



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Sonshine Enterprises

File: B-246268

Date: February 26, 1992

Gary M. Aragon for the protester,
M. K. Baker, Panama Canal Commission, for the agency,
C. Douglas McArthur, Esq., and Michael R. Golden, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protest challenging agency's technical evaluation and selection of higher priced offeror is sustained where record, showing unexplained deductions in the protester's technical score in areas of past experience and timeliness, and maximum scores assigned to awardee who failed to provide information requested for evaluation, does not support technical evaluation and award decision.
2. Agency improperly accepted proposal from offeror who incorporated into its proposal terms and conditions of sale that differed materially from requirements in solicitation for firm, fixed-price contract, including contingent pricing and provisions conflicting with the solicitation's Federal Acquisition Regulation clauses on default and termination for convenience.

DECISION

Sonshine Enterprises protests the award of a contract under solicitation No. CNP-090541-MQ-29, issued by the Panama Canal Commission for conversion of circuit breakers. The protester, who submitted the lowest priced acceptable proposal, asserts that it responded fully to all discussion questions, argues that the awardee's proposal was at best technically equal to Sonshine's proposal, and contends that the record does not support award to a higher priced offeror.

We sustain the protest.

On June 25, 1991, the agency issued the solicitation for a firm, fixed-price contract for rebuilding and converting 15 Westinghouse type 150-DH-500E and 150-DH-250A, 13.8-kilovolt (kv) air circuit breakers to vacuum interrupter type circuit breakers. The solicitation provided for award to the responsible offeror whose offer conforming to the solicitation was most advantageous to the agency, considering price and other factors.

The agency instructed offerors to provide information on the company and its location, technical evaluation criteria (overall plan to accomplish the work including a network analysis system showing the activities necessary to complete the work), experience of the firm (including a description of similar projects performed in the previous 3 years), technical design and performance (including "complete design features and characteristics exhibiting the detailed operating capabilities of the proposed retrofitted breakers"), and inspection and testing procedures.

The solicitation provided for award based primarily upon technical merit, with the agency determining the best overall proposal by applying factors as follows: appropriateness and thoroughness of the schedule and detailed plan for carrying out the work, demonstrating a full understanding of the work, 250 points; technical design and performance, 250 points; past experience in similar retrofit projects, 200 points; inspection and testing procedures, 150 points; thoroughness of quality assurance program covering the retrofit work, 100 points; timeliness of past performance in carrying out similar work, 50 points.

The agency received 10 proposals on August 5 and referred them to its technical evaluation committee (TEC) for evaluation. The agency found that five offerors had submitted insufficient information for evaluation and eliminated them from the competitive range. Based on the initial evaluation, the protester received the second highest technical score, 914 points, versus 948 for the eventual awardee, Westinghouse Industry Services International Corporation (Westinghouse). The TEC downgraded the protester's score in the areas of appropriateness, technical design and performance, past experience, and timeliness, advising the contracting officer that the primary weaknesses in the protester's proposal were lack of clarity on warranty terms and the failure to provide technical specifications and the type and manufacturer of its proposed vacuum breaker. The TEC provided no narrative justification or explanation of its scoring for past performance and timeliness.

On August 28, the agency requested further information from the offerors, asking the protester for information on its warranty terms and for the "technical specifications of the

breaker"; it did not advise the protester of its concerns regarding past performance and timeliness or identify these as areas of weakness in the proposal. The protester submitted literature listing the breaker specifications, and the TEC increased Sonshine's technical score to 940 points, eliminating the deduction for appropriateness and reducing the deduction for technical design and performance.

Westinghouse had proposed to provide converted breakers from stock, with the agency returning its old breakers to Westinghouse after installing the converted ones. Westinghouse had however made its price contingent upon receipt of the old breakers from the agency within 60 days of delivery of the converted breakers; it also proposed to charge \$35,000 for each old breaker not returned in operational condition. Further, Westinghouse advised the agency that its price would increase by 5 percent after January 1, 1992. The agency, concerned that it might take more than 60 days to ship the converted breakers from New Orleans (where the awardee was to deliver the converted breakers) to Panama, install them, and ship the old ones back to New Orleans, sought in discussions for "flexibility" regarding the 5-percent price increase. The agency also questioned the \$35,000 charge. In discussions, Westinghouse agreed to accept proof that the agency had shipped the replaced breakers to New Orleans within 60 days of receipt of the replacement breakers at New Orleans and confirmed also that the charge for breakers not found operational was \$3,500, rather than \$35,000, per unit. Westinghouse agreed to hold 1991 prices until January 31, 1992, if it received the order by October 15, 1991. The record shows that, after these discussions, the TEC increased Westinghouse's technical score to a perfect 1,000 points, although the awardee had omitted portions of the required technical information such as the network analysis system, past experience information, and information on inspection and acceptance procedures.

On September 17, the agency asked the protester to submit a "detailed technical description of your vacuum breaker operating mechanism" with its best and final offer (BAFO). In BAFOs, the protester submitted the lowest price, \$191,925, versus the second low price of \$236,871 submitted by Westinghouse (exclusive of the price contingencies in the awardee's offer). The protester, who had with its BAFO resubmitted the technical information previously supplied but nothing regarding the design of its operating mechanism, received the third highest technical score--905 points

overall, after a further deduction in the area of technical design and performance of 35 points.¹

On September 23, the TEC provided the results of its review to the contracting officer, concluding that "Westinghouse Electric Corporation's offer is the best." The TEC based its conclusion on the agency's "experience with the quality of their breaker conversions," the on-hand availability of spare parts to use on breakers converted by Westinghouse, and the offeror's superior experience in making conversions. The committee stated that it had reservations concerning the performance of the protester's vacuum conversions and noted that the agency had been unsuccessful in obtaining a detailed technical description of its proposed operating mechanism.² On September 27, the agency awarded a contract to Westinghouse, and Sonshine protested on October 15. Since this was more than 10 calendar days after award, the agency did not stay performance of the contract. See 31 U.S.C. § 3553 (1988).

The protester questions the reasonableness of the agency's evaluation of proposals and its consistency with the evaluation factors stated in the solicitation. The protester contends that contrary to what the TEC advised the contracting officer, its proposal explained its proposed operating mechanism, which "is of a patented (pending) 2-link design," and included all technical data available from the manufacturer. Further, the protester notes that the awardee's proposal, by contrast, contained none of the required information on its plans to accomplish the work, neither the network analysis system nor the required information on past experience or inspection and testing.

Federal Acquisition Regulation (FAR) § 15.612(d)(2) (FAC 90-7) requires that the documentation supporting selection decisions show the relative differences among proposals, their strengths, weaknesses and risks, and the basis and reasons for the decisions. This required explanation provides protesters and this Office a basis upon which to judge the reasonableness of the agency's decision and, ultimately, its compliance with procurement statutes and regulations. Where the record does not support the

¹The deduction is unexplained, although it presumably resulted from the protester's failure to provide details of its operating mechanism in its BAFO.

²Specifically, "The [committee] has [reservations] on the performance of their vacuum conversions." The TEC provided no further elaboration, and there is nothing in the written record of discussions to elaborate on the committee's concerns.

agency's technical evaluation, or even its selection decision, the evaluation is unreasonable. Amtec Corp., B-240647, Dec. 12, 1990, 90-2 CPD ¶ 482, recon. denied, B-240647.2, Feb. 26, 1991, 91-1 CPD ¶ 211. We are unable to conclude that the record here supports the reasonableness of either the evaluation or the award decision.

In the instant case, involving three successive technical evaluations, the TEC downgraded the protester in past experience and timeliness, with no explanation in the record. Although discussions are not necessary where an evaluation of past performance would not be affected by additional information, the agency's failure to address a single discussion question regarding these areas to the protester leaves the record bare of any indication of the agency's concerns. Additionally, evaluators lowered the protester's score by 35 points for technical design and performance in the final evaluation, although there is no evidence that the protester modified its technical proposal from that previously submitted or that the information it furnished in its proposal and in response to discussions, did not adequately describe its proposed operating mechanism.

Further, the protester correctly points out omissions of required information on the network analysis system, past experience, and inspection and testing procedures, from Westinghouse's proposal. The evaluation record lacks any discussion or explanation for the perfect scores received by Westinghouse under the evaluation criteria of appropriateness, inspection and testing procedures, or quality assurance. In addition, in recommending Westinghouse's proposal for award, the TEC gave considerable weight to the on-hand availability of spare parts, although this is nowhere mentioned as an item to be evaluated. We are therefore unable to find that the record supports the reasonableness of the technical evaluation and the selection decision.

Further, our review of the record shows that the agency improperly accepted a proposal that took exception to material terms of the solicitation. In negotiated procurements, any proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. Martin Marietta Corp., 69 Comp. Gen. 214 (1990), 90-1 CPD ¶ 132. Here, the awardee's proposal was expressly conditioned upon the agency's acceptance of "terms and conditions," attached to the proposal, which took material exception to FAR clauses in the RFP. By these terms and conditions, the awardee absolved itself of responsibility for delay resulting from "strikes, lockouts, factory shutdowns, faulty castings or forgings, . . . delays or

shortages in transportation or inability to obtain labor, manufacturing facilities or material from Westinghouse's sources," contrary to the Default clause, FAR § 52.249-8 at page 36 of the RFP. The Default clause, which FAR § 49.504(a) requires for all fixed-price contracts in excess of the small purchase limitation, limits the excusable causes of delay to those beyond the control and without the fault or negligence of the contractor, and does not generally recognize such causes as lockouts, transportation delays, and the unavailability of preferred sources as excusable.

In addition, the awardee restricted the government's right to terminate the contract for convenience, except upon written notice and payment of charges including 10 percent of the net selling price, conditions conflicting with the Termination for Convenience clause, FAR § 52.249-2, incorporated into the solicitation by reference. The termination for convenience clause, in the form appearing in the solicitation, requires a contractor to stop work upon notice of termination, regardless of delays in paying the costs of termination, and does not allow a contractor to recover anticipated profits in the case of termination, since it limits the recovery of profits to "a reasonable allowance . . . on work done. . . ."

In addition to the use of provisions conflicting with the two termination clauses, the awardee offered prices subject to increase if the agency did not ship the old breakers to Westinghouse within 60 days of receiving the converted breakers, in addition to charges assessed if the old breakers were not in operating condition. These conditions appeared in addition to Westinghouse's use of an escalation provision in its "terms and conditions" and constituted a material exception to the terms of the solicitation, which required offerors to propose a fixed price and with which the other offerors complied. The additional charge of \$3,500 proposed by the awardee for delivery of nonoperational breakers could result in an additional cost to the agency of as much as \$52,500; the price increase after January 31 could add another \$14,500 to the contract cost, exclusive of the awardee's claims for escalation of labor and materials. The reservation of these price contingencies constituted a significant and impermissible deviation from the terms of the solicitation. See Ralph Korte Constr. Co., Inc., B-225734, June 17, 1987, 87-1 CPD ¶ 603.

The agency accepted the awardee's offer, which deviated from material requirements of the solicitation, without notifying other offerors that it would accept a contract on terms other than those contained in the solicitation. Nor does the record contain any evidence that the agency considered

the effects of the awardee's price contingencies upon the cost/technical tradeoff. We are therefore unable to find that the agency reasonably could conclude, without consideration of its potential liability under the proposed contract, that the Westinghouse offer was "most advantageous."

Since Sonshine did not file its protest within the 10-day calendar period for obtaining an automatic stay of performance, the contract has been substantially performed, and we are unable to recommend termination of the Westinghouse contract. We award the protester its costs of pursuing this protest, as well as its proposal preparation costs; Sonshine should submit its detailed and certified claim for such costs within 60 days of receipt of this decision to the Commission. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. §§ 21.6(d)(1), (f)(1) (1991)).

We sustain the protest.

for Milton J. Jorlar
Comptroller General
of the United States