



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

P. Thompson
1/11/92

Decision

Matter of: Ogilvy, Adams & Rinehart

File: B-246172.2

Date: April 1, 1992

Rand L. Allen, Esq., Wiley, Rein & Fielding, for the protester.
William H. Butterfield, Esq., McGuire, Woods, Battle & Boothe, for Hager Sharp, Inc., an interested party.
Lafayette N. Johnson, Esq., Federal Emergency Management Agency, for the agency.
Paul G. Thompson, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where selection officials reasonably regard proposals as essentially equal technically, cost may become the determinative factor in making an award notwithstanding that the evaluation criteria assigned cost less importance than technical considerations.
2. In making a determination that two proposals are essentially equal from a technical standpoint, a finding by the agency of strict equality is not required; the General Accounting Office has upheld such determinations with technical differentials between proposals of more than 15 percent.
3. Protest that agency failed to provide the protester with interpretation of alleged ambiguity in the solicitation is denied where solicitation clearly and unambiguously stated the requirement, and the agency merely confirmed another offeror's interpretation of the requirements.

DECISION

Ogilvy, Adams & Rinehart ((Ogilvy)) protests the award of a contract to Hager Sharp, Inc. under request for proposals ((RFP)) No. EMW-91-R-3660, issued by the Federal Emergency Management Agency ((FEMA)) for support of a fire prevention and protection public relations campaign administered by the United States Fire Administration ((USFA)), a component agency of FEMA. Ogilvy principally contends that FEMA improperly selected Hager Sharp on the basis of its lower cost after a determination that the two proposals were essentially equal

from a technical standpoint, despite the fact that the stated evaluation factors emphasized technical superiority, and its proposal was technically superior, and that FEMA failed to hold meaningful discussions with Ogilvy.

We deny the protest.

BACKGROUND

On July 5, 1991, FEMA issued the RFP for a "Public Education/Awareness Program for Fire Prevention and Protection." The solicitation contemplated the award of a cost-plus-fixed-fee contract with a 1-year base period and 2 option years. The RFP called for both consulting services and the production and dissemination of educational projects and materials to assist FEMA in various aspects of public education development, management, and implementation.

Section M of the solicitation stated that it was the government's intent to award a contract to the offeror whose proposal was considered most advantageous considering the RFP's technical criteria, cost, and other factors. The RFP also stated that cost could be the deciding factor if proposals were ranked technically equal. An amendment to the RFP explained that firms would be deemed technically equal if there were no "significant difference in services" proposed. Further, technical criteria were considered of greater importance than cost under the RFP evaluation methodology, and the government reserved the right to award a contract to other than the low offeror.

Section M also established the following technical evaluation criteria and associated point values:¹ (1) technical approach (35 points); (2) experience and qualifications of key staff (25 points); (3) understanding of the problem (20 points); (4) corporate experience (15 points); and (5) facilities and equipment (5 points).

On August 15, 1991, FEMA received five initial proposals. FEMA established a Technical Evaluation Panel (TEP), consisting of three voting members and a technical advisor, to evaluate the technical merits of the proposals. On August 19, the TEP held its first meeting. At that time, the contract specialist instructed the panel members on how to review and score the technical proposals consistent with the evaluation criteria and related weights listed in Section M.

¹These factors were divided into several subfactors and associated point values.

The panel members individually reviewed and scored the proposals. On August 27, the TEP convened to discuss the proposals and assign consensus numerical ratings and narrative evaluations. The panel recorded its evaluations in a report on the meeting dated August 29, 1991, and signed by each of the voting panel members (Initial TEP Report). The Initial TEP Report contained narrative findings of the panel concerning the strengths and weaknesses of each proposal. The TEP characterized as "unacceptable" three proposals which received numerical scores of 42.3, 61.1, and 73.1, respectively. Hager Sharp received a numerical score of 80.6, and its proposal was designated as "acceptable." Ogilvy received a numerical score of 89.3. The Initial TEP Report designated Ogilvy's proposal as "acceptable and superior."²

Based on the Initial TEP Report and following cost evaluations, FEMA determined that Ogilvy and Hager Sharp were within the competitive range. The agency developed written technical questions concerning each proposal and provided them to the respective offerors for written response. Ogilvy received two questions. Hager Sharp received five. Ogilvy and Hager Sharp submitted timely written responses, which included technical revisions to their proposals in response to the agency's technical questions. Hager Sharp made much more substantial revisions to its proposal than did Ogilvy. Ogilvy did not revise its cost proposal. Hager Sharp, on the other hand, revised its cost proposal to reflect the technical revisions contained in its response.

On September 23, revised proposals were provided to the TEP. The results of this review are set forth in a memorandum to the contract specialist from the chairman of the TEP dated September 24 (Final TEP Report). The TEP's final technical score for Ogilvy was 89.7 and Hager Sharp received a final technical score of 84.

Following an audit by the Defense Contract Audit Agency and an internal review and cost analysis of the proposals, FEMA arrived at recommended changes in the number of labor hours and costs and other direct costs for each proposal. The agency held telephonic cost negotiations with Hager Sharp on September 27, 1991, and with Ogilvy on September 28, 1991.

²FEMA explains that this designation resulted from an "editing oversight." Specifically, after the panel concluded that the "acceptable and superior" designation was not justified for Ogilvy, the panel chairman forgot to remove this designation which was contained in an earlier draft report.

During these discussions, FEMA advised each firm of the agency's recommendations concerning the number of labor hours. With respect to Hager Sharp, one of these recommendations was to reduce the hours of a media specialist during each of the 2 option years from 1,800 to 1,500 per year. Hager Sharp accepted some of the agency's recommendations. The firm, however, questioned FEMA's recommendation concerning the media specialist.

The contract specialist had based this recommendation on an interpretation of the statement of work in the RFP that during the option years tasks would be limited to the augmentation of existing programs and not the introduction of new ones. Hager Sharp, on the other hand, interpreted the statement of work to require a new campaign in each of the option years as well as augmentation. Hager Sharp requested that FEMA confirm the correctness of the firm's interpretation. After discussions with the project officer, FEMA acknowledged that Hager Sharp's interpretation was correct. Thus, Hager Sharp did not revise the proposed hours for its media specialist.

FEMA did not convey this interpretation to Ogilvy in their negotiations on the following day; the question whether new campaigns were required for the option years was not discussed. During the oral negotiations, Ogilvy responded to FEMA's recommendations with a counter-proposal in which the firm accepted some of the recommended hour reductions. With respect to others, however, the counter proposal included hours above those recommended by FEMA. FEMA determined that the counter-proposal was technically acceptable.

On September 28, following the conclusion of negotiations, FEMA sent letters to Ogilvy and Hager Sharp advising them that they could make revisions to their proposals and submit best and final offers (BAFO) by September 30.

Ogilvy submitted a BAFO containing the same terms it had proposed in its oral counter-proposal, which already had been determined to be technically acceptable. Hager Sharp, on the other hand, submitted a BAFO containing further reductions in the labor hours of certain individuals and the cost of print materials and a corresponding decrease in the overall cost it had proposed during the negotiations. The TEP determined that these changes did not affect the technical score of Hager Sharp's proposal. The cost of Hager Sharp's BAFO was \$2,113,028. The cost of Ogilvy's BAFO was \$2,172,539. On September 30, FEMA awarded the contract to Hager Sharp on the basis of its lower cost since the agency

considered the proposals to be essentially technically equal. This protest followed.¹

ANALYSIS

Essentially Equal Determination

Ogilvy's first point of protest is that FEMA improperly deviated from the evaluation methodology set forth in the RFP by selecting Hager Sharp on the basis of cost when Ogilvy's proposal was technically superior. According to Ogilvy, "proposals must be technically equal, not 'close'." The agency contends that the proposals were technically equal, thus the selection of Hager Sharp was consistent with the evaluation factors.

We find Ogilvy's argument that the agency deviated from the evaluation methodology and converted the procurement from one emphasizing technical factors rather than price into one for the lowest cost to be without merit. Cost became the determinative factor only when the agency determined that Ogilvy and Hager Sharp were essentially equal technically. Where selection officials reasonably regard proposals as being essentially equal technically, cost may become the determinative factor in making an award notwithstanding that the evaluation criteria assigned cost less importance than technical considerations. Associations for the Educ. of the Deaf Inc., B-220868, Mar. 5, 1986, 86-1 CPD ¶ 220.

Our review of the record shows no basis to object to the agency's determination that the technical proposals were essentially equal. The record shows that the contracting officer based the determination of technical equality on the small point difference between the two proposals and the TEP's initial and final reports. The relative final point scores (89.7 and 84--a difference of approximately 6 percent) reasonably showed that the proposals were approximately equal. In this regard, contrary to the protester's assertion, strict equality is not required. We have upheld determinations that technical proposals were

¹By letter to this Office dated November 20, 1991, FEMA determined that it was in the best interest of the government to continue performance notwithstanding the protest. On December 3, 1991, Ogilvy filed an amended protest in which it alleges that FEMA improperly treated the offerors unequally by failing to disclose to Ogilvy the agency's confirmation of Hager Sharp's interpretation of the statement of work. This decision responds to both protests.

essentially equal despite differentials significantly greater than the one here. See, e.g., Lockheed Corp., B-199741.2, July 31, 1981, 81-2 CPD ¶ 71 (where the differential was more than 15 percent).

In support of its position that its proposal was technically superior, Ogilvy principally relies on the "more positive descriptions of Ogilvy's proposal" in the TEP's initial report. For example, under the technical approach factor, Ogilvy notes that the TEP stated in the initial report that Ogilvy had a "successful track record"; provided an "excellent summary of previous campaign experience"; had the "demonstrated ability" to provide public education messages and other tasks; and that its experience in teleconferencing was "excellent." In contrast, according to Ogilvy, the TEP stated--concerning Hager Sharp's proposal--that "[t]op executives were assigned to project with a high priority given to the project"; that Hager Sharp "showed good use of focus groups testing" and presented a "good example of an approach, for a . . . campaign"; and that Hager Sharp "demonstrated good creativity and [consistent] quality assurance." In short, Ogilvy contrasts the adjective "excellent" as describing its proposal with the adjective "good" as describing Hager Sharp's proposal. Ogilvy advances similar arguments for the other factors.

We do not think that this "more positive" narrative description in the Initial TEP Report demonstrates the unreasonableness of the contracting officer's determination. Ogilvy is the incumbent contractor for most of these services. The TEP's initial report shows that Ogilvy simply reiterated and relied heavily on its work under the previous contract in presenting its technical approach in its proposal. Consistent with Ogilvy's presentation of its technical approach, the TEP found, for example, that Ogilvy had a "successful track record" and an "excellent summary of previous campaign experience." Indeed, the TEP also found as a weakness that Ogilvy's proposal "dwelled on past successes." We think the contracting officer could reasonably regard the "more positive" narrative descriptions as simply a reflection of Ogilvy's status as an incumbent and not as a reflection of significant technical superiority.⁴ In this regard, under the second most important evaluation factor, experience and qualifications of key staff, Hager Sharp in fact received higher average scores than did Ogilvy.

⁴The contracting officer states that he "noticed that several of the comments under such factors as technical approach (personnel and corporate experience) indicated that [Ogilvy] had just reiterated the work it had done in the past."

Moreover, the TEP's initial report is not completely relevant to the issue of technical equality since proposal revisions were reevaluated during the final evaluation and Hager Sharp made substantial revisions to its proposal after discussions while Ogilvy did not. Hager Sharp's score increased while Ogilvy's score essentially stayed the same. The final evaluation rated both proposals as acceptable (neither superior), and we have no basis to question the final rating. Regardless of Ogilvy's disagreement with the selection decision, Ogilvy's mere disagreement does not render that decision objectionable. Associations for the Educ. of the Deaf Inc., supra. Accordingly, we find that Ogilvy has not shown the selection decision to be flawed.

Failure to Conduct Meaningful Discussion

Ogilvy also contends that FEMA failed to conduct meaningful discussions because FEMA's recommendations regarding the appropriate levels of effort for certain personnel "chilled Ogilvy's freedom" to submit an independent BAFO.

During negotiations, FEMA presented both offerors with its estimates of reasonable levels of effort for certain personnel. Ogilvy incorporated some of these revisions into its proposal. With respect to others, Ogilvy revised its levels of effort, but not to the extent recommended by FEMA, or remained with levels it originally had proposed.

Ogilvy contends that FEMA's recommendations of personnel hours constituted a "floor" on the hours to be proposed and that had FEMA not made these recommendations, the firm "would have been free to reduce the quantity and mix of hours" and costs even more than it did when it modified its proposal during negotiations. Nothing in the record indicates that FEMA's recommendations were mandatory or coercive. Ogilvy was free to reject them. In fact, Ogilvy did not consider itself bound by the recommendations. With respect to certain personnel, Ogilvy's BAFO contained levels of effort greater than those recommended by FEMA. In these circumstances, it appears that Ogilvy exercised its business judgment in responding to FEMA's recommendations. We deny this ground of protest.⁵

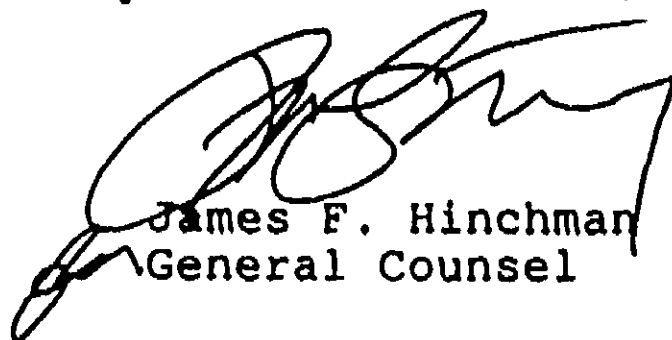
⁵As a second reason for contending that discussions were not meaningful, Ogilvy, in its comments on the agency report, for the first time asserts that FEMA failed to inform Ogilvy of an area of weakness in its proposal under the experience and qualifications of key staff evaluation criterion. A request from one of the parties to extend the receipt date for comments beyond the 10-day period envisioned in our Regulations, see 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(j)), was granted. However, granting this

Unequal Treatment of Ogilvy

Ogilvy contends that FEMA treated the offerors unequally when it failed to inform Ogilvy of the agency's exchange with Hager Sharp concerning whether the statement of work required the development of new campaigns during the 2 option years. FEMA maintains that Hager Sharp's interpretation was correctly based on the explicit language of the statement of work, hence FEMA merely confirmed with Hager Sharp what the RFP already stated. Hager Sharp believed that during the option years the work was to include both new campaigns and augmentation. Hager Sharp asked the agency to confirm this interpretation of the statement of work. The contracting officer adjourned the negotiation session and relayed Hager Sharp's position to the project officer, who was the chairman of the TEP. FEMA agreed with Hager Sharp's interpretation and conveyed this conclusion to the firm during negotiations.

There is nothing in the record to show that FEMA provided information about the requirements of the RFP Hager Sharp which the agency had not provided to Ogilvy.

The protest is denied.



James F. Hinchman
General Counsel

request did not toll the time limits for filing a protest. Since Ogilvy's comments were not filed within 10 working days of its receipt of the agency report, this protest ground was untimely filed and will not be considered. See 4 C.F.R. § 21.2(a)(2) (1991). We do note, however, that Ogilvy received the highest numerical rating under this criterion.