



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Actus Corporation/Michael O. Hubbard and L.S.C.
Associates
File: B-225455
Date: February 24, 1987

DIGEST

1. The General Accounting Office has no authority to determine what information the contracting agency must release to the protester under the Freedom of Information Act but will review the requested source selection documents in camera to resolve a bid protest.
2. A protest that the request for proposals is defective because it does not adequately indicate the evaluation factors is untimely where filed after the contract has been awarded.
3. Where the solicitation does not expressly state the relative importance of price versus technical factors, price and technical factors will be considered to be approximately equal in importance.
4. Where selection officials, after evaluating proposals on a basis clearly consistent with the solicitation's stated scheme, reasonably regard technical proposals as essentially equal, cost or price may become the determinative selection factor.
5. Although the protester's proposal received the highest technical rating, it was not unreasonable for the contracting agency to make award to the awardee to take advantage of its lower price, where the agency considered the protester's and awardee's technical proposals to be essentially equal.
6. Allegation that the source selection board in a procurement for design and construction of a family housing project improperly allowed its preference for a townhouse configuration to affect the selection process is dismissed where the protester could not have been competitively prejudiced by the board's alleged bias, because the protester

itself offered only a townhouse configuration. Furthermore, since the protester did not comment upon the agency's report on this issue, the issue is considered abandoned.

DECISION

Actus Corporation/Michael O. Hubbard and L.S.C. Associates (Actus), a joint venture, protests the Department of the Navy's award of a contract to San Diego Diversified Builders Services (Diversified) pursuant to request for proposals (RFP) No. N62474-83-R-2553. The solicitation was issued by the Western Division, Naval Facilities Engineering Command and requested proposals for design and construction of 200 family housing units at the Naval Complex, San Diego, California. Basically, Actus alleges that the RFP is deficient because it does not set forth in sufficient detail the evaluation factors to be considered in award of the contract and that the Navy did not properly evaluate proposals in accord with the evaluation scheme contained in the RFP.

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

The solicitation was issued on May 30, 1986, and, as amended, required initial proposals to be submitted by July 30. A preproposal conference with potential offerors was convened and written questions were submitted to the Navy which responded with written answers and clarifications. Eight proposals were received by the Navy and were evaluated by the Technical Evaluation Board under the guidance of the Source Selection Board. The evaluators determined that the four highest technically rated proposals were "high quality technical" proposals of "almost equal quality." The evaluators determined that there was no need to conduct discussions with offerors because adequate technical and price competition had been achieved. The Source Selection Board then turned its attention to price considerations and concluded that Diversified's proposal, which was \$687,000 less than its nearest competitor among the four highest rated technical proposals, was the "most advantageous" proposal. Therefore, award was made to Diversified on the basis of initial proposals on September 19. Actus protested the award with the Navy on October 3, and the Navy denied Actus' protest by letter dated October 21. The present protest was filed with our Office on November 3.

At the outset, Actus complains that the Navy refuses to provide it with certain evaluation documents (the reports of the Technical Evaluation Board and the Source Selection Board) it requested under the Freedom of Information Act

(FOIA), 5 U.S.C. § 552 (1982). Actus points out that the Navy's report on this protest contained copies of these evaluation materials which were so heavily expurgated by the Navy as to prevent Actus from providing detailed information in support of its protest. Actus requests that our Office release unexpurgated copies of those documents to it.

Our Office has no authority to determine what information must be disclosed by a contracting agency under the FOIA; a protester's recourse to the contracting agency's denial of its request for documents is to pursue the remedies provided in the FOIA. E.R. Johnson Associates, Inc., B-217059, May 8, 1985, 85-1 CPD ¶ 513 at 3. In any event, although the documents in question have not been furnished to Actus, the Navy has provided all of the requested source selection material, as well as the proposals of Actus and Diversified, to our Office for our in camera consideration.

Concerning evaluation of proposals, the solicitation states (at paragraph 1C.1, entitled "CONTRACT AWARD") that:

"a. The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, cost or price and other factors, specified elsewhere in this solicitation, considered.

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"c. The Government may award a contract on the basis of initial offers received, without discussions. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint."

The RFP also contains (in section 4, entitled "STANDARD TECHNICAL EVALUATION MANUAL FOR TURNKEY NAVY FAMILY HOUSING PROJECTS") 21 pages of detailed evaluation criteria for use in considering technical proposals submitted in response to the solicitation. As we understand it, this technical evaluation manual represents the method used by all agencies within the Department of Defense to evaluate technical proposals for turnkey family housing projects and the Navy modified the technical evaluation manual only slightly for use in the present RFP. No other evaluation criteria are contained in the solicitation.

The protester argues that "[i]t is apparent that [the] solicitation is at least deficient, if not defective, on its face because the more detailed evaluation criteria required by Paragraph 1C.1 are not 'specified elsewhere in the solicitation.'" The protester further contends that the RFP does not comply with the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.605(e) (1986), which requires the solicitation to state clearly the evaluation factors, including price or cost and any significant subfactors that will be considered in the source selection, and their relative importance.

To the extent that Actus argues that the RFP is defective because it does not adequately state the evaluation factors which are referred in paragraph 1C.1 as "other factors" in addition to cost or price, the protest is untimely. Our Bid Protest Regulations require that a protest based upon alleged improprieties apparent on the face of the RFP be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1986); Medical Services Consultants, Inc. et al., B-203998 et al., May 25, 1982, 82-1 CPD ¶ 493 at 4. However, Actus did not protest until after the contract had been awarded to Diversified. Therefore, we will not consider this issue on its merits.

Actus next alleges that the Navy gave more weight to price than to technical considerations, and thus misapplied the evaluation criteria as set forth in the RFP. Actus argues that, where the RFP does not indicate the relative importance of cost and technical factors, cost and technical factors are to be considered as approximately equal in weight. Actus cites previous cases issued by our Office in support of this principle (Riggins Co., Inc., B-214460, July 31, 1984, 84-2 CPD ¶ 137, and Fabrics Plus, Inc., B-218546, July 12, 1985, 85-2 CPD ¶ 46).

Actus points out that the Technical Evaluation Board rated its technical proposal at 767 points out of a possible 1000 points for technical factors while Diversified's technical proposal was given only 703 points. Actus also points out that it proposed to do the work for \$12,260,000 while Diversified offered a price of \$11,533,000. The protester contends that the Navy should have divided the proposed price specified by a proposal by the number of points received by that proposal for technical factors to determine the mathematical ratio of dollars quoted for each technical point awarded. According to Actus, "This places exactly equal weight on the cost and technical evaluation factors. If

these calculations are done in this particular instance the resulting quotient for Actus Corporation, et al. is 15,984 (\$12,260,000.00 divided by 767), and the comparable figure for San Diego Diversified is 16,405."

Actus believes that, instead of considering cost and technical factors as approximately equal in weight, the Navy actually selected the lowest cost proposal which met "minimum in-house criteria which were not stated in the RFP." Actus charges that the Navy gave greater weight to the lower cost offered by Diversified than to the higher technical score given to Actus' proposal by the Technical Evaluation Board. In sum, Actus concludes that it should have been awarded this contract based upon its lower cost per technical point ratio.

The RFP specifically stated in paragraph 1C.1 that award would be made on the basis of the "most advantageous" offer "cost or price and other factors, specified elsewhere in this solicitation, considered." The RFP then set out in section 4 a very detailed technical evaluation manual which described precisely how technical proposals would be evaluated. In its written answers to preproposal questions, the Navy indicated that the term "other factors" referred to the technical features of a proposal as evaluated in accord with the RFP's technical evaluation manual. In paragraph 4A.2 of the "Introduction" to this technical evaluation manual, the RFP stated the major evaluation areas and the percentage of relative weight assigned to each evaluation area, as follows:

"a. Site Design	30%
b. Site Engineering	10%
c. Dwelling Unit Design	50%
d. Dwelling Unit Engineering and Specifications	10%
Technical Evaluation Total	100%"

Thus, while the relative importance of price vis-a-vis technical factors was not expressed in the RFP, the technical factors and their importance relative to other technical factors were clearly stated.

Regarding the emphasis placed upon price by the Navy in the selection process, as the protester notes, we have previously held that where, as here, an RFP indicates that cost will be

considered, without explicitly indicating the relative weight to be given to cost versus technical factors, it must be presumed that cost and technical considerations will be considered approximately equal in weight. See Medical Services Consultants, Inc. et al., B-203998 et al., supra, 82-1 CPD ¶ 493. Moreover, we have specifically held that, even where price is not listed at all as an evaluation factor, it should be obvious to all offerors that, if proposals are otherwise equal, the overall cost to the government would be an important factor, since cost must be considered in every competitive procurement. Multinational Agribusiness Systems Inc., B-201447, June 15, 1981, 81-1 CPD ¶ 482. Furthermore, as indicated above, the RFP (in paragraph 1C.1) specifically put offerors on notice that price would be an important consideration in the selection decision. Thus, we think it is clear from the RFP and general procurement principles that price was to be a key element of the award decision.

In considering protests against an agency's evaluation of proposals, we will not evaluate the proposals anew and make our own determination as to their acceptability or relative merits. Bendix Field Engineering Corp., B-219406, Oct. 31, 1985, 85-2 CPD ¶ 496. However, we will examine the record to determine whether the evaluation was consistent with the evaluation criteria. See Deuel and Associates, Inc., B-212962, Apr. 25, 1984, 84-1 CPD ¶ 477. -

Where, as here, the RFP does not assign weights to technical factors and cost upon which a selection is to be based, the selection officials retain considerable discretion in determining the significance of technical point score differentials in making technical/cost tradeoffs. Association for the Education of the Deaf, Inc., B-220868, Mar. 5, 1986, 86-1 CPD ¶ 220 at 5. Their decision, the manner in which they use the results of technical and cost evaluations, and the extent, if any, of technical/cost tradeoffs are governed only by the tests of rationality and consistency with established evaluation criteria. *Id.* Thus, Actus' contention that the Navy was required to award the contract to it because Actus' price per technical point ratio was slightly lower than Diversified's price per technical point ratio is not persuasive. Since the RFP did not provide a formula demonstrating how price and technical scores would be used in the selection process, the selection officials were free to use any reasonable method to select the most advantageous proposal as long as price and technical scores were given approximately equal weight and the evaluation was conducted in a manner which was consistent with the RFP's stated evaluation scheme.

Where selection officials reasonably regard technical proposals as being essentially equal, cost or price may properly become the determinative factor in making an award, even where the RFP evaluation scheme assigns cost less importance than technical factors. Id. at 6; SETAC, Inc., 62 Comp. Gen. 577 (1983), 83-2 CPD ¶ 121. Here, where price was not assigned any weight relative to technical considerations and therefore must be considered approximately equal to the technical factors in the selection process, it is even more apparent that lower cost or price could properly be the deciding factor since the agency considers the proposals to be essentially technically equal.

We have reviewed all of the evaluation materials, including the unexpurgated copies of the Technical Evaluation Board's report and the Source Selection Board's report, and examined the proposals submitted by Actus and Diversified in light of the protest issues raised by Actus. We conclude that the technical evaluation was conducted in general compliance with the RFP's technical evaluation manual. While we are not at liberty to discuss the details contained in the Source Selection Board's and the Technical Evaluation Board's reports, we can verify that the evaluation appears to have been very thorough, included virtually every significant area of the technical evaluation manual, and gave proper emphasis to technical areas based upon the weights assigned each evaluation factor in the technical evaluation manual (quoted above).

The Technical Evaluation Board gave the four highest quality proposals total technical scores ranging from a high of 767 points (Actus) to a low of 703 points (Diversified), while the four lowest quality proposals were given total scores in the range from 664 points to 423 points. The Source Selection Board considered the four proposals (including Actus' and Diversified's proposals) with the highest technical ratings to be "high quality technical proposals each of which provided a significant amount of amenities with few undesirable features." The record also shows that the Source Selection Board considered the four highest technically rated proposals to be of "almost equal quality" and that the Source Selection Board attempted without success to find anything significant which set one proposal above the others on technical grounds alone.

Ultimately, the Navy selected Diversified's proposal for award, because it was essentially technically equal to the highest rated proposal (Actus) but represented a savings of

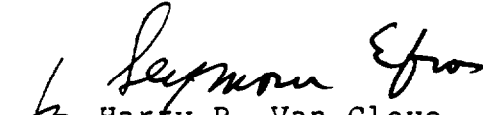
approximately \$727,000 over that proposal, and \$687,000 over the next lowest cost proposal in the "high quality" rated category. Moreover, the Navy determined that Diversified's proposal represented the "lowest overall cost" to the government.

We find nothing in the record to suggest that Diversified's proposal received a higher technical rating than was reasonable and consistent with the stated evaluation criteria. See The Orkand Corp., B-224541, Dec. 31, 1986, 86-2 CPD ¶ 723. In view of the fact that Actus' proposal was only rated 9 percent higher in technical quality than Diversified's proposal, we cannot find unreasonable the Navy's determination that the proposals were essentially technically equal. We have upheld determinations that technical proposals were essentially equal despite differentials significantly greater than the one here. See, for example, Lockheed Corp., B-199741.2, July 31, 1981, 81-2 CPD ¶ 71 (where the differential was more than 15 percent). Accordingly, the Navy's decision to save approximately \$687,000 by awarding to Diversified was reasonable.

Actus also alleges that the Source Selection Board preferred proposals offering townhouse configurations over those offering apartment configurations and that this bias improperly entered into the selection process even though the RFP did not indicate that the Navy preferred townhouses. However, assuming for the sake of argument alone that the Source Selection Board actually preferred townhouses over apartments, we cannot see how Actus was competitively prejudiced by the Board's alleged bias since Actus itself proposed only a townhouse configuration. See Micro Research, Inc., B-220778, Jan. 3, 1986, 86-1 CPD ¶ 9 at 3. Furthermore, in its report on this protest, the Navy rebutted Actus' allegation and pointed out that Actus had offered no evidence to support the charge. When it commented on the Navy's report, Actus did not refute the Navy's arguments or comment further on this issue. Therefore, we consider Actus to have abandoned this protest issue and need not consider it further. See Military Base Management, Inc., B-224128, Nov. 26, 1986, 86-2 CPD ¶ 616.

Finally, Actus has requested that it be reimbursed the costs of preparing its proposal. However, since we find the protest to be without merit, we deny the claim for costs. COMSAT International Communications, Inc., B-223953, Nov. 7, 1986, 86-2 CPD ¶ 532.

The protest is dismissed in part and denied in part.


Harty R. Van Cleve
General Counsel