

7772-1077



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Bay Tankers, Inc.

**File:** B-238162

**Date:** April 13, 1990

William A. Shook, Esq., Preston, Gates, Ellis, Rouvelas & Meeds, for the protester.  
Charles E. Purcell for P&C Marine Engineering, Inc.; Paul Sa for S&S Shipping, Inc.; and Richard F. Smith for Marine Carriers (USA), Inc., interested parties.  
Ernest Hawkins, Maritime Administration, for the agency.  
C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### **DIGEST**

Under request for proposals calling for award to low technically acceptable offerors, agency determination that protester's proposal was outside of the competitive range was improper where agency determination was based on proposal's relative technical ranking, without consideration of price, and consequently agency violated Federal Acquisition Regulation § 15.609(a) (FAC 84-16) in establishing the competitive range.

### **DECISION**

Bay Tankers, Inc., protests the exclusion of its technical proposal from the competitive range under request for proposals (RFP) No. DTMA91-89-R-90016, issued by the Maritime Administration, for services of ship managers for elements of the Ready Reserve Fleet, to insure their activation within assigned readiness periods. The protester contends that the agency improperly determined that its proposal was unacceptable.

**We sustain the protest.**

The agency issued the solicitation on April 12, 1989, for services of ship managers to operate and maintain 20 ships, in 7 groups, for 5 years; the solicitation provided for multiple awards by vessel groups, up to a maximum of

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12 ships per awardee, with 1 group of 2 ships reserved for the Small Business Administration's 8(a) program. The solicitation requested a per diem rate for each vessel for full operational status, maintenance status and activation, and provided for award to the lowest priced offerors judged technically and managerially acceptable.

The solicitation provided further that the agency would evaluate and assign numerical scores to technical and management proposals, with technical factors worth one-third more than management factors. Although the RFP essentially provided for award on the basis of price to the low technically acceptable offerors, it stated that to be eligible for award the combined point scores for technical and management proposals must be equal to or greater than the point score set as minimally technically acceptable by the agency (without consideration of price).<sup>1/</sup>

Offerors submitted proposals on May 31, and a team of four evaluators assigned point scores to the proposals, in accordance with information requested in section L of the RFP. The evaluation team added the point scores and divided them by four to produce an average technical score and provided a list of average technical scores to the contracting officer. The list ranked 21 offerors in order of technical merit based on their technical scores without regard to price.

The contracting officer reviewed the average technical scores, which ranged from a low of 280 points (out of 760 possible) to a high of 699 points. She found that there was a gap of 13 technical points between the average scores of the thirteenth-ranked offer (461 points) and the protester's fourteenth-ranked offer (448 points). The contracting officer found that this gap between 461 and 448 points was the lowest naturally occurring cutoff that would retain enough offerors to allow competition, since 13 offerors received scores of 461 points or higher, and eight received scores of 448 points or lower. Although the agency had received price proposals, it did not consider them in making its determination of competitive range, since it determined

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<sup>1/</sup> The RFP did not include any numerical technical weights and did not contain any minimally technically acceptable point score.

that proposals that had received a score of less than 461 points were technically unacceptable.<sup>2/</sup>

At the end of August, the contracting officer sent letters to all offerors determined to be technically unacceptable, advising them of her determination that their proposals were outside the competitive range. During October and November, the agency conducted negotiations with offerors in the competitive range, and the agency requested offerors to submit best and final offers (BAFO) by December 29.

On December 14, the protester contacted the agency to inquire about the status of its proposal; on that date the agency advised the protester that its proposal had been eliminated from the competitive range as technically unacceptable.<sup>3/</sup> This protest followed.

The protester contends that the agency evaluated its offer in a manner that was unreasonable and inconsistent with the solicitation's requirements. The protester argues essentially that the statement of work in the instant solicitation is nearly identical to that in an earlier solicitation, RFP No. DTMA98-87-R-70001, and that the protester's technical proposal found unacceptable is also nearly identical to that submitted in response to the earlier proposal which was found acceptable. The protester states that any deficiencies noted by the agency in the protester's current proposal also appeared in the proposal that was earlier found to be acceptable. The protester believes that this constitutes evidence that the agency's determination, that its proposal was unacceptable and outside of the competitive range, was arbitrary and unreasonable.

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<sup>2/</sup> The agency notes, for example, that the protester's offer "was weak in comparison with the approach taken by other, higher rated offerors." These other offerors, according to the agency, "demonstrated more awareness of the range and depth of the requirements."

<sup>3/</sup> The agency sent the protester a letter dated August 29, advising Bay Tankers of its elimination from the competitive range. The protester denies receiving the letter, which was not sent to its current address, notes that lengthy evaluation periods are common in ship management solicitations, and states that until the agency requested BAFOs from the other offerors on December 11, it had no reason to believe that its proposal was not in the competitive range. Under these circumstances, we find that the protest was timely filed.

The agency acknowledges that in 1986, it found the protester technically acceptable, but explains that the higher scores received by other proposals meant that although the protester received substantially the same score as in 1986, its relative ranking fell below the competitive range for the instant procurement. The agency argues that its increased experience in ship management contracts has prompted it to look for more depth and range in proposals, to assure itself of a contractor's understanding of requirements before making an award. The agency believes that the higher score received by other offerors reflects their greater awareness of the range and depth of requirements, while the lower score received by the protester indicates its lack of understanding of the requirements and the effort needed for performance.

Federal Acquisition Regulation (FAR) § 15.609(a) requires that the competitive range be determined on the basis of cost or price and other factors that were stated in the solicitation and consist of all proposals that have a reasonable chance of being selected for award, including deficient proposals that are reasonably susceptible of being made acceptable through discussions. See Hummer Assocs., B-236702, Jan. 4, 1990, 90-1 CPD ¶ 12. In reviewing a competitive range determination, we do not reevaluate technical proposals; instead, we examine the agency's evaluation to ensure that it was reasonable and in accord with the evaluation criteria. Rainbow Tech., Inc., B-232589, Jan. 24, 1989, 89-1 CPD ¶ 66. Here, we think that the agency's competitive range determination was seriously flawed.

First, despite the fact that price was the ultimate determining factor for award and that FAR § 15.609(a) (FAC 84-16) requires the consideration of price in the determination of the competitive range for proposals that have a reasonable chance of being selected for award, the agency ignored price in its determination of the competitive range. The record shows that while the protester's proposal was ranked fourteenth technically, it was the low offeror for at least four vessel groups by a substantial margin. Thus, in establishing the cutoff of 461 technical points (a score approximately 2 percent greater than the protester's), the agency ignored the fact that many of the 13 higher technically rated firms had prices 50 percent higher than the protester's price and that the protester, on the basis of price, was potentially in line for award at substantial savings to the government.

Second, while the agency ostensibly eliminated the protester because it was "technically unacceptable," the record shows

that by "unacceptable," the agency meant no more than that the protester received a technical score that was low relative to other offerors. For example, the contracting officer terms a "flagrant mistake" the protester's plan to drydock vessels during activation, which, she argues, creates a high risk of not meeting the 5-day activation schedule. The agency also contends that the protester's proposal for sea trials did not meet the minimum requirements of the solicitation.

Our review of the evaluators' score sheets shows, however, that these deficiencies contributed very little to the rejection of the protester's proposal. Some evaluators disliked the protester's plan to place vessels in drydock, but none of them rated the proposal less than "good" with respect to that aspect of the proposal. Furthermore, the agency now concedes that the protester's proposed plan for sea trials represented a "positive approach."

The record also shows that three of four evaluators gave the protester a score above the cutoff, and two of them rated the protester higher overall than the lowest scored proposal included in the negotiations. Of the total scores awarded by the four evaluators for all technical and management criteria, the protester received 81 percent "good" or "very good" scores, and 95 percent "fair," "good," or "very good" scores. Indeed, our review of the competitive range determination shows that an offeror who received a uniform rating of "good" would score 456 points, below the cutoff for technical acceptability. We therefore find that the cutoff was based on an impermissible comparative evaluation of proposals in contravention of the solicitation terms which specifically called for award to the low technically acceptable offerors without a relative evaluation of proposals. In this regard, it is improper, in a negotiated procurement, to exclude an offeror from the competitive range solely on the basis of technical considerations (without considering price) where the proposal is merely technically inferior in relation to other proposals, though not unacceptable by itself. See HCA Gov't Servs., Inc., B-224434, Nov. 25, 1986, 86-2 CPD ¶ 611.

In short, in making its competitive range determination, the contracting officer essentially determined that proposals with technical scores less than 2 percent greater than the protester's had a better chance for award although their prices were more than 50 percent higher. The record before us demonstrates that with a slight improvement through discussions in its technical score, the protester would in fact have been in line for several of the awards

contemplated. We therefore find that the exclusion of Bay Tankers' proposal from the competitive range without consideration of its price proposal was improper. See Howard Finley Corp., 66 Comp. Gen. 545 (1987), 87-2 CPD ¶ 4.

We are therefore recommending by letter of today to the Secretary of Transportation that the agency reopen discussions with the protester, for the purpose of resolving any uncertainties or weaknesses in the proposal of Bay Tankers that preclude that proposal from being found acceptable for award, and request another round of BAFOs all competitive range offerors. We award the protester its costs of pursuing this protest including attorneys' fees; the protester should submit its claim for costs directly to the Maritime Administration. 4 C.F.R. § 21.6(d) (1989).

The protest is sustained.

A handwritten signature in black ink, reading "Milton J. Fowler". The signature is written in a cursive, flowing style.

Acting Comptroller General  
of the United States