I. JORDAN

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Marine Transport Lines, Inc.; Lant Shipping, Inc.

File: B-238223.2; B-238223.3

Date: July 30, 1990

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DIGEST

1. Protester was not prejudiced by reevaluation of all offerors' initial proposals by technical evaluation review panel, conducted in accordance with source selection plan, which lowered protester's "technically acceptable" score to a level considered "technically unacceptable but capable of being made acceptable," where protester was kept in the competitive range, advised of its deficiencies during discussions, and successfully corrected them in its best and final offer.

2. Agency did not mislead protester into raising its price where, based on the agency's reasonable concern that the protester had offered unrealistically low prices in certain areas of its proposal, during discussions the agency advised the protester that it must address the evaluators' price realism questions in its best and final offer, but did not state that the protester was required to raise its price.

3. Award of contract at fixed price lower than that initially offered by protester, where certain items of protester's prices were criticized by evaluators as unrealistically low, does not establish that the agency applied a stricter price realism standard to the protester than to the awardee. Agency reasonably concluded that in certain areas the protester's low initial offer coupled with corresponding technical deficiencies indicated a lack of understanding and ability to perform the contract at the offered price, but reasonably did not have the same reservations about the awardee because of its technically superior offer.

4. Allegation that awardee was not properly found to be "corporately viable" and cannot perform the contract at the award price concerns the agency's affirmative determination of the awardee's responsibility which the General Accounting Office will not review absent evidence of possible fraud, bad faith, or misapplication of a definitive responsibility criterion.

DECISION

Marine Transport Lines, Inc. (MTL) and Lant Shipping, Inc. protest the award of a fixed price contract to International Marine Carriers, Inc. (IMC) under request for proposals (RFP) No. N00033-89-R-4003, issued by the Military Sealift Command, Department of the Navy. Both protesters allege flaws in the evaluation process and each contends that it, not IMC, is entitled to the award, or in the alternative that negotiations should be reopened.

We deny the protests.

The RFP is for 5 years' operation and maintenance of nine Sealift tankers, used by the Navy for worldwide transportation of Department of Defense refined petroleum products. MTL, the incumbent contractor, has operated and maintained the tankers on both cost reimbursable and fixed price bases for the past 15 years.

Each offeror was required to submit a price proposal which contained for each ship, by year, a schedule of total crew wages for periods when the Service Contract Act (SCA) would and would not apply; a separate schedule itemizing the contractor's daily cost and profit (19 separate items) or "per diem" rate for each ship;1/ the total (5-year) fixed operating price for each ship; and a cumulative contract total for all nine ships. In addition, offerors were required to provide a copy of their most recent audited and certified financial statements and projected cash flow statements for the entire performance period. Offerors also were required to be able to demonstrate the ability to finance or obtain financing for a minimum of 1/30 of the proposed value of the contract. This information was to be provided in order to allow the Navy to evaluate each offeror's "corporate viability." The RFP stated that the price proposal should present the offerors' understanding of the RFP's requirements and the offerors' ability to organize and perform efficiently. The solicitation stated that evaluation would be based on an analysis of the proposed price, price realism, and the traceability of the price to each offeror's technical proposal.

The RFP provided for evaluation of technical proposals in six areas: "Personnel," including "Personnel Qualifications," "Crew," "Contingency Plan," and "Training"; "Operations," including "Tanker Operations," "Manning," and "Security"; "Maintenance Procedures;" Quality Control"; "Management"; and "Purchasing, Property Control and Accounting Systems." "Operations" and "Maintenance Procedures" were considered most important and of equal value with the remaining areas equal in importance to each other. Award was to be made to the responsible offeror whose offer, conforming to the solicitation was most advantageous to the government, price and other factors considered. Price, while not controlling, was to be an important evaluation factor, with its importance increasing as technical scores approached equality.

1/ Among other items included in the "per diem" were total and overlapping crew wages, port captain(s) and engineer(s), training, subsistence, equipment and stores, transportation and handling of material, repair parts, crew transportation costs, insurance, other expenses, industrial assistance (mid-period inspection, biennial overhaul, voyage repairs, and tank coatings), indirect expenses, general and administrative expenses, and profit, all on both full operating status (FOS) and reduced operating status (ROS) bases.

Ten offerors, including the protesters and IMC, submitted proposals by the November 15, 1989, closing date. A technical evaluation review panel (TERP) composed of five members individually reviewed and scored the technical proposals in the six listed areas. Proposals which received a minimum average weighted score of 75 points were considered "technically acceptable." Initially, Lant received a score of 77.03, with scores of less than 75 for "Personnel Qualifications" and "Maintenance Procedures." MTL's score was 82.58 and IMC's was 87.60, with neither receiving scores of less than 75 in any evaluation area. After reviewing the individual scores awarded by the evaluators, the TERP chairman determined "it was apparent that joint review of all offerors would be constructive while still reflecting independent judgment of each individual evaluator."

The joint review and final scoring of the proposals resulted in lower scores for all proposals but MTL's, whose composite weighted score rose to 82.93. IMC's score dropped to 86.60; Lant's score dropped to 74.74, with unacceptable ratings in "Personnel Qualifications," "Training," "Tanker Operations," "Security" and "Maintenance Procedures." Although Lant and four other offerors' received composite scores below 75 points, those proposals were all considered "susceptible to being made acceptable," and were included in the competitive range.

Lant's price proposal was low at approximately $173 million, with MTL the fourth low offeror at approximately $222 million and IMC the sixth low offeror at approximately $264 million. In evaluating price proposals, the contracting officer compared various aspects of the proposals with other proposals, the current contract, and the government estimate. The contracting officer identified 5 areas for discussion with IMC, 4 areas with MTL, and 18 areas with Lant. These concerns, as well as the offerors' technical deficiencies, were discussed during negotiations. The Navy also discussed a yet-to-be-issued amendment No. 7 with all offerors and then issued it before best and final offers (BAFOs) were due. Among other things, amendment No. 7 reduced the number of days of operation to which the SCA would apply.

Lant, MTL, and IMC all submitted BAFOs addressing the matters covered in negotiations. All were evaluated as technically acceptable and realistically priced with IMC receiving the highest technical score of 87.24 and having the lowest proposed price of approximately $170 million. MTL received the third highest score of 83.93 and had the third lowest price of approximately $194 million. Lant received the seventh highest score of 76.44, and had the fourth lowest price of approximately $195 million.

On March 9, 1990, the Navy awarded the contract to IMC, and on March 23, Lant and MTL protested to our Office. Each has raised a number of allegations concerning the conduct of proposal evaluations, discussions, and the Navy's decision to award to IMC.

Lant protests the reevaluation of its proposal as unreasonable and lacking a rational basis. In particular, Lant alleges the TERP chairman's decision to conduct a reevaluation was "unilateral" and "without authority" and an abuse of discretion.

The source selection plan provides that the TERP chairman is responsible for ensuring that each evaluator's narrative report and rating properly reflect the evaluator's scoring of an offeror's response. Where individual evaluators propose widely differing evaluations of a proposal's strengths or weaknesses, the TERP chairman is to discuss the rationale for the evaluations to ensure that the evaluation subcriteria were clearly understood, the evaluators reviewed the same proposal material, and that outside considerations that might significantly alter the evaluation process were not introduced by evaluators. No changes to evaluations are to be made without thorough discussions between the individual evaluator and the TERP chairman, and no change may be made without the concurrence of the individual evaluator. Any disagreement with the TERP report, drafted by the chairman, is to be the subject of a minority report.

After reviewing individual scores, the chairman determined that a "joint review" of all offerors would be constructive. We note that for 8 of 14 scored items in Lant's proposal, there were substantial differences the evaluators' scores, including 10 to 21 point differences in "Personnel Qualifications," "Training," "Security," "Maintenance Procedures," and "Purchasing, Property Control and Accounting Systems." Similar scoring differences appear for all the other offerors. There is no evidence that any individual evaluator either failed to concur or disagreed with the final TERP report which reflected the changed scores. Under the circumstances, we find that the TERP chairman had a reasonable basis to conduct the reevaluation, and we find nothing in the record which suggests any impropriety in the manner in which it was conducted.

With regard to the results of the reevaluation, we find no basis to disagree with the evaluators' conclusions. The evaluators found Lant unacceptable in five areas. For example, in "Tanker Operations" and "Maintenance Procedures," the evaluators found that Lant provided generalized statements instead of a comprehensive plan or understanding of the RFP; apparently did not examine the RFP maintenance requirements; discussed port turnaround in general terms; and provided only a general statement instead of details on tank cleaning. Our review of Lant's proposal indicates that the evaluators could legitimately reach these conclusions. In fact, Lant does not provide any specific examples of how the technical evaluation was flawed. In short, on this record we have no basis to conclude that the evaluation was unreasonable or arbitrary. United Health Serv. Inc., B-232640 et al., Jan. 18, 1989, 89-1 CPD ¶ 43.

Lant also alleges that it was misled, during discussions, into raising its price to a point where it lost the contract award. While an agency may not consciously mislead or coerce an offeror into raising its price, see Johns Hopkins Univ., B-233384, Mar. 6, 1989, 89-1 CPD ¶ 240, here the record does not support Lant's allegation that it was misled. Prior to conducting discussions, the Navy identified 18 price areas in Lant's proposal that it considered unrealistic. For example, the Navy questioned certain aspects of Lant's personnel and crew costs; low salaries for certain key personnel; a failure to itemize training costs; low provisions, loose equipment, consumables, transportation of items, and repair costs; low overhaul and dry docking costs; low insurance offer; high general and accounting and indirect costs; and straight-lining of direct costs throughout contract performance. In discussing these matters, the Navy expressed concern that Lant might not be able to perform certain obligations of the contract for the prices proposed in its offer. Lant was advised to review those prices about which the Navy had expressed concern and the corresponding RFP requirements, to ensure that the proposed contract could be performed as proposed. The Navy also advised Lant that it would have to address the price realism questions that were raised, but that it did not have to raise its price.

Lant concedes that the Navy did not specifically advise it to raise its price, but asserts that such advice was "implicit" in the Navy's identification of its proposal as "technically unacceptable" and its advice that various prices were considered unrealistically low. According to Lant, its representative attempted during discussions to explain where the Navy had misinterpreted or made mistakes in evaluating its prices, without success. Lant concluded that it had no viable alternative but to raise its price.

In its protest Lant identifies 10 of the Navy's 18 price realism concerns where it argues that the Navy misinterpreted its price proposal. However, Lant does not specifically identify what it did in its BAFO to respond to the Navy's concerns. The record reflects that Lant raised its prices in some, but not all, areas identified by the Navy. For example, Lant criticizes the Navy's identification of its low insurance rate, explaining that, although low, it represented a quote from its broker. In its BAFO, Lant's insurance price remained unchanged. Lant also criticizes the Navy's misreading of its proposal with regard to overhaul and dry dock expenses, and the Navy now admits that it had initially miscalculated Lant's proposed expenses in this regard. However, rather than clarifying in its BAFO the basis of its overhaul and dry docking expenses and explaining that the Navy's criticism was based on a rudimentary miscalculation, Lant simply raised its BAFO price for these items.

With the exception of the overhaul and dry dock expenses, we find the Navy reasonably identified its concerns over Lant's low prices in the specified areas of Lant's proposal. Lant's decision to raise its prices, thereby increasing its overall price, reflects Lant's business judgment, and we find that Lant was neither misled nor coerced into making that decision by the agency. See Eagle Technology, Inc., B-236255, Nov. 16, 1989, 89-2 CPD ¶ 468. We are unpersuaded by Lant's argument that since it could not convince the Navy during discussions of the realism of Lant's prices, it was denied an opportunity to establish its cost realism. On the contrary, Lant could have provided appropriate explanatory material in its BAFO to address the Navy's concerns, but instead exercised it business judgment to raise its prices in some instances and maintain them in others. Id.

In a related protest ground, Lant argues that the Navy applied a more stringent price realism standard in evaluating its initial offer than it did in evaluating IMC's BAFO. MTL similarly argues that the Navy ignored price realism during evaluation of BAFOs.2/ The protesters base their contentions that the Navy unequally treated offerors on the fact that the Navy awarded the contract to IMC at $170 million dollars, while it rejected Lant's initial offer of $173 million as unrealistic. We find that the Navy treated all offerors equally in its review of initial proposals and BAFOs.

In conducting its price realism analysis, the Navy compared all offers with each other, with the current contract, and with the government estimate. During the initial evaluation, when the Navy considered Lant's technical deficiencies in conjunction with its low prices for some items, it concluded that there was doubt as to Lant's understanding of the RFP's requirements and its ability to perform successfully at some of the prices it proposed. In the same evaluation, IMC's proposal received the highest technical score and, viewed in conjunction with this technical excellence, IMC's proposed prices were determined to be realistic for the effort proposed.

When BAFOs were evaluated, IMC's technical score remained the highest. In evaluating its reduced offer, the Navy made the same price comparisons as before. Although IMC's total price was lower than other offerors' and the government estimate, the Navy, focusing primarily on the areas of operations, maintenance and wages, found all prices to be adequate and realistic. For example, proposed wages exceeded the Department of Labor wage determination and current contract wages. Further, IMC was found to have adequately considered operations costs including key

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2/ In their original protests, both also contended that offerors were not advised of the consideration or importance of price realism. The RFP proposal preparation instructions clearly identified price realism as an area of evaluation of price proposals. Further, at the outset of discussions, each offeror was advised that both technical deficiencies and realism issues would be addressed. Thus, we find these contentions without merit.

personnel, logistics, corporate and subcontracted resources, with estimated profitability to ensure a viable, operating contract. While finding that a majority of IMC's BAFO reduction came in the area of maintenance-related items, the Navy found that the offer adequately included costs incidental to maintenance in comparison with the current contract and other offers submitted in the procurement. Having found IMC's prices realistic, the Navy attributed the difference between IMC's BAFO of 170 million and the Navy's estimate of $221 million to "intense price competition." Under these circumstances, we find that no different standard was applied to IMC than that applied to Lant, and we find reasonable the Navy's evaluations of price realism.

In its protest, MTL also speculates that amendment No. 7 and its reduction of SCA applicable days was intended to benefit IMC by manipulating its price downward. MTL explains that it was unaffected by the change since its "non-SCA" wages exceed the SCA levels. This allegation is untimely since it concerns a matter apparent from the face of the amendment which should have been raised prior to the closing date for receipt of BAFOs. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990). In any event, the record establishes that IMC's "non-SCA" wages also exceed SCA levels.

MTL next contends that the Navy ignored the corporate viability factor in evaluating IMC's BAFO, since IMC's capital reserves, outside financing,3/ and proposed price are insufficient for IMC to meet the contract requirements. MTL also contends that the award was made to IMC in bad faith in view of the Navy's misleading Lant, and its favoring IMC by issuing amendment No. 7, and by ignoring IMC's cost "unrealism," lack of corporate viability, and failure to submit financial statements.

3/ In their original protests both Lant and MTL argued on "information and belief" that IMC had secured outside financing improperly made or guaranteed by a labor union, to meet the RFP's requirement that offerors demonstrate the ability to obtain financing for 1/30 of the proposed contract value. However, the record establishes that IMC's 1/30 financing obligation was not guaranteed by any labor union.

MTL's contentions essentially attack the Navy's affirmative determination of IMC's responsibility to successfully perform the contract. We will not review that determination unless there is a showing of possible fraud or bad faith on the agency's part or that definitive responsibility criteria in the RFP were misapplied. Electronic Sys. USA, Inc., B-233104, Dec. 28, 1988, 88-2 CPD ¶ 631. MTL has failed to make the requisite showing. There is no evidence of fraud and we have rejected the protesters' contentions regarding misleading discussions, the effect of amendment No. 7, and the Navy's evaluation of the price realism of IMC's offer. With regard to whether IMC was properly found corporately viable, the record establishes that IMC met the 1/30 financing requirement and submitted all requested financial statements.4/

Accordingly, the protests are denied.

Robert P. Murphy

for James F. Hinchman
General Counsel

4/ We note that IMC's proposal contained an unaudited financial statement in response to the RFP's request for an audited statement. However, IMC promised to and did submit an audited version of the same statement after contract award, but prior to performance, which statement presented a more favorable financial picture of IMC. Inasmuch as an awardee may establish compliance with such a responsibility matter up until the time of performance, we perceive no error in the Navy's reliance on the original statement and acceptance of later submitted audited statement. See Motorola, Inc., B-234773, July 12, 1989, 89-2 CPD ¶ 39.