



Comptroller General
of the United States

Washington, D.C. 20548

Ayer
1440660

Decision

Matter of: High-Point Schaer
File: B-242616; B-242616.2
Date: May 28, 1991

Martin Healy, Esq., Thompson & Waldron, for the protester.
Robert B. Wallace, Esq., and Steven Lavin, Esq., Wilson,
Elser, Moskowitz, Edelman & Dicker for O'Brien-Kreitzberg &
Associates, Inc., an interested party.
Tracy Gruis, Esq., Department of the Army, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Lower priced offeror timely filed protest of agency's cost evaluation and technical/cost tradeoff within 10 days of its receipt of information under a Freedom of Information Act request pertaining to the awardee's prices; however, protest is untimely to the extent that it touches on the protester's objections to the agency's technical evaluation and technical ranking of its proposal because it was not filed within 10 days of an agency debriefing disclosing the specific deficiencies in the protester's technical proposal.
2. Agency price evaluation that only considered the total cost of a sample task, rather than the total contract cost, on a solicitation for an indefinite quantity of services under a delivery order contract was proper, where the sample task provided a common basis for cost evaluation under a solicitation that did not specify labor classifications or labor hours because of the uncertainty of the tasks that may be ordered during the contract and the agency's desire to use offerors' existing organizational structure and approaches, and where the task is typical of work under the contract.
3. Agency properly exercised its discretion in determining awardee's technical superiority to be worth its higher cost under an evaluation scheme that accorded equal weight to costs and to technical factors.

DECISION

High-Point Schaer (HPS) protests the award of a fixed-price, indefinite-quantity, delivery order contract to O'Brien-Kreitzberg & Associates, Inc. (OKA), issued by the Department of the Army, Corps of Engineers under request for proposals (RFP) NO. DACA51-90-B-0003 for construction claims management services at Fort Drum, New York, for a base year and 4 option years. HPS' contends that the Corps improperly evaluated offerors' costs and made an improper technical/cost tradeoff in the award selection.

We deny the protests.

The RFP's statement of work calls for the contractor to assist the Corps in researching and evaluating claims received from construction contractors working at Fort Drum.^{1/} Under this fixed-price, indefinite-quantity contract, the minimum dollar amount for the base year work was \$100,000 and the maximum was \$2,000,000.

The RFP sought proposals based on offerors' existing organizational structures and approaches. Instead of listing required labor classifications and giving an estimated number of labor hours for each classification, the RFP required offerors to (1) name the disciplines (i.e., labor classifications such as engineers, technicians, and clerical help) they would use to perform the work; (2) state each discipline's minimum qualifications (e.g., level of education and years of experience); and (3) provide a fixed, price-

^{1/} The claims may involve such diverse matters as allegations of government-caused construction delays, differing site conditions, and deficient designs. The contractor reviews government and claimant (i.e., construction contractor) documents (the contract, contract modifications, submittals, and planned and progress schedules) showing both how the parties initially planned to carry out the construction ("as planned" documents) and how the construction actually was performed ("as built" documents). From this information, the contractor develops as-built schedules and achievable schedules to show who, or what, was responsible for deviations from the "as planned" documents, and estimates the extent of the government's liability, if any, for any amounts claimed. The contractor reports its conclusions concerning the merits of particular claims to the agency, and may be called on to provide expert testimony in support of the agency's position should the matter go to trial.

per-hour for each discipline.^{2/} Offerors submitted the required information in their technical proposals, price proposals,^{3/} and their proposed approaches to the resolution of a hypothetical construction contractor's claim against the Corps.^{4/} The RFP advised offerors that their responses to the hypothetical claim would be used for the "purposes of the Government's price and technical evaluation of proposals."^{5/}

^{2/} The RFP calls for agency and contractor negotiation of delivery orders specifying the disciplines that the contractor will use to assist on particular claims. The contractor is compensated for the designated disciplines at the contract's fixed labor rates.

^{3/} The price proposals did not have a bottom line cost because the RFP did not provide total estimated hours for each labor classification against which to evaluate the offerors' proposed discipline rates, nor did it specify what particular disciplines should be proposed or priced.

^{4/} The RFP included a hypothetical construction delay claim that offerors were to address in their technical proposals by providing:

- "a. the general approach and methodology to be used in analyzing the claim and determining the issues,
- b. each of the offeror's proposed disciplines required to analyze the claim and the role of each,
- c. the estimated number of hours, broken down by discipline, required to analyze the claim,
- d. the estimated number of days to complete the analysis and prepare a recommendation. . . ."

^{5/} At the pre-proposal conference, offerors asked how the hypothetical claim would figure into the evaluation:

"Q: Section M-Evaluation Factors. Under which evaluation criteria will the hypothetical be evaluated? How will the estimate provided in the hypothetical claim be evaluated? What is the relative importance of the hypothetical claim vs. the criteria in Section M.1a Technical Ability/Approach?"

The Army answered:

"A: . . . the hypothetical will be evaluated as part of the technical and price evaluations. The estimate will be considered as part of the price evaluation, proposed management and staffing, and
(continued...)"

The RFP listed two evaluation areas--technical and cost. The technical area listed two sub-areas, in descending order of importance, technical ability/approach and past performance/experience. Within the technical ability/approach sub-area, the following items were given equal importance: (1) ability to analyze claims using network analysis scheduling techniques; (2) proposed management and staffing for project; (3) qualifications of proposed personnel; and (4) ability to provide a timely response to government requirements, including the ability to respond to multiple, concurrent delivery orders. The Corps evaluated technical proposals using both a weighted scoring system (for initial proposal evaluation) and adjectival scoring systems (for best and final offers (BAFO)).

The Corps evaluated cost/price separately. The RFP provided that:

"For hourly pay rate price evaluation, the Government will consider the duties and responsibilities of each proposed discipline, including the qualifications, professional background, education, and experience the offeror states is included in its proposed disciplines."

The RFP stated that award would be "made to an acceptable technical proposal, the cost or price of which is not the lowest, but which is sufficiently more advantageous as to justify the additional cost or price."

The Corps received 14 proposals in response to the RFP, included 6 proposals in the competitive range, and conducted discussions with those offerors. BAFOs were submitted on June 21, 1990. The Corps reevaluated the BAFOs before determining to select OKA for award because its technical superiority was worth its additional cost. On October 22, the Corps awarded the contract to OKA. The Army debriefed HPS on November 13, 1990. HPS filed this protest with our Office on January 17, 1991, after requesting and receiving certain information pertaining to OKA's price pursuant to a Freedom of Information Act (FOIA) request.

5/(...continued)

ability to provide a timely response. The hypothetical will be one factor considered in the M.1a evaluation and will be evaluated as an element of each of the above items."

The protest focuses on the Corps' cost evaluation and technical/cost tradeoff. HPS argues that it was unreasonable to award the contract to OKA when OKA's technical proposal was only marginally better than that of HPS,^{6/} but HPS' proposed hourly rates were substantially below OKA's rates. In HPS' view, the award is inconsistent with the equal importance accorded technical and cost considerations by the RFP. HPS also claims that the cost analysis of OKA's response to the hypothetical claim was unreasonable and not documented, and that the Corps improperly limited its cost evaluation to only the disciplines proposed in the offerors' responses to the hypothetical claim. Finally, HPS questions the propriety of the evaluation of its proposal and argues that meaningful discussions were not conducted with it.

The Corps argues that HPS' protest is untimely because HPS filed the protest more than 2 months after the debriefing in which the Corps told HPS why the Corps considered HPS' proposal "less attractive" than OKA's proposal. The Corps reports that it told HPS of its concern "with HPS' emphasis on a [1 to 2 month] initiation visit to Fort Drum as well as the fact that the New Jersey office which would be responsible for the contract only has 15 people on staff, since both provisions could impact the timeliness of performance."

HPS states, and the Corps does not deny, that at the debriefing the Corps limited the debriefing to a discussion of the Corps' evaluation of HPS' proposal and refused to disclose any information concerning other offerors.

We find HPS' protest timely insofar as it challenges the propriety of the cost evaluation and technical/cost tradeoff as it is based on HPS' comparison/evaluation of OKA's and its own prices. HPS made its FOIA requests on November 9 and 20, promptly after the award and debriefing. On January 3, 1991, HPS received some of the requested information including OKA's labor rates and evaluated price. The Corps does not allege that it provided HPS with any information concerning OKA's prices or the cost/price evaluation before January 3, despite HPS' consistent attempts to obtain it. Thus, HPS' January 17 protest is timely since it was filed within 10 working days of HPS learning of OKA's labor rates and cost evaluation. 4 C.F.R. § 21.2(a)(2) (1991); see Canadian Gen. Elec. Co., Ltd., B-223934.2, July 10, 1987, 87-2 CPD ¶ 29.

^{6/} HPS views its proposal deficiencies as de minimis in nature since at the debriefing the agency apparently characterized HPS' proposal as "less desirable."

On the other hand, we agree with the Corps that the protester's arguments touching on either the evaluation (scoring/ranking) of HPS' technical proposal or the adequacy of the Corps' discussions are untimely filed, since HPS was expressly advised in the November 13 debriefing of the evaluated deficiencies in its proposal and its proposal's relative technical evaluation vis-a-vis OKA's. See Sach Sinha and Assocs., Inc., B-241056.3, Jan. 7, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 15. Consequently, we will review the reasonableness of the technical/cost tradeoff in light of the stated cost evaluation criteria and the firms' technical ratings, and we will not consider HPS' challenge of the Corps' technical evaluation.

The procuring agency has broad discretion in determining the manner and extent to which it will make use of the technical and cost evaluation results, and the agency's technical/cost tradeoffs are subject only to the tests of rationality and consistency with stated evaluation factors. Babcock & Wilcox Co., B-235502, Sept. 18, 1989, 89-2 CPD ¶ 237. In other words, we will consider whether the Corps could reasonably find OKA's technically superior proposal worth its additional cost consistent with the evaluation criteria.7/

In this case, the Corps' evaluation of total cost was limited to those disciplines and hours that offerors proposed to use to resolve the hypothetical claim. HPS questions the propriety of this evaluation, particularly the Corps' failure to consider any of the offerors' proposed disciplines other than the ones used in the hypothetical claim. Given the RFP's unusual labor provisions, we think the Corps may have used the only reasonable method it could to evaluate relative total cost. Agencies normally evaluate and compare each competing proposal's labor rates by requiring rates for RFP specified/defined labor classifications and multiplying the

7/ In a negotiated procurement, the government is not required to make award to the firm offering the lowest price unless the RFP specifies that price will be the determining factor. Sach Sinha and Assocs., Inc., B-241056.3, supra. Here, the RFP stated that cost would be evaluated but did not indicate its specific weight relative to technical factors, aside from stating that award may not be made to the lowest priced offeror. Therefore, we presume that cost and technical factors have approximately equal importance. Associates in Rural Development, Inc., B-238402, May 23, 1990, 90-1 CPD ¶ 495; Babcock & Wilcox Co., B-235502, supra.

rates times the RFP estimated number of labor hours. In this case, the Corps had to evaluate proposals on the basis of unique, offeror-defined labor classifications and a hypothetical claim, without the benefit of estimated labor hours.

The Corps reports that it did not provide total estimated labor hours for the total contract work because of the uncertain nature of the amount and kind of construction claims that may arise during the contract. Indeed, the RFP stressed that the number of delivery orders and contract value were unknown. The Corps wanted to assure that offerors could perform this work within their existing organizational structures and approaches. Consequently, the RFP also did not specify or define what disciplines an offeror was required to offer; this left the matter of labor classifications to the discretion of the individual offerors. While the successful offeror could largely retain its particular management and technical approach, the Corps would retain control of the contract work by individually negotiating delivery orders as the need for specific services arose.

The record shows that the Corps looked at all the disciplines proposed by each offeror, and found no common basis for comparison mainly because of the offerors' unique discipline definitions. The hypothetical claim provided a common basis for proposal comparison since it required the offerors to designate disciplines able to accomplish a common specific task.^{8/} In other words, all offerors had to select and price a group of personnel that together possessed the skills required to resolve the hypothetical claim. While significant variations in offeror responses to the hypothetical claim could be expected, given the considerable latitude left to the offerors in preparing their proposals, we agree with the Corps that this was a reasonable basis on which to evaluate cost. Furthermore, the RFP, as clarified at the pre-proposal conference, apprised offerors that the evaluation of the hypothetical claim would be a significant part of the cost evaluation.

In support of its⁹ position, HPS provides several quantitative comparisons/analyses that HPS thinks show that OKA's productivity or quality would have to be double that of HPS to justify the cost difference in their respective solutions to the hypothetical claim. HPS argues that "[t]he price of OKA

^{8/} The Corps reports, and the protester does not rebut, that the work envisioned by the hypothetical claim (i.e., a delay of construction claim) is typical of the work that the agency would order from the contractor.

was significantly greater than that of HPS based on both a comparison of the rates, and the total price of the sample claim, and especially comparing the price for the amount of effort on the sample claim."

We are not persuaded that HPS' comparisons/analyses of the labor rates and its conclusion that OKA is substantially higher priced are valid. The RFP allowed, and the two offerors proposed, different disciplines (in term of skills and capabilities), hours, and approaches to accomplishing the hypothetical claim. The protester did not have access to OKA's proposal, which we examined in camera. Contrary to HPS' contentions, the Corps did consider the reasonableness of the costs of OKA's response to the hypothetical claim. OKA's proposed approach involved using personnel with higher labor rates for fewer hours than HPS' proposed approach. The Corps attributed OKA's faster completion of the claim to the greater efficiency of OKA's more experienced and higher paid personnel, and we do not find this conclusion to be unreasonable.^{9/}

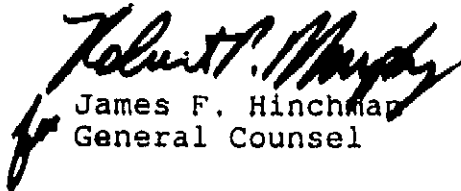
On the other hand, although HPS appeared to offer a lower price for resolving the hypothetical claim, the Corps doubted the reliability of HPS' pricing. The Corps' doubts stem from HPS' suggestion in its proposal that the Corps consider placing a delivery order for an initiation visit--to familiarize HPS personnel with the situation at Fort Drum--at the beginning of the contract. The Corps perceived the initiation visit as an unnecessary cost. During discussions the Corps questioned HPS regarding the need for the initiation visit. HPS' BAFO did not convince the Corps that HPS personnel could operate just as efficiently with or without the initiation visit. Consequently, the Corps was unsure of how much faith it could place on HPS' hypothetical claim pricing (rates and hours) if the initiation visit was not ordered.

We find the Corps' cost evaluation reasonable. While its method did not consider all possible disciplines, since some disciplines are not needed for the hypothetical task, the agency did review the reasonableness of OKA's proposed discipline rates and hours given the personnel proposed.

^{9/} The Army had prepared an estimate of the labor hours required to resolve the hypothetical claim based on how long it would take junior-level Army personnel to resolve the problem. The Army estimate substantially exceeded OKA's proposed solution to the hypothetical claim. The Army did not question the discrepancy because the Army concluded that had its estimate been based on Army personnel with experience similar to OKA's personnel, the Army labor hour estimate would have been substantially lower.

Agencies may award to higher rated offerors with higher proposed prices or costs where the agency reasonably determines that the cost premium involved is justified considering the technical superiority of the selected offeror's proposal, even where cost is equal in weight to the technical factors. Babcock & Wilcox Co., B-235502, supra. Given the Corps' conclusion about the technical superiority of OKA's technical proposal over HPS' proposal, which was not timely protested by HPS, we do not believe that the tradeoff made by the Corps was unreasonable.

The protests are denied.


James F. Hinchman
for General Counsel