Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: United Engineers & Constructors Inc., Stearns-Roger Division

File: B-240691; B-240691.2

Date: December 14, 1990

Jacob B. Pankowski, Esq., and D. Michael Fitzhugh, Esq., McKenna & Cuneo, for the protester.
John Pettit, Esq., and Capt. Mary E. Harney, Department of the Air Force, for the agency.
Barbara C. Coles, Esq., Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency's determination to award cost-plus-fixed-fee contract to offeror with a lower rated technical proposal to take advantage of its lower proposed cost was proper, even though cost was the third in importance of evaluation factors, where the agency reasonably decided that the cost premium involved in an award to a higher rated, higher priced offeror was not warranted in light of the acceptable level of technical competence available at the lower cost, and where offerors were explicitly advised that cost was a significant evaluation factor.

2. Challenge to agency's review of awardee's cost realism is denied where record shows that cost realism review was reasonable and thorough and where agency sought advice from the Defense Contract Audit Agency regarding indirect cost rates and negotiated a rate ceiling with the successful offeror to protect against increases in those rates.

3. Protest alleging that agency violated the prohibition against technical leveling is denied where there is no indication that agency either conducted successive rounds of technical discussions or provided impermissible assistance to the awardee.

4. Fact that agency awarded contract to a different corporate affiliate than the one that responded to the Commerce Business Daily (CBD) announcement regarding the procurement has no bearing on the propriety of the award because a CBD announcement is not a solicitation and has no legal effect on the

validity of a contract formed when an agency accepts an offer submitted in response to a request for proposals.

5. Fact that awardee is not meeting a contract requirement during performance does not show that awardee's proposal failed to conform to the solicitation's requirements where the proposal in fact offered to perform as required.

DECISION

United Engineers & Constructors Inc., Stearns-Roger Division (UEC), protests the award of a contract, known as the Ground Systems Associate Contract (GSAC), to Brown and Root Services Corporation (BRSC), under request for proposals (RFP) No. F04701-89-R-0042, issued by the Department of the Air Force for support services for ground systems associated with the launch, payload, instrumentation systems and subsystems at all Air Force Space Systems Division locations.1/ UEC asserts that the Air Force improperly departed from the solicitation's evaluation scheme by making a cost/technical tradeoff that failed to give more weight to technical factors than to cost in the evaluation of proposals. UEC also challenges the cost realism analysis of BRSC's proposal on the basis that BRSC's proposed costs were too low and that the Air Force negotiated an overhead rate ceiling with BRSC that will not provide the government with adequate protection against cost overruns.2/ In addition, in its post-conference comments, UEC raises three new arguments: that the Air Force engaged in technical leveling on behalf of BRSC; that BRSC should not have received award because a corporate affiliate, not BRSC, responded to the Commerce Business Daily (CBD) announcement of this procurement; and that the BRSC proposal did not comply with the requirements of the RFP.

We deny the protest.

1/ These locations include: Vandenberg Air Force Base, California; Cape Canaveral Air Force Station, Florida; Falcon Air Force Base, Colorado; and Buckley Air National Guard Base, Colorado.

2/ The initial protest filed by UEC also raised two issues that have since been abandoned--that the Air Force failed to include a wage determination in the RFP, and that BRSC was improperly permitted to propose an alternate manning and management proposal that did not meet the solicitation requirements. The Air Force fully responded to these issues in its agency report; UEC did not rebut the agency response on these two points. Accordingly, we consider the issues to have been abandoned by the protester. Herman Miller, Inc., B-234704, July 10, 1989, 89-2 CPD ¶ 25.

BACKGROUND

The RFP, issued on April 19, 1990, contemplated the award of a cost-plus-fixed-fee contract for a wide range of ground systems support on a level-of-effort basis. The solicitation advised that award would be made to the responsible offeror whose proposal was considered to be the most advantageous to the government. In addition, the RFP indicated that proposals would be evaluated in the management and technical areas, and in the area of cost. In this regard, section M of the solicitation stated:

> "The Management and Technical Areas are equal in importance and are of greater importance than the Cost Area which is third in importance and is a significant factor. It will be evaluated for realism, completeness and reasonableness."

UEC and BRSC submitted proposals in response to the RFP by the May 22 closing date. After reviewing the initial proposals, the Air Force conducted discussions, and requested and received best and final offers (BAFO) from both offerors. The evaluation team rated UEC's BAFO "exceptional" in both the management and technical areas.3/ Specifically, UEC's proposal was rated exceptional in two of the three management subcategories, and acceptable in the third subcategory. In the technical area, UEC's BAFO was rated exceptional across the board--i.e., in all three technical subcategories and in both sample tasks. BRSC's BAFO, on the other hand, was rated acceptable in both the management and technical areas, as well as in all subcategories within each area, and in the two sample tasks.

Although UEC's proposal was clearly superior to BRSC's proposal, as evaluated by the Air Force, UEC's proposed cost was $11 million higher than BRSC's proposed cost--UEC proposed a cost of $41.7 million; BRSC proposed a cost of $30.8 million. After reviewing the evaluation results and the proposed costs, as well as the cost realism analysis, the source selection authority (SSA) concluded that the relative

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3/ In evaluating the offerors' proposals in the management and technical areas, the Air Force used a color-coded evaluation scheme. Under this scheme, evaluation factors and subfactors are awarded color rankings rather than scores. Blue indicates an exceptional proposal; green, yellow and red indicate acceptable, marginal and unacceptable proposals, respectively. For clarity, our decision will refer to the adjectival descriptions, and not the color code, when discussing evaluation results.

merits of UEC's proposal were more than offset by UEC's substantially higher proposed cost. Therefore, the SSA determined that BRSC's proposal was the most advantageous to the government and awarded the contract to BRSC on July 27, 1990. On August 6, UEC protested to our Office.

COST/TECHNICAL TRADEOFF

UEC contends that the award to BRSC was improper because the Air Force did not follow the evaluation criteria set forth in the RFP. According to UEC, since technical factors were more important than cost under the evaluation scheme, and since UEC submitted the highest-ranking proposal, its higher cost should not have precluded it from receiving the award.

In a negotiated procurement, even if cost is the least important evaluation criterion, an agency may properly award to a lower-cost, lower-scored offeror if it determines that the cost premium involved in awarding to a higher-rated, higher-cost offeror is not justified given the acceptable level of technical competence available at the lower cost. Carrier Joint Venture, B-233702, Mar. 13, 1989, 89-1 CPD ¶ 268, aff'd, B-233702.2, June 23, 1989, 89-1 CPD ¶ 594. The determining element is not the difference in technical merit, per se, but the contracting agency's judgment concerning the significance of the difference. Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the established evaluation criteria. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

As stated above, the RFP provided that the contract would be awarded to the responsible offeror whose proposal was determined to be the most advantageous to the government. While the RFP listed proposed cost as the third in importance of the evaluation factors, the RFP specifically stated that cost would be a significant evaluation factor. The Air Force's evaluation concluded that the BRSC proposal was technically acceptable in every subcategory of both the management and technical factors; also, BRSC's response to both sample tasks was evaluated as technically acceptable. This conclusion, combined with the fact that the proposed cost of UEC's technically superior proposal was approximately $11 million, or 35 percent, higher than BRSC's proposed cost, formed the basis for the SSA's cost/tradeoff decision.

In support of its argument, the protester relies principally on DLI Eng'g Corp., B-218335, June 28, 1985, 85-1 CPD ¶ 742, aff'd, 65 Comp. Gen. 34 (1985), 85-2 CPD ¶ 468. Unlike that case, the record here shows that the protester's superior

ratings were derived primarily from its experience as the long-time incumbent contractor. Since such advantages may be overcome by a new contractor as it gains experience, a selection official reasonably may decide that a significant cost premium associated with a technical advantage derived from incumbency is not warranted. See Grey Advertising, Inc., 55 Comp. Gen. 1111, supra.

Given these factors, together with the SSA's written determination balancing the results of the technical evaluation with the large difference in cost and other strengths of the BRSC proposal--such as its safety record and past performance record--we conclude that the SSA's decision to award to the low cost, technically acceptable offer was reasonable and consistent with the RFP's evaluation scheme. See Carrier Joint Venture, B-233702, supra.

COST REALISM ANALYSIS

UEC also charges that the Air Force failed to conduct a proper cost realism analysis of BRSC's low cost proposal. According to UEC, the Air Force analysis improperly disregarded the large difference between BRSC's proposed cost and the government's own estimate. Specifically, BRSC's proposed cost was approximately 33 percent lower than the agency estimate, which, UEC argues, should have raised concerns about the realism of BRSC's proposed costs. In addition, UEC argues that the Air Force improperly relied on an overhead rate ceiling with BRSC to protect the government from increases in overhead costs. UEC contends that the agency's reliance on a rate ceiling is misplaced and will not provide the desired protection because the ceiling covers overhead rates, rather than absolute dollar amounts. Also, UEC claims that BRSC will be able to avoid the ceiling by decreasing indirect costs and increasing direct costs.

The Air Force responds that it conducted a thorough cost realism review of each proposal. Specifically, the agency compared the cost proposals to its own estimate of what the effort should cost; conducted both a price analysis and a cost analysis; and requested and received a Defense Contract Audit Agency (DCAA) review of each offeror's proposed indirect rates. As a result of this review, the contracting officer concluded that BRSC's proposed costs were not unrealistically low and that the substantial savings represented by BRSC's offer were due largely to its lower overhead rates. To ensure that BRSC's lower overhead rates would not increase and erode the savings presented by the proposal, the Air Force negotiated a ceiling rate for BRSC's overhead and general and administrative expenses. The Air Force responds that it properly negotiated these ceilings to mitigate the risk of increased costs.

When an agency evaluates proposals for the award of a cost reimbursement contract, an offeror's proposed estimated costs of contract performance are not dispositive, since the offeror's estimates may not provide valid indications of the actual costs which the government is, within certain limits, required to pay. See Federal Acquisition Regulation (FAR) § 15.605(d). Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. Arthur D. Little, Inc., B-229698, Mar. 3, 1988, 88-1 CPD ¶ 225. Our review of an agency's exercise of judgment in this area focuses on whether the agency's cost evaluation was reasonably based. Grey Advertising, Inc., 55 Comp. Gen. 1111, supra; Science Applications Int'l Corp., B-238136.2, June 1, 1990, 90-1 CPD ¶ 517.

The record (portions of which were not released to the protester but all of which we have reviewed in camera) indicates that the Air Force conducted a reasonable cost realism analysis of BRSC's proposal to determine if the costs proposed were realistic and to ensure that BRSC understood the solicitation. In particular, the Air Force analyzed the cost elements of direct labor hours, direct labor rates, indirect rates, other direct costs and fee. Further, the contracting officer and the SSA determined that BRSC's contract price, including options, was fair, reasonable, and commensurate with the contract effort.

The protester complains that the cost realism analysis was improper because of the large discrepancy between BRSC's proposed cost and the government estimate. The government estimate here was based primarily on historical expenditures for these services, which have been performed by UEC for approximately 25 years. As a result, it comes as no surprise that UEC's proposed costs are quite close to the government estimate. In any event, an agency is not required to view an offeror's proposed cost as unrealistic solely because those costs are lower than the government estimate. See Opti-Metrics, Inc.; NU-TEK Precision Optical Corp., B-235646; B-235646.2, Sept. 22, 1989, 89-2 CPD ¶ 266.

Nor are we persuaded by the protester's assertion that the Air Force improperly employed an overhead and general and administrative expense ceiling to protect the agency from cost increases. The Air Force decision to seek input from DCAA led to the decision to negotiate an overhead ceiling in the BRSC proposal. Since BRSC proposed to accomplish the contract effort within its newly created Federal Programs Division and there was no indirect rate history for the Division, DCAA expressed concerns about the proposed rates. Following DCAA's

advice, the agency included indirect ceiling rates in the contract which covered overhead and general and administrative costs. Contracting officers properly may rely on DCAA's advice in performing a cost realism analysis, see NKF Eng'g, Inc.; Stanley Assocs., B-232143, B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497, and, in this case, we find that the Air Force acted reasonably in adopting the protection urged by the DCAA review.

Despite UEC's claims to the contrary, overhead ceiling rates provide an obvious limitation on reimbursable overhead expenses, notwithstanding the fact that they do not impose an actual dollar ceiling for such reimbursements. In fact, we have specifically held that rate ceilings are appropriate tools for agencies attempting to evaluate competing cost proposals. See PTI Envtl. Servs., B-230070, May 27, 1988, 88-1 CPD ¶ 504.

To the extent that UEC argues that BRSC will escape the impact of the rate ceilings by shifting its indirect costs into the direct cost pool, this argument assumes that BRSC will act in bad faith--an assumption we see no basis to accept--and that the government will not avail itself of the safeguards available in administering cost type contracts. These include the requirement, found at FAR § 31.201-2, that all costs charged to the government be reasonable, allocable, allowable, and consistent with the cost principles set forth in FAR Part 31; cost reimbursable contracts also are subject to audit, pursuant to FAR § 52.215-2, which protects against cost substitution by unscrupulous contractors. UEC's speculation as to future improper conduct by BRSC simply does not show that the ceilings adopted are ineffective in protecting against cost increases.4/

POST-CONFERENCE ISSUES

In its post-conference comments, UEC raises three new issues based on information received during the conference and during its review of the agency response to the protest. These issues are: (1) that the Air Force impermissibly engaged in technical leveling during discussions with BRSC;

4/ As support for its speculation that BRSC may attempt to avoid the ceiling rates, UEC contends that BRSC has hired UEC's former employees at higher salaries but with lower fringe benefits than they received from UEC. This comparison is not meaningful. Since BRSC is not bound to offer the same compensation package as UEC did, the fact that its offers to UEC's former employees differ from their prior compensation packages does not demonstrate that BRSC is improperly attempting to shift indirect costs to the direct cost pool.

(2) that the agency awarded the contract to a company different from the company that responded to the CBD announcement of this procurement; and (3) that the BRSC proposal did not conform to credentialing requirements established in the RFP for certain personnel.

With respect to the claim of technical leveling, UEC alleges that the agency had successive rounds of discussions with BRSC before and after clarification requests (CR) and deficiency reports (DR) were issued to BRSC in order to advise the firm of the corrective actions it could take to improve its proposal. As evidence of such improper assistance, UEC points out that in at least one technical evaluation area, BRSC's score improved by two color levels. According to UEC, such improvement could only have been attained with the government's assistance in correcting deficiencies.

Technical leveling occurs when an agency helps an offeror bring its proposal up to the level of other proposals through successive rounds of discussions; an agency engages in leveling when it points out weaknesses in an offeror's proposal due to a lack of diligence, competence, or inventiveness in preparing the proposal. FAR § 15.610(d)(1). Based on our review of the record, there is no indication that the Air Force violated the prohibition against technical leveling since there is no evidence that successive rounds of technical discussions were held with BRSC, nor is there evidence of improper assistance to BRSC, under the guise of discussions, to help it revise its proposal to an acceptable level. From the record, it appears that only one series of CRs and DRs was sent to each offeror and that only one set of oral questions was addressed to both offerors, not successive rounds of questions.5/

Next, the protester challenges the award to BRSC on the basis that a different company, Brown & Root Development Inc., not BRSC, responded to the CBD announcement for this procurement. The CBD announcement here requested a statement of capabilities from interested contractors, and as the protester notes, a corporate affiliate of BRSC responded to the announcement.

UEC's contention that this fact should invalidate the contract award is wholly without merit. An announcement in the CBD is not a solicitation; the field of potential offerors was not

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5/ The record does reflect that the agency made brief follow-up telephone calls to both offerors after written discussions to identify minor changes it sought to include in the BAFO model contract, and changes to the offerors' Small and Small Disadvantaged Business Plans based on information not available at the time of discussions.

limited to those companies responding to the announcement, nor is it relevant that a corporate relative of BRSC responded to the CBD announcement and BRSC did not. In short, actions taken in response to a CBD announcement have no legal effect on the validity of a contract formed when an agency accepts an offer submitted in response to an RFP. BRSC is the legal entity that responded to the RFP, and on the basis of that response BRSC was awarded a contract. Since the agency was free to provide a copy of the solicitation to any company that requested it and would have evaluated a proposal submitted by any prospective offeror, these facts do not render award to BRSC objectionable.

Finally, UEC contends that the award to BRSC was improper because BRSC's proposal did not conform to the solicitation's requirement that field managers at Cape Canaveral Air Force Station and Vandenberg Air Force Base have professional engineer registrations. Despite UEC's assertion to the contrary, BRSC did, in fact, propose to use engineers in these positions that met the registration requirement. Thus, BRSC's proposal complied with the solicitation, although the Air Force admits that the current field managers at these sites do not have the appropriate registrations. The fact that BRSC is not performing in accordance with the requirements of the solicitation in this fashion is a matter of contract administration which is the responsibility of the contracting agency and which we will not review.6/ 4 C.F.R. § 21.3(m)(1); Louisiana Found. for Medical Care, B-225576, Apr. 29, 1987, 87-1 CPD ¶ 451, aff'd, B-225576.2, July 2, 1987, 87-2 CPD ¶ 6.

The protest is denied.

for James F. Hinchman
General Counsel

6/ UEC also raises another contract administration issue, claiming that BRSC has requested a contract modification to increase the contract's estimated costs to pay for increased salaries or fringe benefits. Although UEC is incorrect in its charge, the Air Force explains that BRSC has requested a contract modification for the transition phase because the agency required more personnel during this period than BRSC had proposed. Nonetheless, this contention involves a matter of contract administration which we will not consider. 4 C.F.R. § 21.3(m)(1) (1990).