



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: KMS Fusion, Inc.

File: B-242529

Date: May 8, 1991

Timothy Sullivan, Esq., and Katherine S. Nucci, Esq., Dykema Gossett, for the protester.
Ralph Perkins, Esq., for General Atomics, an interested party.
Harvey Brosler, Esq., Department of Energy, for the agency.
Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency request for final submissions which does not include the term "best and final offers," but which reasonably communicates to offerors that discussions are closed and establishes a common cutoff date for the submission of final offers, meets the Federal Acquisition Regulation requirement for requesting best and final offers.
2. Allegation of agency bias which does not establish any specific and malicious intent by agency officials to harm the protester does not provide a basis to sustain a protest.
3. Agency's failure to retain notes and worksheets of individual evaluators does not render record inadequate for purposes of determining reasonableness of agency's evaluation where record contains detailed narrative description of the evaluation results, including a narrative description supporting the rating of each offer under each evaluation criterion and subcriterion.
4. Protest alleging improper evaluation of proposals is denied where record supports the reasonableness of the agency's determination that protester's proposal contained specific weaknesses.
5. Issuance of task orders for "phase in" activities constitutes work within the scope of the requirements advertised.

DECISION

KMS Fusion, Inc. (KMS) protests the Department of Energy's (DOE) award of a contract to General Atomics (GA) under request for proposals (RFP) No. DE-RP03-90SF18601. The RFP sought offers to provide target component fabrication and technology development to support the DOE national laboratories engaged in Inertial Confinement Fusion (ICF) research.^{1/} KMS alleges that DOE failed to request best and final offers (BAFOs) after discussions, was biased against KMS, improperly evaluated proposals, and awarded a contract for work beyond the scope described in the RFP.

We dismiss the protest in part and deny it in part.

BACKGROUND

KMS has been the incumbent contractor for services similar to those sought under this procurement since 1975. Between 1975 and 1987, KMS' contracts were awarded without competition. In 1987, DOE first competed its requirement for ICF support services. KMS was the successful offeror under that competition and was awarded a 3-year contract for the period extending through December 30, 1990, along with two 1-year options.

In January 1990, DOE determined it would not exercise KMS' contract options because the scope of the work required under the contract had changed.^{2/} On February 2, 1990, a "sources sought notice" was published in the Commerce Business Daily (CBD). On August 2, the current RFP was issued.

^{1/} The ICF program is intended to investigate and demonstrate the technologies required to achieve thermonuclear ignition conditions in the laboratory. ICF experimentation involves use of lasers or particle beam accelerators (referred to as "drivers") to bombard tiny fusion fuel capsules (referred to as "targets") to cause a momentary fusion reaction. The national laboratories involved in ICF research are: Lawrence Livermore National Laboratory; Los Alamos National Laboratory; Sandia National Laboratories; University of Rochester Laboratory for Laser Energetics; and the Naval Research Laboratory.

^{2/} The scope of work for KMS' predecessor contract included a large component (approximately one-third of contract costs) for chroma laser operations which DOE determined was no longer required.

The RFP contemplated award of a cost-plus-fixed-fee, level-of-effort contract and provided that the contractor's performance would be authorized by task assignments. The RFP stated that the contractor would be required to furnish personnel, facilities, equipment, material, supplies, and services necessary to carry out task assignments and required offerors to submit technical, business/management, and cost proposals. The RFP stated that technical factors were most important, business/management factors less important, and cost factors least important.

KMS and GA each submitted proposals on or before the September 24, 1990 closing date. On October 4, DOE advised both offerors that they were in the competitive range and provided each offeror with a list of questions prepared by the Source Evaluation Board (SEB). On October 10 and 11, DOE conducted site visits at KMS and GA facilities, respectively, and requested that BAFOs be submitted by October 19.

Following submission of BAFOs, the proposals were audited by the Defense Contract Audit Agency (DCAA). By letter dated November 14, the contracting officer advised both offerors that final negotiations were scheduled for the week of December 17. The contracting officer subsequently met with GA on December 12 and with KMS on December 14. In the morning of December 14, DOE's contracting officer discussed DCAA's audit of KMS' cost proposal and conveyed DOE's pricing objectives to KMS. In the afternoon, the contracting officer's technical representative (COTR)^{3/} provided KMS with a draft list of tasks the successful contractor might be expected to perform after contract award.

On December 19, both offerors were orally requested to submit signed contract documents confirming the results of the final negotiations. DOE confirmed its request by telecopying the offerors a contract cover sheet with revised prices and requesting the parties to execute and return the documents by December 21. Both offerors submitted the final contract documents as requested; neither offeror revised its technical or business/management proposals at that time.

Between December 21 and December 26, the SEB evaluated proposals in light of the price changes made in the December 21 submissions. On December 26, the SEB met with the Source Selection Official (SSO) and reported the results of its evaluation of the final offers. The SEB noted that no changes had been made to the technical and business/management proposals of either offeror and concluded that technical

^{3/} The COTR also chaired the technical evaluation committee and was a member of the SEB.

proposals were "equivalent," that GA's business/management proposal was rated a little higher than KMS', and that GA was the low-priced offeror. On December 27, the SSO selected GA as the awardee.

On January 4, 1991, KMS protested DOE's selection of GA. On January 28, following a DOE debriefing regarding evaluation of KMS' proposal, KMS supplemented its protest on the basis of information obtained at that debriefing.

REQUEST FOR BAFOs

KMS first protests that DOE violated Federal Acquisition Regulation (FAR) § 15.611 by failing to request BAFOs following the discussions that occurred on December 12 and 14, 1990. KMS maintains that the list of possible tasks presented on December 14, described work it could not have anticipated from the statement of work contained in the RFP and asserts that it was not given an opportunity to revise its proposal based on this information.^{4/} KMS acknowledges that DOE requested a final submission from the offerors following the discussions on December 12 and 14, but asserts that the contracting officer "made it clear" no significant changes, other than those necessitated by the DCAA audit, would be permitted.

The FAR requires that, upon completion of discussions, the contracting officer shall issue a request for BAFOs to all offerors in the competitive range and confirm oral requests of BAFOs in writing. FAR § 15.611. An agency request that does not use the specific words "best and final offer," but reasonably communicates to offerors that discussions are closed and establishes a common cutoff date for submission of final offers, meets the FAR requirement in this regard. See Israel Aircraft Indus., Ltd., B-239211, July 30, 1990, 90-2 CPD ¶ 84; A. T. Kearney, Inc., B-237731, Mar. 19, 1990, 90-1 CPD ¶ 305.

^{4/} KMS argues that the information provided on December 14, altered the RFP requirements regarding the contractor's use of "on-site" personnel at the national laboratories. However, the RFP did not address the issue of where the contractor's personnel would be required to perform other than to require that the contractor maintain an independent facility. We are not persuaded that the information disclosed on December 14, materially altered the scope of the statement of work in the RFP.

On December 19, after final negotiations, DOE asked both GA and KMS to submit final offers by December 21, 1990. DOE confirmed this request by telecopying contract cover sheets to both offerors. The record does not show that the offerors were prohibited from revising any portion of their proposals at that time and KMS does not suggest it was treated any differently from GA with regard to the request for final submissions. Cf. Woodward Assocs., Inc; Monterey Technologies, Inc., B-216714; B-216714.2, Mar. 5, 1985, 85-1 CPD ¶ 274. Accordingly, we conclude that DOE's oral request for final submissions by a common cutoff date, subsequently confirmed by telecopying the contract cover sheet, complied with the FAR requirements regarding requests for BAFOS. See Federal Data Corp., B-236265.4, May 29, 1990, 90-1 CPD ¶ 504; Morris Guralnick Assocs., Inc., B-218353, July 15, 1985, 85-2 CPD ¶ 50.

AGENCY BIAS

KMS next asserts that, throughout this procurement, DOE procurement officials demonstrated bias against KMS and that this bias "manifested itself at every level of DOE." KMS asserts it has been the sole commercial source of ICF research for nearly 20 years, but that during this period, it "has had to withstand a number of challenges to its ICF work both from inside and outside the Government." KMS asserts that DOE has been attempting to "rid itself" of KMS for some time, stating:

"In the last 5 years, DOE officials have taken a number of steps designed to harm KMS or, at the very least, to 'teach KMS a lesson.' First, in 1987, DOE attempted to obtain competition for the ICF program . . . KMS was selected as the contractor . . . however, DOE refused to exercise any options"

To the extent KMS is protesting that DOE officials improperly obtained competition for the ICF requirements, its protest is untimely. 4 C.F.R. § 21.2 (1991). Moreover, Congress has mandated that procuring agencies obtain "full and open competition" to the greatest extent possible and has limited authority to award sole-source contracts to a few narrowly defined circumstances. 41 U.S.C. § 253 (1988). DOE's attempts to obtain competition here are not indicative of bias. See Canaveral Maritime, Inc., B-238356.2, July 17, 1990, 90-2 CPD ¶ 41.

KMS also asserts that the DOE COTR demonstrated bias against KMS during the meeting that took place in the afternoon of December 14, 1990. At that meeting, the COTR handed KMS personnel a "cartoon" labeled "Organization Chart" which depicted a toilet with an arrow pointing to the drain pipe

below the toilet and the words "you are here" next to the arrow.

At a bid protest conference held pursuant to our regulations, the COTR stated that as he handed the KMS personnel the cartoon in question he made the self-effacing comment that the government had developed a new organization chart and now he (the COTR) knew where he belonged on that chart. The COTR also stated that during the performance of KMS' predecessor contract, jokes and cartoons had often been exchanged between DOE and KMS personnel.

In contrast to the COTR's explanation, KMS asserted in its written protest submissions that the cartoon "obviously referr[ed] to KMS" and was presented to KMS with "obvious delight by [the COTR]." However, at the bid protest conference, KMS personnel stated they could not recall whether the COTR, or anyone else, made any statements or comments regarding the cartoon during the December 14 meeting. KMS personnel also acknowledged that jokes and cartoons had previously been exchanged between the parties.

Where a protester alleges bias on the part of procurement officials, the protester must prove that the officials had a specific and malicious intent to harm the protester. Advanced Sys. Technology, Inc.; Engineering and Professional Servs., Inc., B-241530; B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153. In the absence of such proof, contracting officials are presumed to act in good faith. Institute of Modern Procedures, Inc., B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93.

We do not believe the COTR's actions on December 14 demonstrate an intent to harm KMS. DOE has offered a reasonable explanation of the incident. While KMS interprets the COTR's action differently, KMS has not identified specific statements or actions evidencing an intent to harm KMS. The COTR's decision to share this particular cartoon with KMS at the time may reflect questionable judgment, but in view of the COTR's explanation, the action does not provide evidence of bias which warrants sustaining the protest.

Finally, KMS points to various other alleged incidents and circumstances which it perceives as demonstrating illegal bias on the part of DOE officials. Such incidents include allegations first made in its post-conference comments that various DOE officials had conflicts of interests with regard to this procurement. With regard to the alleged conflicts of interest, it does not appear that KMS' complaints are based on information which it obtained within 10 days prior to its raising these issues. Accordingly, its protest in this regard is untimely. 4 C.F.R. § 21.3. KMS' allegations

regarding the various other incidents which it asserts demonstrate bias on the part of DOE officials fail to provide evidence of any intent to harm KMS.

EVALUATION OF PROPOSALS

With regard to DOE's evaluation of proposals, KMS first protests that DOE improperly failed to retain the notes and worksheets of its individual evaluators. KMS asserts that this action violates the requirements of FAR §§ 4.801(b) and 15.608(a)(2) and DOE's Source Evaluation Handbook, and argues that the resulting record is inadequate to support DOE's evaluation decisions. DOE maintains that its retention of the item-by-item consensus evaluation of the technical and business evaluation committees and the SEB report to the SSO sufficiently complies with the record retention requirements.

In reviewing protests against allegedly improper evaluations, we examine the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria listed in the RFP. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223. Implicit in the requirement that the agency's judgment be reasonable is the requirement that these judgments be documented in sufficient detail to show they are not arbitrary. Waddell Eng'g, Corp., 60 Comp. Gen. 11 (1980), 80-2 CPD ¶ 269. FAR § 15.612(d)(2) requires that documentation supporting selection decisions show the relative differences among proposals; their strengths, weaknesses and risks; and the basis and reasons for the decisions. Evaluators' individual notes and scoresheets may or may not be necessary for the record to be adequate for us to test the reasonableness of the agency's evaluation of proposals. Department of the Army--Recon., B-240647.2, Feb. 26, 1991, 91-1 CPD ¶ 211 (evaluators' notes necessary to adequately document evaluation and award); Hydraudyne Sys. and Eng'g, B.V., B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88 (record without evaluators' notes and scoring sheets sufficient to judge rationality of evaluation). Here, the record, which includes a detailed description of the evaluation results including a narrative description supporting the conclusions reached for each offeror on each evaluation criterion and subcriterion, provides an adequate basis for our review.

Both KMS' and GA's technical proposals were evaluated as "good" and the SSO concluded that the proposals were "technically equivalent."^{5/} However, KMS asserts that "if DOE had not taken such abnormal measures to downgrade KMS' proposal

^{5/} Section M.004 of the RFP provided that technical and business/management proposals would be rated adjectively.

. . . [KMS'] proposal would have been rated superior to that of General Atomics, a result which would have mandated an award to KMS."

In reviewing agency evaluations of proposals, it is not the function of our Office to independently evaluate those proposals. Ira T. Finley Invs., B-222432, July 25, 1986, 86-2 CPD ¶ 112. Rather, the determination of the relative desirability and technical adequacy of the proposal is primarily a function of the procuring agency which enjoys a reasonable range of discretion. AT&T Technology Sys., B-220052, Jan. 17, 1986, 86-1 CPD ¶ 57. We will question an agency's technical evaluation that has no reasonable basis or is inconsistent with the evaluation criteria contained in the RFP. See American Educ. Complex Sys., B-228584, Jan. 13, 1988, 88-1 CPD ¶ 30. The fact that the protester disagrees with the agency does not itself render the evaluation unreasonable. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

KMS asserts that DOE improperly downgraded its proposal in numerous areas. We have thoroughly reviewed the record with respect to DOE's evaluation of both KMS' and GA's proposals. We conclude that DOE's evaluation of the proposals was reasonable and consistent with the RFP evaluation criteria.

For example, KMS asserts that DOE improperly downgraded its proposal on the basis of the qualifications of the program manager it proposed. The RFP provided that the program manager proposed must have a minimum of 10 years of project manager experience and further stated that in evaluating proposed personnel, DOE would consider:

"the extent to which the technical capabilities and resources proposed are sufficient to successfully complete the program, as demonstrated by . . . the technical qualifications, experience and work assignments (in those particular fields of science, engineering, and technology pertinent to the technical task areas of the SOW) of the proposed principal technical personnel"

KMS' proposed program manager had over 40 years of experience in a variety of positions including: 27.5 years as a university professor; 15 years as a project engineer at a private company; and approximately 1 year at KMS as the project manager under the predecessor contract. KMS' proposal relied on a "weighted average" for asserting that 11.3 years of this experience should be considered as relevant "project manager" experience necessary to meet the RFP's requirements.

DOE concluded that KMS' proposed program manager had sufficient experience to meet the RFP's minimum requirements. However, DOE determined that KMS' proposed program manager constituted a weakness in the proposal because he lacked significant experience in managing similar, technically complex, production-driven projects.

KMS challenges DOE's evaluation on the basis that the RFP did not require the proposed program manager to have 10 years experience in managing major projects, and "did not state that such project management experience must have been directly relevant to ICF research." KMS argues that DOE applied a new and more difficult evaluation criterion than the RFP contemplated.

Contracting agencies are required to identify within each solicitation all factors and significant subfactors to be used in evaluating proposals. 41 U.S.C. § 253a(b)(1) (1988); FAR § 15.605(e). However, under the law applicable here, a contracting agency need not specifically identify subfactors reasonably related to the identified criteria. Washington Occupational Health Assocs. Inc., B-222466, June 19, 1986, 86-1 CPD ¶ 567.

KMS' assertion that DOE was precluded from considering the relevance or similarity of the program manager's prior program management experience is without merit. DOE did not disqualify KMS' offer on the basis of that experience. Rather, it determined that KMS' technically acceptable proposal contained a weakness in that area. DOE's determination was consistent with the evaluation criteria which stated technical personnel would be evaluated as to "the extent" their experience demonstrated an ability to successfully perform the contract. An agency's evaluation plan which gives greater credit based on the extent to which an offeror exceeds the minimum requirements is reasonable. Hoffman Management, Inc., B-238752, July 6, 1990, 90-2 CPD ¶ 15.

By way of further example, KMS protests that DOE improperly downgraded its proposal on the basis of its past performance. The RFP provided for evaluation of proposals on the basis of:

"[t]he extent to which the offeror's experience and performance record demonstrates the likelihood that the offeror can successfully perform the requirements of the overall technical SOW as demonstrated by . . . performance as documented by deliverables under other contracts, especially Government and R&D contracts"

DOE rated KMS' proposal as having a weakness in this area on the basis that, under the predecessor contract, KMS had missed

due dates for certain deliverables because of KMS' unauthorized reallocation of resources. DOE explained that, under the predecessor contract, DOE had directed KMS to discontinue certain cryogenic experimental work; however, KMS disregarded this directive and continued the work without authorization resulting in missed due dates for certain deliverables. KMS acknowledges that it performed unauthorized work under the prior contract, but maintains that "in each case [KMS'] decision was based on [KMS'] belief that the decision best met DOE's needs . . . [I]n retrospect it appears that [KMS] may have misjudged DOE's needs"

In evaluating proposals, a contracting agency may properly consider extrinsic evidence of an offeror's prior contract performance where, as here, the solicitation puts offerors on notice that prior contract performance will be evaluated. Ferranti Int'l Defense Sys., Inc., B-237555, Feb. 27, 1990, 90-1 CPD ¶ 239; Western Medical Personnel, Inc., 66 Comp. Gen. 699 (1987), 87-2 CPD ¶ 310. Where past performance is relevant, the contracting officer should consider this factor. We have held that an agency acted improperly in ignoring an incumbent offeror's prior contract experience. Inlingua Schools of Language, B-229784, Apr. 5, 1988, 88-1 CPD ¶ 340.

KMS acknowledges that it had some performance problems under the predecessor contract, but argues that DOE failed to focus on the final year of that contract during which KMS alleges its performance improved significantly. Based on our review of the entire record, we find no basis to question DOE's determination that KMS' past contract performance evidenced a weakness in KMS' proposal.

KMS also asserts that DOE improperly found that its proposal contained various weaknesses with regard to its commitment of personnel, proposed organization structure, proposed technical approach, adequacy of facilities, proposed management information system, and cost management. We have reviewed the record regarding DOE's evaluation of KMS' proposal and find that evaluation to be reasonable and consistent with the RFP evaluation criteria. We do not believe that any useful purpose would be served by addressing in detail each aspect of DOE's evaluation.


SCOPE OF CONTRACT AWARDED TO GA

Following the bid protest conference, KMS was provided with copies of the initial task orders that DOE has issued to GA under this contract. These task orders contemplate certain "phase in" activities for GA including monitoring the transfer of government furnished equipment from KMS' facility to GA's facility as well as orientation and training of GA personnel at the national laboratories. KMS asserts that the work to be

performed under these task orders is substantially different from the work advertised under the RFP which KMS characterizes as "predominantly a target fabrication effort."

The RFP provided that the contractor's performance would be authorized by task assignments issued within three technical task areas; (1) fabrication/delivery of target components to ICF laboratories; (2) development of target component technology for ICF laboratories; and (3) other efforts which, in the judgment of the contracting officer, were necessary to perform task assignments under areas 1 and 2. The task orders issued to GA clearly fall within the scope of the third task area listed in the RFP.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel