



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Oklahoma Aerotronics, Inc.--Reconsideration

File: B-237705.2

Date: March 28, 1990

Daniel J. Piliero II, Esq., Piliero, Tobin & Mazza, for the protester.

John H. Lannen, Jr., Space and Naval Warfare Systems Command, and Andrei Kushnir, Esq., Office of the General Counsel, Department of the Navy, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Supervisory official of contracting functions at a Navy command has the authority to review, vacate, and make source selection decisions pursuant to a delegation of authority from the head of the contracting activity.
2. Procuring agency properly could select for award the higher rated, higher priced offeror in a negotiated procurement where the solicitation provided that, although price was the most important evaluation factor, technical and management factors would also be evaluated.
3. The ultimate selection official reasonably determined, notwithstanding the contrary recommendations of the chairman of the technical evaluation board, contract award review panel and designated source selection authority, that the awardee's higher technical score reflected the technical superiority of the awardee's proposal which outweighed the protester's price advantage and that the awardee's proposal, which had received the highest price/technical/management point total, was the most advantageous to the government.

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DECISION

Oklahoma Aerotronics, Inc. (OAI), protests the award of a contract to R.F. Products, Inc., under request for proposals (RFP) No. N00039-89-R-0037(Q), issued by the Space and Naval Warfare Systems Command (SPAWAR), Department of the Navy, for a quantity of OA-9123/SRC multicouplers with associated spare parts, technical data, and field engineering services.^{1/} OAI contends that the SPAWAR Assistant Commander for Contracts improperly, unreasonably, and without authority vacated the decision of the designated source selection authority (SSA) to make award to OAI and instead selected R.F. Products.

The protest is denied.

The RFP, issued as a 100 percent small business set-aside, contemplates the award of a firm, fixed-price contract for the fabrication of OA-9123/SRC multicouplers in accordance with detailed performance specifications.^{2/} The RFP also provided that technical drawings would be furnished to offerors for informational purposes. Currently, the Navy is procuring the multicoupler from R.F. Products, the original designer of the equipment.

Offerors were informed that award would be made to the offeror whose proposal was considered most advantageous to the government, price and other factors considered, and that the government reserved the right to make award to other than the low offeror. The RFP stated the following evaluation criteria, in descending order of importance, and

^{1/} We initially dismissed OAI's protest as untimely because it appeared that OAI's agency-level protest had not been filed within 10 working days of the date on which OAI learned the basis of its protest. Upon reconsideration, we find that OAI's agency-level protest was timely filed.

^{2/} The multicoupler is a shipboard device, comprised of tunable filter channels, RF combiner network, control head, and power supply, which allows the coupling of transmitters, receivers, and transceivers to a common antenna without mutual interference. The purpose of the multicoupler is to reduce the number of antennas required on Navy ships.

informed offerors that price and technical factors were substantially more important than management:^{3/}

Price (51)

Technical (34)

- A. Compliance with technical criteria (20)
 - a. specification (9)
 - b. statement of work (5)
 - c. interchangeability (4)
 - d. technical data (2)
- B. Degree of Technical Risk (14)

Management (15)

- A. Management (5)
- B. Personnel (4)
- C. Facilities (3)
- D. Past Performance (2)
- E. Schedule (1)

The source selection plan provided for narrative evaluations and numerical scoring of the proposals under the RFP evaluation criteria. Proposals were scored for each criteria and subcriteria on a 100 point scale according to the following standards:

<u>Point Score</u>	<u>Adjective Rating</u>
91 to 100	Excellent
82 to 90	Good
72 to 81	Fair
61 to 71	Poor
01 to 60	Unacceptable

Three proposals were received and evaluated by the Navy, which found that all were technically acceptable and within the competitive range. Discussions were conducted with all three offerors, and revised proposals and best and final offers (BAFO) received.

OAI's BAFO was evaluated "good" for the statement of work, technical data, management, facilities, and past performance factors and "fair" for the specification, interchangeability, technical risk, personnel, and schedule factors. R.F. Products' BAFO was evaluated "excellent" for

^{3/} The assigned weights for the evaluation factors were not disclosed in the RFP but were set out in the source selection plan.

the interchangeability and technical risk factors and "good" in all other areas. The weighted scoring was as follows:4/

	<u>OAI</u>	<u>R.F. Products</u>
Price	51 (\$8,002,843.14)	49.87 (\$8,180,450)
Technical	27.19	29.97
Management	12.18	12.89
Total	90.37	92.73

The chairman of the technical evaluation board (TEB) determined that the differences in the two offerors' weighted technical/management scores were insignificant and that R.F. Products' scoring advantage reflected its incumbent status; he concluded that the two proposals were essentially technically equal. The contract award review panel (CARP) agreed with this assessment and recommended that award be made to OAI as the low priced offeror. The SSA determined that award should be made to OAI and sought the requisite business clearance from the SPAWAR Assistant Commander for Contracts to make award to OAI.5/

The SPAWAR Assistant Commander for Contracts questioned whether the SSA's determination to make award to OAI was supported by the TEB's technical scoring. Specifically, he questioned whether R.F. Products' technical advantage offered the best value to the government in light of OAI's mere 2 percent advantage in price. The Assistant Commander for Contracts instructed the SSA and the CARP to review their award recommendation.

The SSA and the CARP reviewed their award recommendation in favor of OAI and determined that the technical risk to the government would be the same for both offers and that the 2 percent price difference was not supported by greater technical value. However, the Assistant Commander for Contracts reviewed the TEB scoring and concluded that the

4/ R.F. Products, as the incumbent, was eligible for the waiver of first article requirements; the Navy, however, determined that OAI was not eligible for first article waiver. Accordingly, the Navy properly compared R.F. Products' price for the multicouplers without first articles to OAI's price for the item with first articles.

5/ The Navy's acquisition regulations provide that award of a contract cannot be made prior to obtaining the approval of a post-negotiation business clearance memorandum. Navy Acquisition Procedures Supplement § 1.690-1(c)(2) (1989).

technical risk to the government would not be the same for both offers, and that R.F. Products' offer was the best value to the government. The Assistant Commander for Contracts implemented his decision by conditioning approval of the SSA's business clearance request upon making award to R.F. Products.

OAI first protests that the SPAWAR Assistant Commander lacked the authority to overrule the award selection of the SSA and condition approval of the SSA's business clearance request upon making award to R.F. Products. OAI argues that the authority to review offers and recommend and make awards lies with the TEB, CARP, and SSA, respectively, and contends that the SPAWAR Assistant Commander does not have the authority to condition his business clearance approval upon award to other than the offeror selected by the SSA.

We disagree. The authority of agency officials to make source selections and awards under competitive proposal procedures flows from the authority granted to the head of the agency under the Competition in Contracting Act of 1984. 10 U.S.C. § 2305(b) (1988); Scheduled Airlines Traffic Offices, Inc., B-229883, Mar. 29, 1988, 88-1 CPD ¶ 317. Here, the contracting authority of the Secretary of the Navy was delegated to the head of each Navy contracting activity, including SPAWAR. See Navy Acquisition Procedures Supplement § 1.601(a). The head of the SPAWAR contracting activity in turn delegated his authority to conduct the SPAWAR acquisition function to the Assistant Commander of Contracts. This delegation of authority provided the Assistant Commander with the authority to review source selection decisions, reverse or vacate those decisions and make his own reasonable source selection decisions in accordance with RFP criteria.^{6/} See Scheduled Airlines Traffic Offices, Inc., B-229883, *supra*, at 4-5. While OAI argues that Federal Acquisition Regulation (FAR) §§ 15.604 (FAC 84-28) and 15.612 (FAC 84-51) only allow the designated SSA to make a source selection, the Assistant Commander, as the cognizant supervisory official, has the authority to direct and supervise a source selection. *Id.* Indeed, the cited regulations recognize that the source selection authority flows from the authority of the agency head or his designate.

^{6/} Thus, he had the authority to control the source selection by conditioning approval upon the selection of a particular offeror.

OAI also argues that the agency violated the requirements of FAR § 15.612(e) and the source selection plan which provide for the protection of source selection information. OAI contends that the source selection decision in this case was tainted because the TEB chairman, at the direction of the Assistant Commander for Contracts, discussed his assessment of the technical risk in OAI's proposal with the SSA's supervisor. This argument is without merit. These provisions do not prohibit the selection official, or someone acting in his behalf, from obtaining information necessary to a source selection decision.

OAI next protests that the award to R.F. Products was unreasonable because OAI is entitled to award as the low priced offeror. OAI contends that since price was identified as the most important evaluation criterion that award must be made to the low, technically acceptable offeror. The government, however, is not required to make award to the firm offering the lowest price unless the RFP specifies that price will be the determinative factor. F.A.S. Sys. Corp., B-236344, Dec. 4, 1989, 89-2 CPD ¶ 512. In the absence of such an express provision, the procuring agency retains the discretion to select a higher priced, more highly rated proposal if doing so is in the government's best interest and is consistent with the solicitation's stated evaluation scheme. Id.

Here, the RFP made no representation that price alone would be the basis for award; instead, it advised that price would be the most important of the evaluation criteria and specifically stated that the government reserved the right to make award to other than the lowest priced offeror based on consideration of the other evaluation factors set forth in the solicitation. Although each of these other factors was less important than price, they all were to be used, along with price, in determining the relative merits of the proposals.

OAI also challenges the rationality of the ultimate source selection. The Assistant Commander determined that the technical superiority of R.F. Products' proposal outweighed the lower price advantage of OAI's proposal. He based his decision upon the following considerations: (1) that R.F. Products had received the highest overall point score of 92.76 out of 100 available points while OAI had received 90.37 points; (2) that OAI had received the lowest technical point score of the three offerors; (3) that under technical risk, a very significant technical subcriterion, R.F. Products received a raw score of 91 points and was rated "excellent" while OAI received a raw score of 79 points and been rated only "fair"; (4) that the TEB chairman confirmed

that the difference in point scores for technical risk accurately reflected the difference in technical risk between the two proposals; and (5) that R.F. Products was ranked "excellent" or "good" for every technical/management criteria while OAI was only ranked "fair" or "good". The Assistant Commander concluded that "[n]ot only did R.F. Products receive the highest overall score, the price difference of \$177,606 (2.2 percent in a contract worth over \$8 million) clearly does not warrant the greater technical risk that is apparent in the technical/management scoring."

OAI contends that the Assistant Commander's determination that R.F. Products' proposal was technically superior is unreasonable because the SSA, CARP, and TEB chairman found that R.F. Products' technical scoring advantage did not reflect technical superiority. OAI argues that since the SSA, CARP, and TEB chairman specifically considered the difference in technical scoring to be insignificant, the Assistant Commander's contrary determination must be unreasonable.

In the evaluation of proposals, neither the selection official nor upper-level evaluators are bound by the recommendations of lower-level evaluators, and, as a general rule, we will not object to the higher-level official's judgment, absent unreasonable or improper action, even when that official disagrees with an assessment made by a working level evaluation board or individuals who normally may be expected to have the technical expertise required for such evaluations. Burnside-Ott Aviation Training Center, Inc., et al., B-233113; B-233113.2, Feb. 15, 1989, 89-1 CPD ¶ 158. The selection decision, and the manner in which such an official uses the results of the technical and cost evaluations and the extent, if any, to which one is sacrificed for the other, are governed only by the tests of rationality and consistency with established evaluation factors. Bank St. College of Educ., 63 Comp. Gen. 394 (1984), 84-1 CPD ¶ 607, aff'd, 84-2 CPD ¶ 445; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. In determining whether a particular evaluation conclusion is rational, we do not make an independent determination of a proposal's merits; we do, however, examine the record before us and determine whether the judgment exercised was fair and reasonable. Burnside-Ott Aviation Training Center, Inc., et al., B-233113; B-233113.2, supra.

We have reviewed the evaluators' scoring sheets and narratives, the reports of the TEB chairman and the CARP, and OAI's and R.F. Products' proposals, and are unable to find that the Assistant Commander's determination regarding

the technical superiority of R.F. Products' proposal was unreasonable. Indeed, R.F. Products received a higher point score than OAI for every technical and management factor.^{7/}

Specifically, the record supports the ultimate selection official's conclusion that the difference in technical scoring accurately reflected the greater risk present in OAI's proposal. Under the evaluation factor for technical risk, OAI received a raw score of 79 points while R.F. Products received 91 points, a difference of approximately 15 percent. The narrative evaluations indicate that OAI's lower technical risk score reflected OAI's relative lack of experience in the filter area and with equipment such as the multicoupler sought by the RFP. Among other things, the evaluators noted that OAI had not built similar equipment; that OAI had not had contracts of the magnitude contemplated by the RFP; that OAI in its proposal had failed to deal with the possible obsolescence of parts; and that OAI, having not previously built this equipment, presented greater risk in producing an item that was interchangeable in form, fit and function within the required delivery schedule.

R.F. Products' narrative evaluations, on the other hand, supported its superior technical score for technical risk. The evaluators noted that R.F. Products had considerable experience in the filter field; that R.F. Products had demonstrated that it was fully knowledgeable of and capable of solving filter problems to ensure delivery and interchangeability; and that R.F. Products, as the original designer and manufacturer of the equipment, had specific experience which minimized the risk to the government.

OAI argues that the selection official's emphasis on technical risk was inconsistent with the stated RFP criteria since the RFP informed offerors that the equipment was expected to require little or no design modifications. OAI contends that since design modifications were not contemplated there would be little technical risk in fabricating the multicoupler.

However, not only was this subcriteria worth 14 points, the RFP was not a "build-to-print" procurement, but required offerors to manufacture the multicouplers in accordance with stated performance specifications. In this regard, offerors were required to provide schematics, block diagrams, and interface descriptions to describe the offeror's design, and to demonstrate the techniques and procedures the offeror

^{7/} Albeit, this point difference was marginal for some factors.

intended to use to comply with the RFP requirements. The RFP also identified several changes in the specifications of the previously procured multicouplers, which offerors had to assess in designing their proposed equipment, and informed offerors that interchangeability of new components must be addressed.

Consequently, the RFP, in Section M, informed offerors that the agency would evaluate technical risk by assessing the ability of the offeror to make required modifications without adversely affecting the schedule or performance. In this regard, the RFP, in Section L, required offerors to address the technical risk in their proposals by describing: (1) the offeror's successful implementation of past design, fabrication and manufacturing efforts; (2) the availability of resources, such as components, personnel and facilities, required to meet the delivery schedule; (3) the plans the offeror would implement to reduce risk in performing the work, and (4) the similarity of other equipment produced by the offeror.

R.F. Products' consistently higher scores for other technical/management factors was also supported by the evaluation narratives. For example, under the technical factor, specification, for which R.F. Products received 84.25 points and a rating of "good" while OAI received 80.75 points and a rating of "fair," the evaluation narratives noted that R.F. Products demonstrated full understanding of the design characteristics of the multicoupler and had previously met the specification requirements. The evaluators, however, found that OAI's proposal failed to display a full understanding of the conditions and ramifications of each specification point but instead mimicked the specifications.

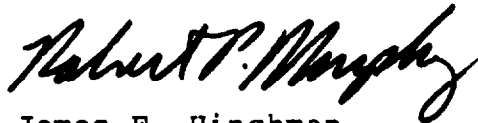
Also, under the technical factor, interchangeability, for which R.F. Products received 91 points and a rating of "excellent" while OAI received 78 points and a rating of "fair," the evaluators noted that R.F. Products demonstrated the ability to solve technical problems affecting interchangeability while OAI's proposal was found to indicate less than full understanding of the problems affecting interchangeability.

OAI contends that R.F. Products' technical scoring advantage merely reflects R.F. Products' status as the incumbent rather than technical superiority. We have found that a numerical scoring advantage based primarily on the advantages of incumbency might not necessarily indicate a

significant technical advantage that would warrant the payment of a substantial cost premium. See, e.g., NUS Corp. et al., B-221863, B-221863.2, June 20, 1986, 86-1 CPD ¶ 574, aff'd, 86-2 CPD ¶ 364. However, in this case, unlike NUS, the record indicates that the incumbent's proposal demonstrated real technical superiority over the protester's in every technical and management area. A competitive advantage gained through incumbency is generally not an unfair advantage which must be eliminated, and, therefore, proposal strengths flowing from a firm's prior experience may properly be considered by an agency in evaluating proposals. Frequency Eng'g Laboratories Corp., B-225606, Apr. 9, 1987, 87-1 CPD ¶ 392.

Based upon this record, we have no basis to conclude that the Assistant Commander acted unreasonably in selecting R.F. Products' proposal, which received the highest price/technical/management point total, as the most advantageous offer to the government. Since the selection official specifically considered whether OAI's 2 percent price advantage out-weighed R.F. Products' technical advantage, we find that the Assistant Commander properly could conclude that OAI's offered cost savings did not offset the greater technical risk to the government.

The protest is denied.



for James F. Hinchman
General Counsel