



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** NKF Engineering, Inc.; Stanley Associates

**File:** B-232143, B-232143.2

**Date:** November 21, 1988

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### DIGEST

1. Protest contentions relating to proposal deficiencies raised in negotiation letter and relating to request for proposals amendment are untimely because issues were required to be raised before the due date for receipt of revised proposals but were raised later.
2. Contracting officer may properly decide in favor of a technically lower rated proposal in order to take advantage of its lower cost, where he reasonably determines that the cost premium involved in making award to the higher rated, higher cost offeror is not justified in light of the acceptable level of technical competence available at the lower cost.
3. Agency realism analysis of successful offeror's cost proposal was reasonable. Agency is entitled to rely upon advice of Defense Contract Audit Agency in analyzing proposed costs.

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### DECISION

NKF Engineering, Inc. and Stanley Associates, Inc. protest the award of a contract to Columbia Research Corporation (CRC) under request for proposals (RFP) No. N61331-87-R-0038, issued by the Navy for engineering support services relating to fleet introduction of new ships and combat systems. In general, NKF and Stanley challenge the Navy's analysis of the realism of CRC's cost proposal and the selection of CRC in spite of Stanley's higher rated technical proposal.

We dismiss both protests in part and deny them in part.

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The solicitation requested proposals for a base year and 2 option years and contemplated award of a cost-plus-fixed-fee (CPFF) contract to be performed through the issuance of task orders. The contractor is to furnish the necessary personnel, materials and facilities to complete tasks in five technical program areas: amphibious warfare; strategic sealift; mine countermeasures; special warfare; and Marine Corps programs.

Under the solicitation each proposal was to include separate technical, management and cost volumes. The technical proposals were required to include resumes or certifications of employment commitment for 12 key personnel including one project manager, five senior systems engineers, five senior systems analysts and one senior naval architect. The combined background of the key personnel was required to show experience in each of the five listed technical program areas.

The solicitation included a list of labor categories including the key personnel and 24 categories of non-key personnel and estimated staff hours for each category per year (the hourly estimates for the base year and each of the option years were identical). Cost proposals were to be prepared on the basis of providing the number of staff hours per labor category listed in the RFP. The RFP also required offerors to indicate how burden and general and administrative rates were developed by listing costs included in these indirect rates. It further stated that uncompensated overtime was not to be used in any manner to reduce the proposed hourly rates of employees exempt from the Fair Labor Standards Act. The RFP further stated that emphasis would be placed upon the realism and reasonableness of proposed labor rates.

Award under the solicitation was to be made to the offeror whose proposal was judged by the government to present the greatest value considering technical merit and cost. The RFP also stated that, while technical merit was very important and award would not be made solely on the basis of cost, if the competitive range proposals were determined substantially technically equal, cost would become determinative.

Under the original solicitation, proposals were to be evaluated under the following criteria, listed in descending order of importance: technical (including two subfactors: personnel qualifications/availability and company experience); management and cost (including cost realism). By solicitation amendment No. 0004, however, which was issued on June 6, 1988, after the initial proposals were

submitted, the weight of the criteria was changed so that cost was ranked higher than management.<sup>1/</sup>

Five offerors submitted initial proposals. After the technical evaluation, all five proposals were considered to be within the competitive range and written discussions were conducted with all five offerors. By amendment No. 0004, which also reversed the order of importance of the "cost" and "management" evaluation criteria, best and final offers (BAFOs) were requested. After a second technical evaluation of all five BAFOs, the agency analyzed the realism of each offeror's proposed costs which resulted in an upward adjustment of four of the five cost proposals, including CRC's. The technical and cost scores, with proposed and evaluated costs of CRC and the two protesters, were as follows:

	Technical (out of 60)	Cost (out of 40)	Total	Proposed Cost	Evaluated Cost
Stanley	47.42	31.00	78.42	\$28,696,744	\$29,117,972
CRC	36.56	40.00	76.56	20,537,626	22,567,800
NKF	35.12	37.74	72.91	23,507,385	23,915,847

The technical evaluation panel, based on its superior rating of Stanley's proposal, recommended to the contracting officer an award to that firm. At that point, the record indicates that the contracting officer, as the source selection authority, determined that only Stanley and CRC would be considered for award. The contracting officer then concluded that the superiority in technical score of Stanley's proposal was not worth the additional estimated cost of \$6,550,172 over CRC's proposal and that award to CRC would constitute the "best value" to the government. The award has been withheld pending resolution of the protests.

As a preliminary matter, the Navy maintains that Stanley's arguments that amendment No. 0004, dated June 6, improperly rearranged the evaluation criteria is untimely. We agree.

Under our Bid Protest Regulations, alleged improprieties which do not exist in an initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation,

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<sup>1/</sup> Initially proposals were to be evaluated under an 80/20 technical to cost ratio which was changed to a 60/40 ratio when the solicitation was amended.

4 C.F.R. § 21.2(a)(1) (1988). Here, the next closing date for receipt of proposals after amendment No. 0004 was June 24. Since Stanley did not protest the changed evaluation criteria in amendment No. 0004 until July 29, well after the June 24 closing date, the ground of protest is untimely and will not be considered. C. Martin Co., Inc., B-228552, Jan. 20, 1988, 88-1 CPD ¶ 56.

Stanley's principal contention is that the award to CRC was improper because the contracting officer failed to follow the evaluation scheme established by the RFP. Stanley argues that since the RFP provided that cost was less important than technical concerns the agency was required to award the contract to the offeror submitting the "highest affordable" technical proposal. Stanley maintains that instead of following this scheme, the contracting officer ignored the recommendations of the evaluation panel, reevaluated the proposals and selected for award the lowest cost proposal that met a minimum technical standard. Stanley also argues that it was prejudiced by the evaluation because it would have proposed a less costly labor mix had it known that such emphasis would be placed on cost.

In a related allegation, Stanley argues that the contracting officer improperly altered the required evaluation scheme in order to justify an award to CRC by deemphasizing CRC's low score for key personnel and by emphasizing the transition of non-key personnel. Stanley argues in this respect that although the first subfactor under the highest ranked technical evaluation factor, "personnel qualifications/availability," related solely to key personnel, the contracting officer downplayed the importance of key personnel by stating that they will account for only 6.36 percent of the total staff hours under the contract. Stanley also contends that since the solicitation required offerors to submit resumes only for key personnel, non-key personnel were not to be evaluated and should not have been a factor in the award decision.

In a negotiated procurement selection officials have the discretion to make cost/technical tradeoffs and the extent of such tradeoffs is governed only by the tests of rationality and consistency with the announced evaluation criteria. Hardman Joint Venture, B-224551, Feb. 13, 1987, 87-1 CPD ¶ 162. Thus, even if cost is the least important evaluation criterion, an agency may properly award to a lower cost, lower scored offeror if it determines that the cost premium involved in awarding to a firm proposing a higher cost is not justified given the acceptable level of technical competence available at the lower cost.

AMG Assocs., Inc., B-220565, Dec. 16, 1985, 85-2 CPD ¶ 673. The determining element is not the difference in technical merit per se, but the contracting agency's judgment concerning the significance of that difference. TEK, J.V. Morrison-Knudsen/Harnischfeger, B-221320, et al., Apr. 15, 1986, 86-1 CPD ¶ 365. The question in such a case is whether the award decision was reasonable in light of the RFP evaluation scheme. Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321.

The RFP stated that the Navy retained discretion to determine which proposal offered the greatest value to the government, considering technical merit and cost. Although the Navy used a 60-40 technical to cost ratio, the use of that approach does not deny the agency its discretion to decide whether the technical difference between two proposals is significant enough to outweigh a particular cost difference. Hardman Joint Venture, B-224551, supra.

Here, the contracting officer determined that the technical superiority of Stanley's proposal did not justify the additional \$6.5 million in evaluated cost. We have no basis to disagree with that determination which we believe was reasonably supported by a number of factors listed by the contracting officer. First, although there was a 10.86 point difference (out of 60 points) in technical scores between Stanley and CRC, the contracting officer noted that most of that difference was attributable to the technical subfactor personnel qualifications/availability which related to key personnel. The contracting officer stated that key personnel account for only 6.36 percent of the total hours on the project so the difference in the quality of key personnel between the two offerors was not significant in terms of ability to perform the contract. Further, the contracting officer noted that the two firms' scores were comparable on the company experience technical subfactor and under the management evaluation factor and that CRC's proposal, in spite of its lower technical score, was considered technically acceptable overall. Also, according to the contracting officer, the technical point difference between Stanley and CRC did not indicate that Stanley would perform the contract in a substantially superior manner, at least in part because all offerors are essentially equal with respect to non-key personnel due to the fact that non-key personnel frequently move from the incumbent to the new contractor. The contracting officer also stated that to compensate for the risk in the estimate as proposed by CSC, CRC's proposed costs were evaluated upward. According to the contracting officer, adjustments were made to the firm's estimated costs in the cost realism analysis and the firm has a history of stable labor rates.

Although Stanley stresses that the evaluation scheme emphasized technical merit over cost, cost still was a significant evaluation factor. Moreover, Stanley neglects to address the fact that the original evaluation scheme was changed by amendment No. 0004, so that cost became more important than the management factor in the final evaluation. The effect of this amendment was to change the 80/20 technical/cost evaluation scheme to a 60/40 scheme and make cost much more significant in the evaluation.<sup>2/</sup>

In this respect, although Stanley says it was prejudiced because it would have proposed a less costly labor mix had it known that such emphasis would be placed on cost, this assertion is not supported by the record. Stanley was informed by amendment No. 0004 that greater emphasis would be placed on cost than was initially indicated; yet Stanley made no significant changes in its proposal in either the cost or technical areas.

Further, we do not agree with Stanley that the contracting officer in effect altered the evaluation scheme in making the source selection decision by adding a nonexistent factor for non-key personnel. The contracting officer's comments relating to the transition of non-key personnel merely indicated his belief that there would be little difference between the various offerors with respect to the quality of non-key personnel. Thus, the contracting officer simply viewed the quality of non-key personnel as a neutral factor.

In our view, the contracting officer's comments relating to the transition of employees and the relatively small level of effort required of key personnel simply supported his determination that the 10.86 point difference between Stanley and CRC in technical scores greatly exaggerated the actual difference between the firms' proposals as far as the performance was concerned. Based on his judgment of the actual overall technical difference and on cost considerations, the contracting officer made a considered judgment to award the contract to CRC as the most advantageous offeror. The record shows that the contracting officer specifically considered whether the additional

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<sup>2/</sup> This case thus can be distinguished from a situation in which cost is the lowest rated evaluation factor so that it has only minimal importance. See Hardman Joint Venture, B-224551, supra; DLI Engineering Corp., B-218335, June 28, 1985, 85-1 CPD ¶ 742, affirmed, DLI Engineering Corp.-Reconsideration, 65 Comp. Gen. 34 (1985), 85-2 CPD ¶ 468.

technical merit offered by Stanley was worth the projected \$6.5 million extra expense associated with the proposal. The contracting officer determined that the difference in technical merit was not significant, particularly in view of the great difference in cost. This is exactly the kind of decision making which is vested in the discretion of contracting officials and we find no basis to object to it here. AMG Assocs., Inc., B-220565, supra.

Both protesters also allege that the Navy did not perform a proper cost realism analysis of CRC's proposal. The protesters note that the solicitation stressed that proposals would be evaluated to determine if proposed compensation for professional employees was adequate and cautioned that uncompensated overtime was not to be used to reduce the proposed hourly rates of professional employees. The protesters argue that CRC's proposed staff hour rates are much lower than both the incumbent's rates and those based on the government's estimate and that the Navy made no attempt to explain this discrepancy. According to the protesters, CRC's rates, even though adjusted by the Navy for realism, are not a valid indication of the actual costs that will be incurred by the firm under the contract.

When a cost-reimbursement contract is to be awarded, the offerors' estimated costs of contract performance and their proposed fees should not be considered as controlling since the estimates may not provide valid indications of final actual costs. See Federal Acquisition Regulation § 15.605(d). The government's evaluation of estimated costs thus should determine the extent to which the offerors' estimates represent what the contract should cost, assuming reasonable economy and efficiency. This determination in essence involves an informed judgment of what costs actually would be incurred by acceptance of a particular proposal. Ecology and Environment, Inc., B-209516, Aug. 23, 1983, 83-2 CPD ¶ 229. Because the contracting agency clearly is in the best position to make this cost realism determination, we will disturb it only where it is shown to be unreasonable. Polaris, Inc., B-220066, Dec. 16, 1985, 85-2 CPD ¶ 669.

Here, to perform its cost analysis of the proposals, the Navy obtained audit assistance from the Defense Contract Audit Agency (DCAA). DCAA reviewed CRC's labor rates, overhead rates, general and administrative rate, subcontractor cost proposal, and CRC's fee. Although DCAA expressed reservations about the accuracy of some CRC cost and pricing data, it found no significant unsupported or unresolved items which would preclude acceptance of CRC's proposal. DCAA generally accepted CRC's proposed labor

rates, which were based on actual rates billed by the firm. The DCAA audit report stated, however, that CRC proposed two employees who work in one of the firm's departments which bases its labor rates on a 50-hour work week rather than 40 hours. Nonetheless, because the cost difference was minimal, DCAA did not take exception to the labor rates of those employees, but recommended that the Navy consider contract ceiling limitations on CRC's proposed direct labor rates or obtain a written commitment from CRC as to which departments would perform the direct labor under the contract. DCAA's audit report also stated that CRC did not include an escalation factor over the entire contract period although the firm's normal procedure was to propose 3 to 5 percent escalation per year on direct labor.

The contracting officer can rely on DCAA's advice in performing a cost realism analysis, Allied Maritime Management Organization Inc., B-222918, et al., Aug. 26, 1986, 86-2 CPD ¶ 227, and generally the contracting officer did so here in constructing the evaluated cost estimate of \$22,567,800 for CRC. In response to the DCAA report, contracting officials escalated CRC's labor rates by 3.5 percent per year in the cost realism analysis and, during negotiations with CRC, the contracting officer raised the issue of the two employees whose labor rates are based on greater than a 40-hour work week. According to the Navy, CRC agreed that the individuals in question would be transferred to a department using a standard 40-hour work week. The contracting officer concluded that a cost realism adjustment was unnecessary in this respect because the two individuals were to be transferred and such an adjustment would have had only a slight effect on CRC's evaluated cost. Finally, although DCAA expressed concern about the cost data available from CRC, the contracting officer noted that CRC's labor rates were based on actual rates paid and concluded that sufficient information was available to arrive at an informed judgment of what costs would actually be incurred by CRC. Under the circumstances, we conclude that the contracting officer's reliance on DCAA advice was reasonable and we find no support in the record for the protesters' contention that the Navy did not properly analyze CRC's cost proposal.

NKF also argues that CRC did not propose wages required by the applicable Service Contract Act (SCA) wage determination for non-professional support personnel. The Navy explains that, except for one labor category, CRC proposed wages equal to or higher than the required wage determination. For that single category, CRC proposed to pay \$.06 per hour less than the wage determination. According to the Navy, due to the small number of hours for the labor category in



question, the cost difference is insignificant compared to the differences in total evaluated cost between CRC and the other offerors.

In any event, we have held that even where an offeror has proposed rates which are below those specified in the appropriate wage determination, that offeror may nonetheless be eligible for award since such an offer does not necessarily show an intent to violate the SCA. Taft Broadcasting Corp., B-222818, July 29, 1986, 86-2 CPD ¶ 125. Furthermore, whether CRC performs this contract in accordance with the SCA is a matter for the Department of Labor, which is responsible for the enforcement of the Act. Id.

Finally, in its initial protest letter, NKF also argued that CRC has been debarred by the Army that CRC's proposal included resumes of individuals who were not employees of the firm and who had not executed bona fide employment agreements. The Navy responded to these allegations in its report explaining that it has no knowledge that CRC has been debarred and that CRC submitted information required to meet the solicitation requirements relating to the employment status of key personnel. NKF offered no further argument or evidence in support of these contentions and, thus, appears to have abandoned these issues. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218.

The protests are dismissed in part and denied in part.

*for Seymour Egan*  
James F. Hinchman  
General Counsel