/b/a/ Halcyon Days, B-189697, Feb. 1, 1978, 78-1 CPD ¶ 91. In this regard, it is well-settled that the government's acceptance may not materially vary the terms of the offer. Computer Network Corp. et al.--Requests for Reconsideration, 56 Comp. Gen. 694 (1977), 77-1 CPD ¶ 422.

Failure to Provide Preaward Notice

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.1001(b)(2) (1985), provides that, with respect to negotiated procurements which are small business set-asides, the contracting officer, upon the completion of negotiations and determinations of responsibility, but prior to award, shall inform all unsuccessful offerors of the name and location of the apparent successful offeror. The purpose of this provision is to provide a sufficient period of time in which an unsuccessful offeror may challenge the prospective awardee's small business status. This reflects the FAR, 48 C.F.R. § 19.302(d)(1), which provides that, in order to be timely, a size status protest under a negotiated procurement must be filed with the contracting officer no later than the 5th business day after receipt by the challenging party of the preaward notification from the contracting officer identifying the apparently successful offeror.

Orkand complains that the award was improper because the Army failed to provide the prescribed preaward notice, thereby preventing it from filing a timely size status protest concerning DDC's affiliation with SGC. However, as the Army

correctly points out in its administrative report, the FAR, 48 C.F.R. § 15.1001(b)(2), supra, also provides an exception to the preaward notice requirement when the contracting officer determines in writing "that the urgency of the requirement necessitates award without delay." Here, the record shows that the contracting officer made such a determination on September 24. Although Orkand further complains that a period of time therefore existed between the date of this determination and the September 29 date of award in which notice of DDC's selection could have been provided, some if not all of this time would have been consumed by the mailing and delivery of the award selection notice, and it is obvious that the recipients of the notice would not have had any meaningful time in which to file a size status protest. In any event, the contracting officer's September 24 urgency determination, by regulation, was legally sufficient to excuse compliance with the preaward notice requirement, FAR, 48 C.F.R. § 15.1001(b)(2), supra, and we have seen nothing in the record which would call that determination into question.

The protest is denied.

for *Seymour E. For*
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General Counsel