



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Video Ventures, Inc.

File: B-240016

Date: October 19, 1990

Jim Duffy for the protester.
Thomas E. Rhodes for Viewfinder Productions, Inc., an interested party.
Marc C. Owen, Department of Transportation, for the agency.
Jacqueline Maeder, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency evaluation gave greater weight to technical factors than was reasonably consistent with the solicitation evaluation criteria by using a scoring formula which accorded less than 10 percent to price, and more than 90 percent to technical, and effectively failed to consider protester's low fixed price as a significant evaluation factor.
2. Protest is sustained where agency made award to other than the low priced, technically acceptable offeror on the basis of initial proposals without discussions.

DECISION

Video Ventures Productions, Inc. protests the award of a contract to Viewfinder Productions, Inc. under request for proposals (RFP) No. DTSL55-89-R-C0862, issued by the St. Lawrence Seaway Development Corporation (SLSDC), Department of Transportation (DOT), for the production of a videotape showcasing shipping on the St. Lawrence Seaway System. Video Ventures contends generally that its proposal was unfairly evaluated, and that award to a higher priced offeror was improper.

We sustain the protest.

The RFP was issued on August 29, 1989 with a closing date, as extended, of March 21, 1990. The RFP called for the award of a firm, fixed-price contract for the production of a videotape for use as an educational tool on the St. Lawrence Seaway

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System and as a marketing tool to bolster international shipping through the Seaway. The new videotape was to replace an outdated 1984 videotape on the Seaway System.

The solicitation indicated that award would be made to the offeror whose proposal was determined to be most advantageous to the government, considering technical quality, price and other factors. The RFP indicated that award may be made on the basis of initial proposals and stated that "award will not necessarily be made to the lowest offeror dollarwise." Section M of the solicitation, as revised in amendment 3, provided for cost evaluation and for technical evaluation, listing 10 factors which the agency would use to evaluate proposals technically. These factors examined how well the proposal demonstrated an understanding of the purpose and objective of the videotape, the adequacy with which the proposal addressed each task, and the offeror's personnel, past performance and experience.

Seventeen proposals were received, including Viewfinder's and Video Ventures'. The technical review panel, comprised of six experts in the fields of media and communications and video production, reviewed the proposals. Panel members scored each proposal independently, awarding up to 10 points for each of the 10 technical factors and 10 points for the cost factor.

Video Ventures proposed a firm fixed price of \$43,295. Viewfinder's proposed price was \$58,956. The review panel evaluation resulted in a technical score of 397 (out of a possible 600) for Video Ventures' proposal and 497.5 for Viewfinder's proposal. Video Ventures' low price received a price score of 51 (out of a possible 60), resulting in a total score of 448; Viewfinder received a price score of 45, resulting in a total score of 542.5. The agency concluded that Viewfinder's proposal was more advantageous to the government because the technical superiority offered by Viewfinder was worth the additional 27 percent in price, and award was made to Viewfinder on the basis of initial proposals.

In a negotiated procurement, the contracting agency has broad discretion in determining the manner and extent to which it will make use of the technical and cost evaluation results. TRW, Inc., 68 Comp. Gen. 511 (1989), 89-1 CPD ¶ 584. Cost/technical trade-offs may be made and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation criteria. Id. However, here we find the trade-off unjustified and inconsistent with the stated criteria. In particular, we find that while the solicitation indicated that both technical and price proposals were to be submitted and would be evaluated, it did not offer any suggestion of the

magnitude of the disproportion between the weights actually assigned to the technical and cost aspects--91 percent versus 9 percent, respectively. In our view, the solicitation does not permit this disproportionate weighing. Where a solicitation indicates that price will be considered, but does not indicate the relative importance of price and technical factors, they are properly considered equal in weight. Avtec, Inc., B-238824, June 22, 1990, 90-1 CPD ¶ 581; Fabrics Plus, Inc., B-218546, July 12, 1985, 85-2 CPD ¶ 46. Furthermore, because here this differential so minimizes the potential impact of price that it makes any technical advantage essentially determinative, irrespective of an overwhelming price premium, we question whether such a formula is consistent with the requirement under the Competition in Contracting Act (CICA) that price be one of the significant factors in the evaluation of competitive proposals. 41 U.S.C. §§ 253a(b)(1); 253b(d)(4) (1988); Coastal Science and Eng'g, Inc., 69 Comp. Gen. 66 (1989), 89-2 CPD ¶ 436.

The agency argues that even if price had been weighed 50 percent, Viewfinder would have received a higher total score than Video Ventures. However, this conclusion is based on the price scores awarded Video Ventures by the review panel, which included two 9s and one 3. It is not clear why the low-priced offeror on a firm, fixed-price solicitation was assigned any score less than the maximum for the price evaluation factor. The record suggests that the agency questioned whether Video Ventures could do the work at the price it offered because the agency found the protester's price to be "suspiciously low." In effect, the review panel used Video Ventures' low price as an indication that the proposal was lacking in technical merit, even though Video Ventures' price is within the agency's \$40,000 to \$60,000 cost estimate. A low fixed priced offer such as Video Ventures' cannot be downgraded in the price evaluation merely by virtue of its low price. Ball Technical Products Group, B-224394, Oct. 17, 1986, 86-2 CPD ¶ 465. The fact that an offeror's price is considered unusually low does not provide a valid basis for rejecting a technically acceptable fixed price proposal, absent a finding of nonresponsibility, which is not present here. Id. In our view, the evaluators simply mis-scored Video Ventures' proposal with respect to its low price, since the protester's 27 percent cost advantage is not reflected in its 12 percent scoring advantage under the cost factor.

In addition, a contracting agency may make award on the basis of initial proposals only where the solicitation advises offerors of that possibility and the competition or prior cost experience clearly demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the

government. Federal Acquisition Regulation § 15.610(a)(3); The Saxon Corp., B-232694.2 et al., June 13, 1989, 89-1 CPD ¶ 553. Here, while the RFP specifically provided that the agency could make award based on the submission of initial proposals without discussions, the agency did not award to the lowest priced offeror. The agency argues for the first time in its report on the protest that Video Ventures' proposal was technically unacceptable; yet, this determination is not substantiated by the record. The agency report does not include a competitive range determination, or other evidence that Video Ventures' proposal was determined to be technically unacceptable. Video Ventures' proposal was ranked eighth out of 17, and its relative technical point score does not suggest that it was technically unacceptable. The contracting officer's apparent "hindsight" determination of technical unacceptability is inappropriate where it is without support in the record. See Presentations South, Inc., B-229842, April 18, 1988, 88-1 CPD ¶ 374. Accordingly, award in this instance to other than the low priced offeror on the basis of initial proposals was improper. Hartridge Equip. Corp.-- Recon., B-228303.2, May 24, 1988, 88-1 CPD ¶ 491.

Suspension of contract performance was not required under CICA because the protest was filed in our Office more than 10 days after the award was made. Since the contract has been substantially performed, termination is not a feasible remedy. However, since the agency's improper actions deprived the protester of a fair opportunity to compete for the award, Video Ventures is entitled to recover its proposal preparation costs. 4 C.F.R. § 21.6(d)(2) (1990). Video Ventures is also entitled to the cost of filing and pursuing its protest. 4 C.F.R. § 21.6(d).

The protest is sustained.



Acting Comptroller General
of the United States