The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Proprietary Software Systems

File: B-228395

Date: February 12, 1988

DIGEST

1. Where two proposals are rated acceptable in all technical and management areas, which are both weighted higher than cost under the solicitation's evaluation criteria, and the awardee's technical capabilities are rated riskier than the protester's capabilities, the source selection official, which has been apprised of the weaknesses/risks, can reasonably select the awardee based on its significant lower cost ($6.4 million vis a vis $9.4 million).

2. Where the Defense Contract Audit Agency performed audits on both offerors' cost/price proposals, including subcontractor costs and indirect costs, and offerors were provided with an opportunity to revise and/or explain their proposals based upon these comments, the agency has performed sufficient cost analysis to justify an award selection based on lower cost.

3. Where an agency advised offerors in the competitive range of all technical, management and cost concerns and gave the offerors an opportunity to revise their proposals based on these concerns, agency has satisfied the requirement that meaningful discussion be conducted. Even if an offeror's price is much higher than the other offeror's price, the agency is not required to advise the high offeror of this fact if there is no indication that the agency found the price unreasonable for the proposed technical/management approach.

4. The General Accounting Office will not consider an allegation that the awardee's subcontractor is not a small business since the Small Business Administration has conclusive statutory authority to determine small business size status.

DECISION

Proprietary Software Systems (PSS) protests the proposed award of a contract to Software Engineering Associates (SEA)

under request for proposals (RFP) No. F33657-87-R-0024, issued by the Department of the Air Force, Aeronautical Systems Division, Wright-Patterson Air Force Base. The procurement, a 100 percent small business set-aside, is for software modification/enhancement of Jovial compilers and other software support tools. PSS argues that the award was improper because the Air Force erroneously evaluated the proposals of PSS and SEA as being essentially equal technically, when PSS's proposal could only have been rated higher because of its superior performance as the incumbent contractor. Moreover, PSS challenges the Air Force's application of the RFP's evaluation criteria claiming that the Air Force gave too much weight to cost in the award selection. PSS also argues that the discussions that were conducted were not adequate.

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

The RFP contemplated the award of a firm-fixed-price labor rate contract, with provision for cost reimbursement of other direct costs, for 1 base year and two 1-year options. The RFP provided that award would be made on the basis of the "overall value of each proposal judged in terms of its potential to best satisfy the needs of the Air Force, cost and other factors considered." The areas to be evaluated, listed in descending order of importance, were (1) technical, (2) management, and (3) cost. Costs were compared on the basis of the total composite person-hour rate, which is a weighted average that accounts for the total estimated contract costs based on the total estimated hours for each job classification to be provided under the contract. For evaluation purposes, estimated hours for each job classification was stated in the RFP.

Three proposals were received in response to the RFP, one of which was withdrawn. The Source Selection Evaluation Committee (SSEC) determined that the initial technical/management proposals of PSS and SEA were technically acceptable and should be included in the competitive range for discussions.

By letters dated April 13, 1987, the contracting officer conducted written discussions with PSS and SEA. Both firms were requested to respond to deficiency reports and clarification requests and respond to cost issues raised by the proposal audits conducted by the Defense Contract Audit Agency (DCAA). Each firm was afforded an opportunity to submit additional clarifying information and best and final offers (BAFOs) were requested and received. The SSEC conducted a further technical and cost evaluation after BAFOs were submitted and the final technical evaluation results remained essentially the same.

The results of the technical evaluation by the SSEC were a color code rating and a risk assessment for each technical and management evaluation criterion and subcriterion. Both offerors received the "green" rating for technical capabilities, technical approach, management planning and management control. The "green" rating, the second highest rating under the rating plan, meant the proposals were "acceptable" in each of these evaluation areas. Under the rating plan, "acceptable" means the proposal "meets standards; good probability of success; weaknesses can be readily corrected." The risk assessment of each proposal was that there was a "low" risk for both offerors in all evaluation areas, except the SSEC found there was a "moderate" risk in SEA's technical capabilities. The evaluated BAFO cost of SEA was $6,358,659 with a total composite person-hour rate of $33.43, while the evaluated BAFO cost of PSS was $9,350,409 with a total composite person-hour rate of $58.10.

The SSEC reported its findings to the Source Selection Authority (SSA). The SSA decided that while both proposals were adequate under the evaluation criteria, the SEA proposal offered the best value since it could satisfy the technical and managerial elements of the project at the most reasonable cost.

PSS contends that the agency's technical evaluation of both proposals was flawed because its technical and management proposal was clearly superior to SEA's and should have received the higher rating. In support of its position, PSS points out that it has been the incumbent contractor since 1983 and has been successfully performing services similar to those required by this RFP. Thus, in its view, it is the most qualified contractor to interpret and understand the requirements of the RFP and each of its incumbent personnel must necessarily have superior qualifications to SEA's personnel. Moreover, PSS argues that SEA's proposal could not reasonably receive the same technical rating because (1) SEA is a small company of "only eleven people" and its current major contract "uses the majority of [SEA's] workforce"; (2) SEA's experience lies in the development and maintenance of compilers, not the other software tools; and (3) SEA has no experience in the development or maintenance of the integrated tool set required by the RFP.

In reviewing protests against the propriety of a technical evaluation, we will not evaluate the proposals anew and make our own determination as to their acceptability or relative merits, as the evaluation of proposals is the function of the contracting agency. See T.H. Taylor, Inc., B-227143, Sept. 15, 1987, 87-1 CPD ¶ 252 at 2. However, we will

reasonable and consistent with the evaluation criteria.1/ Id. The protester has the burden of showing that the evaluation is unreasonable or not consistent with the evaluation criteria; mere disagreement with the agency's evaluation does not meet this burden. See ESCO, Inc., B-225565, Apr. 29, 1987, 66 Comp. Gen. ____, 87-1 CPD ¶ 450 at 7.

In its report on the protest, the Air Force has provided us with the technical evaluations and extensive comments noting the relative strengths and weaknesses of both proposals. Based on our in camera review, we conclude that the Air Force's evaluation of the two proposals was reasonable.

A primary focus of PSS's protest is its contention that each of its proposed personnel is more qualified than SEA's personnel. The Air Force states, and our review confirms, that in this area of personnel qualifications, SEA's proposed personnel exceeded the experience requirements of the RFP.

In its comments on the agency report, PSS disputes any determination that both PSS and SEA have technically equal personnel and critiques each job classification to demonstrate the alleged superiority of its incumbent personnel. PSS argues that the agency has "generalized" the qualification evaluation criteria by emphasizing "years" of experience instead of the "applicability and quality" of the experience.

For example, the protester questions the agency's technical conclusion that SEA's proposed software engineers are equal to its own in the area of "knowledge of the computer languages in which he writes computer programs." In this regard, PSS questions whether SEA's proposed personnel have equal experience in "TILT" (Tool for Independent Language Translation).

However, we find that the solicitation did not require this more particularized experience. The RFP required software engineers to (1) meet the minimum education or experience requirements; (2) have a good knowledge of certain specified operating systems; and (3) a knowledge of the computer languages in which those individuals would write computer programs for the assigned tasks. The SSEC found, and the

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1/ In this case, the Air Force has denied the protester access to its competitor's proposal and to much of the evaluation material, but has provided all of the requested material for our review. We have reviewed these materials in camera and considered them in reaching our decision.

record supports, that SEA's software engineers had the required education and knowledge in operating systems and computer languages. The RFP did not require the software engineers to have knowledge of a specific language, TILT. Consequently, we find that the Air Force was consistent with the evaluation criteria in determining that SEA's proposed software engineers were fully acceptable.

While PSS obviously disagrees with the agency's evaluation of relative experience of the two offerors' proposed personnel, PSS's view of SEA's capabilities does not provide a legal basis for our Office to say that the agency's satisfaction with SEA's offer in this regard was unreasonable.2/ In any case, PSS has misconstrued the Air Force's position in this matter; the Air Force neither stated the proposals were equal nor that all of the proposed personnel of the two offerors were equal. Indeed, the record shows different ratings (none less than green) were awarded for the various proposed personnel of the offerors.

Another focus of PSS's protest was the more limited experience of SEA and its proposed personnel in the development and maintenance of the software tools in question, other than the Jovial compilers, for example, the assembler, linker and debugger, which also had to be developed under the contract. However, our review shows that the SSEC specifically noted this lack of experience as the primary weakness in SEA's technical approach. Indeed, this was the primary reason the SSEC concluded that SEA's technical risk was "moderate" rather than "low"; the SSEC said that this lack of experience in SEA and its proposed personnel increased the risk that the contract work would not be completed in a timely manner. On the other hand, SEA was found to display a very good understanding and technical approach to the project and outstanding experience in the development of the Jovial compilers, the major component of the system. Consequently, the SSEC awarded SEA a "green" acceptable rating in all technical and management areas.

The SSEC specifically advised the SSA of both offerors' "green" ratings and that SEA had a "moderate" risk in technical capability, whereas PSS's risk was "low." The SSA was also specifically advised of SEA's noted weaknesses/ risks before he made his award selection. The record shows that the SSA considered the findings of the SSEC and, in the selection memorandum, stated that he found both proposals adequate when measured against the evaluation criteria; he

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2/ We will not discuss here the other job classifications critiqued by PSS, although our review indicates the SSEC ratings were reasonable.

did not specifically find the proposals were technically equal. He found, and the record supports, that the cost savings attributable to SEA's proposal were significant and offered the best value to the government.

Even though technical and management factors were weighted more than cost, and the SSEC report indicates that PPS's proposal has a modest technical advantage because of SEA's proposal's "moderate" technical risk, the facts are that both offerors received "green" ratings for these criteria, while SEA had almost a $3 million cost advantage. Under the evaluation criteria, the SSA could legitimately balance a modest technical advantage against a considerable cost advantage and decide that the modest technical advantage is not worth the price, even though cost has less evaluation weight, particularly if the technical advantage is attributed to the advantages of incumbency. Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-2 CPD ¶ 427; Summit Research Corp., B-225529, Mar. 26, 1987, 87-1 CPD ¶ 344; Frequency Engineering Laboratories Corp., B-225606, Apr. 9, 1987, 87-1 CPD ¶ 392. We find the SSA did, in fact, perform a proper cost/technical tradeoff analysis giving due consideration to cost and found that the government would get the "best value" from SEA's acceptable low cost proposal. Consequently, we find the SSA gave appropriate weight to technical, management and cost factors in the award evaluation and find no merit in PSS's allegation that the award to SEA ignored the RFP evaluation criteria and was improperly based on cost. Id.

Next, PSS alleges that the Air Force failed to conduct a proper cost realism analysis of SEA's cost proposal. Since SEA's proposed cost was $2,991,750 less than its own proposal, PSS maintains that this wide cost variance is indicative of an inherent failure by SEA to understand the complexity and risk of the RFP requirements. The protester further questions SEA's costs, asserting that experienced personnel, having the qualifications required by the RFP, are not available at salaries low enough to produce the weighted composite rates proposed by SEA, and contends that a proper cost analysis would have indicated that SEA's proposed cost was unrealistically low.

Here, the RFP stated that if a proposal was unrealistically low in cost or price, this would be considered indicative of an inherent failure on the part of the offeror to understand the complexity and risks of the contract requirements and may be grounds for rejection of the proposal. However, as indicated above, the record indicates that after determining that PSS and SEA offered acceptable technical and management proposals, the Air Force requested and obtained the audit assistance of the DCAA. DCAA's review included both

offerors' cost proposals, including the costs of their subcontractors, and their proposed overhead and general and administrative rates. DCAA questioned various costs and either confirmed the proposed rates or recommended different rates. The cost panel adopted DCAA's advice in performing the cost analysis of the proposals and, in the request for BAFO's, passed on DCAA's comments. Both offerors responded to the cost discussions in their BAFO's, and either revised or explained their cost proposals.

An analysis of the DCAA audit of the two firms' cost proposals indicates that much of the difference in evaluated costs stems from PSS's higher indirect costs, rather than unreasonably low labor rates paid by SEA. Moreover, the SSEC found that SEA's proposal demonstrated a clear understanding of the project and that its proposed personnel were fully qualified. Therefore, PSS contention that unrealistically low labor rates are being paid by SEA is not supported by the record.

In its comments on the protest, PSS takes the position that if the principal difference in costs between its own and SEA's is the indirect and G&A rates, SEA's indirect costs are "suspiciously low" and may be a result of SEA's failure to include all appropriate costs in its indirect cost pools. However, the record indicates that SEA's proposed rates were reviewed by DCAA and the SSA to assure their reasonableness; escalation on labor costs was quoted by the offeror and confirmed by the agency as reasonable and realistic; and indirect costs were reviewed to assume that each element, e.g., paid vacation, health and life insurance, was included and was reasonable.

In any case, the vast majority of the contract value is for work at firm-fixed-priced labor rates. This means that a contractor could not recover understated indirect costs that form a part of the fixed-price rates. We therefore find that the agency's evaluation of cost proposals was proper and that the awardee's low cost could be the basis for award selection.

PSS also alleges that the Air Force failed to conduct meaningful discussions. Although the protester concedes that the contracting officer conducted written discussions with the firm, it nevertheless contends that this was not adequate since PSS was never advised of the Air Force's concerns over its proposed costs. PSS further alleges that oral discussions were warranted under the circumstances herein because of the great disparity in proposed costs.

We have consistently stated that in order for discussions in a negotiated procurement to be meaningful, contracting

agencies must furnish information to all offerors in the competitive range as to areas in which their proposals are believed to be deficient so that offerors may have an opportunity to revise their proposals to fully satisfy the agency's requirements. See Federal Acquisition Regulation (FAR) § 15.610(c) (FAC 84-16); Individual Development Associates, Inc., B-225595, Mar. 16, 1987, 87-1 CPD ¶ 290 at 3. However, the actual content and extent of discussions are matters of judgment primarily for determination by the agency involved, and we will only review the agency's judgments to determine if they are reasonable. See Northwest Regional Educational Laboratory, B-222591.3, Jan. 21, 1987, 87-1 CPD ¶ 74 at 5.

The record shows that PSS and SEA were advised in writing of all technical, management and cost concerns and that the offerors were given the opportunity to revise their proposals based on these concerns. However, we find no duty in the Air Force in this case to advise PSS that its price was too high, since there is no indication that the Air Force found PSS's price to be unreasonable for its proposed technical/management approach. Contrast Price Waterhouse, 65 Comp. Gen. 206 (1986), 86-1 CPD ¶ 54 (an agency is required to apprise an offeror that its price exceeds what the agency believes is reasonable in order to have meaningful discussions). In this case, the vast bulk of the substantial cost difference between PSS and SEA is attributable to their respective indirect costs, which had been verified by DCAA. Moreover, PSS has not stated that it would or how it could lower its costs to any substantial degree. Consequently, we find that the Air Force satisfied the requirement that meaningful discussions be conducted.

We also reject the protester's argument that the Air Force was required to conduct oral discussions in view of the marked difference in proposed costs between the two offerors. FAR § 15.610(b) (FAC 84-16) requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. We have held, however, that there is no requirement that an agency conduct face-to-face discussions under a negotiated procurement. See Airtronix, Inc., B-217087, Mar. 25, 1985, 85-1 CPD ¶ 345 at 3. Since PSS was given an opportunity to submit a revised proposal based on written questions, the Air Force met its obligation to hold meaningful discussions.

Finally, the protester alleges that SEA's subcontractor, Systems and Applied Sciences Corporation, is a large business; therefore, SEA is ineligible for any contract award under this small business set-aside. However, under the Small Business Act, 15 U.S.C. § 637(b)(6) (1982), the Small Business Administration has conclusive authority to

determine matters of small business size status. See Newgard Industries, Inc.--Reconsideration, B-226272.2, Apr. 17, 1987, 87-1 CPD ¶ 422. Therefore, we dismiss this protest basis. 4 C.F.R. § 21.3(f)(2) (1987).

Accordingly, the protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel