



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Resource Consultants, Inc.; Wheeler Industries,
Inc.--Reconsideration

File: B-230972.3; B-230972.4

Date: November 23, 1988

DIGESTS

1. Agency reasonably determined that a high evaluation of an offeror's proposal to provide technical services was no longer justified in light of the performance risk the agency perceived based on the offeror's statement in its best and final offer that it had cut the hourly rate of pay of many of its professional employees.
2. Agency reasonably downgraded offeror's proposal without reopening discussions when it discovered in the final stages of the evaluation that the offeror was able to propose a low support-to-professional staff ratio only by classifying as professionals a number of personnel that the agency determined should have been classified as support.
3. Discussions concerning an offeror's reduction in fringe benefits were not required where the offeror first advised of the reductions in its best and final offer.
4. Protest that agency failed to hold discussions prior to selecting other than the low cost proposal for award is denied where the record shows that the agency conducted two rounds of technical discussions, alerting the protester of areas in its proposal the agency considered weak, and the protester submitted a best and final offer reflecting changes in its proposal made as a result of those discussions.
5. Award to the offeror with the highest technically rated proposal that does not have the lowest evaluated cost is unobjectionable where the solicitation provides that technical capability is more important than cost and the agency determines that an award based on a proposal with other than the lowest cost is justified based on that proposal's technical superiority.

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DECISION

Resources Consultants, Inc. (RCI) protests the proposed award of a contract to ANADAC, Inc., under request for proposals (RFP) No. N00024-86-R-5199(Q), which the Naval Sea Systems Command issued to obtain engineering and technical services for the AEGIS shipbuilding program. Wheeler Industries, Inc. requests reconsideration of our decision, Wheeler Industries, Inc., B-230972 et al., Aug. 16, 1988, 88-2 CPD ¶ 150, in which we denied Wheeler's earlier two protests of the proposed award. We deny RCI's protest and affirm our prior denial of Wheeler's protests.

BACKGROUND

The solicitation provided that the Navy would award a cost-plus-fixed-fee contract to the offeror whose overall proposal was most advantageous to the government, with technical factors--technical approach, experience, management approach, and facilities--being significantly more important than cost. The Navy received three acceptable proposals and conducted two rounds of discussions with the offerors. During the final stages of the evaluation, however, the contracting officer determined that the technical evaluation review panel (TERP) had failed to evaluate the proposals in accordance with the criteria described in the solicitation. In addition, the Navy reports that it received several anonymous telephone calls alleging that improper influence had been exerted on both the TERP and a member of the Contract Award Review Panel (CARP). The contracting officer and the Navy's Inspector General conducted separate investigations concerning the allegations, but neither investigation produced proof of any impropriety. Nevertheless, in light of the allegations made and the improper evaluation by the TERP, the Navy decided to appoint a new TERP and CARP to evaluate only the initial proposals. The Navy notified the offerors of this decision.

The initial TERP had determined that each of the three offerors could perform the contract, though each proposal had areas that either were weak or were in need of clarification. In almost all areas, the proposals received adjective ratings of either "good" or "excellent." The new TERP also determined that the three proposals were technically acceptable and assigned high raw scores to each. The Navy reports that because of the high ratings, technical discussions were not conducted at that point. The new CARP decided, however, to request best and final offers (BAFOs), primarily to permit the offerors to update cost data and advise of any changes in proposed subcontractors or key

personnel. The Navy also advised offerors to document any changes in technical approach.

The agency evaluated the revised technical and cost proposals. In the technical areas each proposal improved slightly from the evaluation reported by the new TERP. All of the offerors reduced their proposed costs. The CARP recommended that award be made to ANADAC, the offeror whose proposal received the highest technical score and the highest combined score for both technical and cost factors. The CARP report indicates that the panel made this recommendation even though the projected cost of ANADAC's proposal was almost \$2.7 million higher than that of the offeror with the lowest projected cost based on the panel's belief that "the higher price is justified by the fact that ANADAC is superior in all . . . technical areas." The source selection official concurred in this recommendation.

When the Navy announced the proposed award to ANADAC, Wheeler filed a protest with this Office on a number of grounds, principally involving Wheeler's contention that the Navy improperly had downgraded the firm's proposal. After the Navy submitted its report on that protest, Wheeler filed a second protest alleging that the agency had failed to conduct adequate discussions. At about the same time, RCI filed a protest here based on its review of the report submitted in response to Wheeler's first protest. RCI alleged that the Navy failed to comply with statutory and regulatory requirements regarding discussions and failed to adhere to the evaluation criteria set forth in the RFP.

WHEELER PROTESTS

In denying Wheeler's protests, we concluded that the Navy's downgrading of Wheeler's technical proposal was rationally based. Wheeler had proposed in its best and final offer to institute a "modified work week" for its professional employees, a plan that would have reduced the hourly rate of pay for many of the firm's key personnel. Wheeler's BAFO also stated the firm had reduced its fringe benefits. We said that it was reasonable for the agency to conclude that, given these changes, the agency was unlikely to receive the same level of service in a 40-hour work week under Wheeler's BAFO as it would have under Wheeler's initial proposal, and that a downgrading of the firm's technical proposal from "excellent" to "good" therefore was warranted.

We also found reasonable the Navy's downgrading of Wheeler's proposal in the area of staffing. Wheeler had represented in its proposal that only 15 percent of the work in the base year would be performed by support personnel, and the TERP

rated the proposal highly based in part on that representation. The agency subsequently decided, however, that Wheeler's research assistants should have been classified solely as support personnel since the position required only a high school diploma and 3 years experience. Classifying all the research assistants as support personnel would result in a support-to-professional ratio much higher than 15 percent, reported the agency, and this led it to adjust the rating for Wheeler's proposal under the staffing subcriterion from "excellent" to "good."

Wheeler complains that our prior decision failed to take proper account of the differences between the firm's modified work week plan and what the RFP called "uncompensated overtime," defined in the RFP as hours of work by personnel in excess of 40 hours per week without additional compensation. (The RFP advised that the Navy had noticed an increased use by offerors of uncompensated overtime and was concerned about possible "undesirable results.") Wheeler argues that its proposal did not contain a single hour of uncompensated overtime since all of its personnel would be paid for every hour worked. With respect to the reduction in Wheeler's fringe benefits, Wheeler complains that our prior decision failed to acknowledge that the reduction had occurred 18 months prior to the submission of BAFOs and subsequently had been restored, at least in part. Our decision improperly concluded that the Navy was reasonable in downgrading the proposal in the area of staffing, argues Wheeler, because contrary to what the firm says was the Navy's reading of the proposal, research assistants were not proposed exclusively as professional personnel. Finally, Wheeler complains that our prior decision did not address adequately its contention that the Navy failed to conduct meaningful discussions.

We find nothing in Wheeler's request for reconsideration to convince us that our prior decision was in error. Although our decision did not discuss whatever differences there may be between Wheeler's modified work week and uncompensated overtime, we think a discussion of such differences was unnecessary. We did not base our decision on a finding either that Wheeler had proposed to use uncompensated overtime or that the proposal was in any manner inconsistent with solicitation provisions that were designed to discourage the use of such pricing. Rather, our decision focused solely on Wheeler's statements in its BAFO that it was able to reduce its proposed costs because it had reduced its fringe benefits package and would cut the hourly rate of pay of its professional personnel. In our view, it was reasonable for the Navy to conclude that the high rating given Wheeler's initial proposal under the individual

experience criterion was no longer justified in light of the risk that these reductions could affect the level of service actually delivered.^{1/}

With respect to staffing, Wheeler contends that the Navy misread the firm's proposal as classifying all research assistants as professional personnel and failed to recognize that Wheeler proposed to use only some of its research assistants to perform professional functions. Wheeler argues that the Navy's rescoring of the firm's proposal must be considered unreasonable because it was based on a misreading of the proposal.

Regardless of how the Navy initially classified Wheeler's research assistants, it is clear that the TERP's high rating of the proposal under the staffing criterion was based in part on Wheeler's offer of a 15 percent support-to-professional staff ratio. When the Navy later realized that Wheeler would achieve this ratio only by using some of its research assistants (which the Navy regarded as support personnel) to perform professional work, the agency concluded that the high rating no longer was justified. We think the Navy's rescoring of the proposal had a rational basis. In any event, Wheeler admits that it proposed to use research assistants to perform some professional-level tasks, but it has failed to establish the unreasonableness of the agency's refusal to recognize personnel with only a high school diploma and 3 years experience as professionals.

With regard to discussions, Wheeler argues that the Navy was obligated to discuss with it the firm's reduction in fringe benefits and its proposed use of research assistants. Wheeler contends that its initial proposal and its BAFO were consistent concerning fringe benefits and staffing, and argues, therefore, that if the agency perceived any deficiencies in these areas, it should have raised these concerns through discussions prior to requesting BAFOs.

We find no merit in Wheeler's position. Contrary to Wheeler's contention, the firm's initial proposal and BAFO were not consistent with respect to fringe benefits. Wheeler stated in its initial proposal that its "attractive

^{1/} Although Wheeler correctly points out that our prior decision failed to consider that the firm's reduction in fringe benefits occurred 18 months prior to submission of BAFOs and subsequently were restored, we note that the firm failed to disclose these facts in its BAFO where it simply said that cost reductions were possible in part because of a reduction in fringe benefits.

benefits program" accounted in part for its "excellent" rate of employee retention. The TERP's high rating of the proposal was based partly on this assertion. In its BAFO, however, Wheeler said that it was able to reduce costs in part because of a reduction in fringe benefits and highlighted this reduction in a "summary of changes in the Cost Proposal." (Emphasis added.) In short, the firm's benefits package only became a matter of concern to the Navy as a result of changes made by Wheeler in its BAFO. Under these circumstances, we think discussions in the area of fringe benefits were not required.

In the area of staffing, Wheeler correctly points out that its initial proposal and BAFO essentially were consistent concerning the percentage of the effort to be performed by support staff. Both stated that the support-to-professional staff ratio would be 15 percent. While the TERP accepted this representation and rated the proposal "excellent" under the staffing criterion, the CARP determined upon further review that the rating should be reduced to "good" because the percentage of the work to be performed by support staff would be much higher than 15 percent if all proposed research assistants were classified as support staff. The CARP discussed the rescoring with the chairman of the TERP, who agreed that Wheeler's research assistants should not be classified as professionals. We do not think that discussions were required merely because the CARP, a higher-level panel, rescored Wheeler's proposal on the basis of its finding that the support ratio would be higher in fact than the ratio the TERP used in its evaluation. In this regard, we note that Wheeler has not argued that it would have changed its proposal in any way had the agency reopened discussions in the area of staffing.

RCI PROTEST

RCI has raised essentially two grounds of protest.^{2/} First,

^{2/} The agency has argued that RCI's protest is untimely because the firm should have been aware of its protest grounds when it received the agency's letter announcing the proposed award to ANADAC. RCI argues, however, that its protest is based on the agency's proposal to award to a firm that did not have the lowest evaluated cost, and that when it received the agency's letter it did not know that ANADAC did not have the lowest evaluated cost. RCI says it first learned of this when it received a copy of the agency's report in response to Wheeler's first protest. While it is not entirely clear that RCI's protest is timely, we have decided nevertheless to consider the protest on the merits.

RCI notes that under 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. IV 1986), an agency may award a contract based on competitive proposals without conducting discussions only if such an award would result in the lowest overall cost to the government. RCI points out that discussions were required here because an award to ANADAC will not result in the lowest overall cost. RCI contends, however, that the Navy has not complied with the requirement to conduct discussions because, following the evaluation of the initial proposals by the new TERP, the agency simply sent identical letters to each offeror requesting a BAFO. According to RCI, this does not meet the requirement for meaningful discussions as contemplated by the statute. Further, RCI notes that since the agency admits that the firm's proposal, as revised, contained weaknesses, discussions would have afforded the firm an opportunity to make its proposal more competitive.

We reviewed RCI's initial and revised proposals, as well as the final evaluation reports of both of the technical review panels. The initial TERP scored RCI's proposal highly, but noted that the proposal contained many general statements based on RCI's status as an incumbent and lacked specific details. The panel's discussion questions were directed at areas of the proposal where this was a concern. The new TERP also rated the proposal highly, but again noted the lack of specifics in the proposal, even as revised by the BAFO.


We do not agree with RCI that the agency failed to comply with the statutory requirement to hold meaningful discussions. The agency in fact conducted two rounds of technical discussions with the offerors prior to determining that the TERP had not properly applied the evaluation criteria stated in the RFP. Although the agency based its reevaluation only on the initial proposals, disregarding the proposal revisions submitted as a result of the discussions, there is no question that the offerors, particularly RCI, had the benefit of the technical discussions the agency conducted. In RCI's final BAFO, RCI acknowledged that the Navy's reevaluation did not take into consideration "the significant technical enhancements RCI submitted" as part of its first and second BAFO; therefore, RCI stated in its final BAFO that it had decided "to incorporate selected relevant content from both [its] previous technical enhancements. . . ." In short, we think it is clear that the Navy conducted technical discussions and that RCI had an opportunity to, and did, revise its proposal as a result of those discussions.

RCI's second basis of protest concerns the Navy's selection of ANADAC for award even though the evaluated cost of that

firm's proposal was almost \$2.7 million higher than that of the lowest cost proposal. According to RCI, the selection of ANADAC was both unreasonable and inconsistent with the terms of the solicitation, which provided for award based on the proposal found "to be in the best interests of the government, cost and [other] factors considered."

We do not agree. In addition to the solicitation provision quoted above, the RFP also provided: "Although the evaluated probable cost to the government will be considered, technical capability is of paramount importance." The CARP recommend award to ANADAC, despite the higher evaluated cost, because the firm had submitted a superior technical proposal. The selection of ANADAC for award thus was consistent with the announced evaluation criteria. Further, the agency made a determination that the technical superiority of ANADAC's proposal outweighed the higher cost, and, based on our review of the proposals and the evaluations, we have no basis for concluding that such a determination was unreasonable. See Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

RCI's protest is denied. Our prior denial of Wheeler's protests is affirmed.


James F. Hinchman
General Counsel