



Comptroller General
of the United States

Washington, D.C. 20548

146-489

Decision

Matter of: Lithos Restoration, Ltd.

File: B-247003.2

Date: April 22, 1992

Lawrence M. Philips, Esq., and David M. Tichane, Esq., for the protester,
Steven D. Brisk for Brisk Waterproofing Co., Inc., an interested party.
Rebecca L. Kehoe, Esq., and Lionel G. Batley, Jr., Esq., General Services Administration, for the agency.
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DIGEST

1. In a negotiated procurement in which the solicitation provided that the qualifications of key personnel was the most important of four listed technical evaluation factors and that the combined weight of technical factors was more important than cost, the agency's interpretation that key personnel qualifications would only be evaluated on a go/no-go basis, but the remaining three factors evaluated qualitatively, is not reasonable, inasmuch as the agency's interpretation, reading the solicitation as a whole, does not give effect to all of the solicitation provisions.

2. Award was properly made to higher priced, higher rated offeror where the source selection decision is consistent within evaluation factors and the agency reasonably determines that the technical superiority of the higher priced offer outweighs the price difference.

DECISION

Lithos Restoration, Ltd. protests the award of a contract to Cathedral Stoneworks/Western Waterproofing Co., Inc.,¹ a Joint Venture, under request for proposals (RFP) No. GS-02P-91-CTC-0053, issued by the General Services Administration (GSA) for restoration and conservation of sculptures on the facade of the Alexander Hamilton Custom House in New York

¹In this case, Western Waterproofing Co., Inc. does business under the name of Brisk Waterproofing Co., Inc.

City, New York. Lithos protests that GSA failed to evaluate proposals in accordance with the stated evaluation criteria.

We deny the protest.

The RFP contemplated the award of a 1-year, fixed-price contract for the restoration and conservation of numerous sculptures on the facade of the Alexander Hamilton Custom House² in New York City, New York. The basic solicitation requirement was for management, supervision, labor, material, supplies and related services to perform the required restoration and conservation services. The RFP also contained two options to provide for (1) the removal, transportation to a shop, and reinstallation of four statues and (2) waterproofing.

The RFP contained detailed, comprehensive specifications governing the performance of the contract work, which did not seek unique or innovative technical approaches to performing the contract work. Offerors were informed that proposals would be evaluated and award made as follows:

- "a. The [g]overnment will make an award to the responsible offeror whose proposal conforms to the solicitation and is most advantageous to the [g]overnment, cost or price and technical factors listed below considered. For this solicitation, the combined weight of the technical evaluation factors is more important than cost or price. As proposals become more equal in their technical merit, the evaluated cost or price become more important.
- "b. Factor number 1 (Qualification of Key Personnel) will be evaluated on a go, no-go basis. To be considered further in the evaluation process, an offeror must demonstrate that it has a minimum of five (5) years of experience in categories as described in Section L, Evaluation, paragraph (a), "Qualification of Key Personnel." Offerors that do not meet the minimum requirement will be found unacceptable.
- "c. Technical evaluation factors are listed in descending order of importance.
 - (1) Qualifications of Key Personnel
 - (2) Project Methodology and Plan
 - (3) Experience and Past Performance
 - (4) Available Resources
- "d. The [g]overnment will evaluate price for award purposes by totaling the base bid with each option price to obtain the total evaluated price."

²The Custom House, which was completed in 1907, is a national historic landmark and the sculptures on the facade of the building are considered important works of art.

GSA received five offers, including those of Cathedral and Lithos, and determined that all five offers were technically acceptable and within the competitive range. Discussions were conducted and revised proposals received. After revised proposals were evaluated, GSA discovered that the government estimate for the contract work failed to provide for construction laborers and skilled workmen. GSA amended its cost estimate,³ conducted further discussions, and received best and final offers (BAFO).

The offerors' BAFOs were evaluated as follows:

| <u>Offeror</u> | <u>Score</u> | <u>Price⁴</u> |
|----------------|--------------|--------------------------|
| Offeror A | 963 | -- |
| Cathedral | 958 | \$1,696,595 |
| Offeror B | 713 | -- |
| Lithos | 688 | 870,200 |
| Offeror C | 661 | -- |

GSA determined that the offers of Offeror A and Cathedral were far superior to the offers of Lithos and Offerors B and C. The agency also concluded that the offers of Offeror A and Cathedral were essentially equal but that Cathedral's offer, which was significantly lower priced than Offeror A's price, was the most advantageous to the government. Award was made to Cathedral on December 3, 1991, and this protest followed on December 13.

As an initial matter, GSA argues that Lithos is not an interested party to protest the award to Cathedral because the firm did not propose the lowest price⁵ nor receive the highest technical rating, and thus would not be in line for award, even if its protest were sustained. See 4 C.F.R. § 21.1(a) (1992). We disagree. If Lithos's protest--that GSA's technical evaluation was not in accordance with the stated evaluation criteria--were sustained, the offerors' technical scores and relative ranking could change and result in a different proposal--possibly Lithos's--being selected as the most advantageous to the government.

³The government's cost estimate, and GSA's amendment thereto, were not disclosed to offerors. While the protester asserts this changing of the cost estimate evidences bad faith, the record is devoid of any evidence supporting this contention.

⁴Offerors' total evaluated price includes options. Prices of Offerors A, B, and C have been not been disclosed during our consideration of the protest.

⁵Only Offeror C proposed a lower price than Lithos.

Accordingly, we find that Lithos would be in line for award and is an interested party under our Bid Protest Regulations. See Kinton, Inc., 67 Comp. Gen. 226 (1988), 88-1 CPD ¶ 112.

Lithos first contends that GSA improperly failed to qualitatively evaluate the qualifications of the offerors' proposed key personnel, even though the RFP identified the qualifications of offerors' key personnel as the most important technical evaluation factor. GSA admits that it did not qualitatively evaluate key personnel qualifications but argues that the RFP provided that qualifications of key personnel would be evaluated only on a go/no-go basis and only the remaining technical evaluation factors would be qualitatively scored.⁶

Where a dispute exists as to the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. See Honeywell Regelsysteme GmbH, B-237248, Feb. 2, 1990, 90-1 CPD ¶ 149. To be reasonable, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Id.

Applying this standard here, we find, as described below, that the only reasonable reading of the award selection criteria is that qualifications of key personnel would first be evaluated on a go/no-go basis to determine which offerors would receive further consideration in the agency's technical evaluation. Those offers that satisfied the go/no-go evaluation requirement would then be qualitatively evaluated under the stated technical evaluation factors, listed in descending order of importance, that identified qualifications of key personnel as the most important evaluation criterion.

The RFP provided that the "combined weight of the technical evaluation factors" (emphasis added) was more important than price and set forth the technical evaluation factors in descending order of importance, with key personnel

⁶GSA also contends that Lithos's protest--which the agency characterizes as challenging the stated evaluation scheme--concerns an apparent solicitation impropriety that Lithos untimely protested after the closing date for receipt of proposals. We disagree. As more fully explained below, the only reasonable interpretation of the RFP language is that proffered by the protester. Thus, Lithos had no basis to challenge the solicitation language until it learned of GSA's unreasonable interpretation and evaluation.

qualifications identified as the most important factor. By listing the evaluation factors in descending order of importance, the RFP contemplated a comparative technical evaluation balanced against price to determine the most advantageous proposal. In performing this cost/technical tradeoff, the total weight of all technical factors (of which key personnel qualifications was identified as most important) is more important than price.

Here, GSA calculated the offerors' total technical score by only point scoring the three lowest rated technical evaluation factors, and comparing that evaluation score against price in its cost/technical tradeoff and award selection. Since the key personnel qualifications factor was not qualitatively evaluated or point scored, it was not considered in the cost/technical tradeoff and award selection; in other words, this factor effectively had no evaluation weight, even though it was said to be the most important technical evaluation factor. See generally Trificon, Inc., 71 Comp. Gen. 41 (1991), 91-2 CPD ¶ 375. That is, if the key personnel qualifications factor was only to be evaluated on a go/no-go basis, as GSA argues is provided for by the RFP, then this factor cannot be more important than the remaining three factors that were numerically scored and compared to price. In our view, the only interpretation that gives effect to all the RFP provisions is that key personnel qualifications would be evaluated both objectively as a pass/fail mandatory solicitation requirement and qualitatively as a listed evaluation criterion.

GSA's failure to evaluate offers in accordance with the stated evaluation scheme violated the Competition in Contracting Act of 1984 (CICA), as implemented by the Federal Acquisition Regulation (FAR), which requires that solicitations include a statement of evaluation factors (including price) and their relative importance, and that agencies evaluate proposals solely on those factors. 41 U.S.C. §§ 253a(b)(1)(A), 253b(a) (1988); FAR §§ 15.605(e), 15.608(a) (FAC 90-7); St. Mary's Hosp. & Med. Center of San Francisco, CA, 70 Comp. Gen. 578 (1991), 91-1 CPD ¶ 597.

Despite our conclusion that GSA failed to evaluate proposals in accordance with the stated evaluation criteria, we do not find that Lithos was prejudiced by the agency's actions. Prejudice is an essential element of every viable protest. 51 Comp. Gen. 678 (1972); American Mutual Protective Bureau, Inc., B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65. While the reasonable possibility of prejudice is a sufficient basis for sustaining a protest of an agency's clear violation of

procurement requirements, see Labat-Anderson, Inc., B-246071; B-246071.2, Feb. 18, 1992, 71 Comp. Gen. _____, 92-1 CPD ¶ 193, we will not sustain a protest where no prejudice is evident from the record. American Mutual Protective Bureau, Inc., supra.

Here, the record shows that even if the qualifications of Lithos's key personnel were evaluated under the most important evaluation factor, as contemplated by the RFP, its proposal would not have improved vis-a-vis Cathedral's technically superior offer. In this regard, the record shows that GSA, in addition to its go/no-go evaluation, also qualitatively evaluated the qualifications of the offerors' key personnel under the least important "available resources" factor. Specifically, GSA, in its evaluation of initial proposals, concluded under the available resources factor that Cathedral had "proposed a very qualified and capable team of experts" and that Lithos had also listed "some impressive team members." In its evaluation of revised proposals, Cathedral's proposal received an even higher score because the firm offered an "even more qualified" head conservator. Given that Cathedral's proposal was rated substantially superior to Lithos's proposal under the "available resources" factor that included the qualitative evaluation of key personnel and that Cathedral was found to be far superior overall, as reflected by the firm's 275 technical point score advantage, we can perceive no basis on which to find that Lithos's relative technical ranking vis-a-vis Cathedral would have improved, even if the qualifications of key personnel were evaluated as the most important factor as required by the RFP. Accordingly, we find no reasonable possibility that Lithos was prejudiced by GSA's actions.

Lithos also protests that Cathedral failed to propose key personnel (two supervisory conservators) that satisfied the RFP minimum qualifications requirements and therefore its proposal should have been rejected. Cathedral proposed a total of four individuals as conservators, designating two of the named conservators as alternates. Both Cathedral and Lithos initially proposed the same individual--Douglas Kwart--as one of their supervisory conservators.⁷ After discussions, Cathedral, in its revised proposal, replaced

⁷Lithos contends that GSA conducted unequal discussions with the parties by informing Cathedral that Mr. Kwart's qualifications were not satisfactory but not so informing Lithos. The record does not show that GSA ever found Mr. Kwart's qualifications to be unsatisfactory. Rather, GSA during discussions had questions concerning Mr. Kwart's experience with stone, and both Cathedral and Lithos received discussions in this regard.

Mr. Kwart as one of the two supervisory conservators required by the RFP with a person that had been previously listed as an alternate, and listed Mr. Kwart as an alternate conservator.⁸ While Lithos, which did not have access to Cathedral's proposal, asserts, without support, that Cathedral's key personnel do not meet the minimum RFP criteria, from our in camera review of the record, including Cathedral's revised proposal and GSA's evaluation, we find that GSA reasonably concluded that Cathedral had proposed two supervisory conservators that satisfied the RFP requirements. Cathedral's mere disagreement with GSA's evaluation does not demonstrate that the agency's evaluation was unreasonable. See ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

Lithos also argues that Cathedral, by revising its proposal to replace Mr. Kwart as one of the two required supervisory conservators, violated section H of the RFP, "Special Contract Requirements," which provided that the "contractor shall utilize the personnel named and/or otherwise identified in its TECHNICAL PROPOSAL," and that changes in personnel could only be for good reason and approved by the agency. This argument is without merit. Offerors are always entitled to make revisions to their technical proposals after discussions and requests for revised proposals. See FAR §§ 15.610(c)(5); 15.611(a), (b). The solicitation provision, to which Lithos refers, does not prohibit revisions to technical proposals in response to requests for revised proposals, but is intended to prevent the unauthorized substitution of personnel after contract award.

Lithos argues that GSA improperly evaluated Cathedral's offer as superior to Lithos under the fourth most important technical evaluation factor--available resources. As indicated above, one factor considered by the evaluators in rating this factor was the relative quality of the key personnel. In addition, Cathedral proposed a complete project management team, a state-of-the-art stone fabrication plant and studio, and an experienced scaffolding contractor. On the other hand, Lithos's technical score for available resources was based upon the agency's determination that Lithos proposed a less complete project management

⁸After contract award, Cathedral terminated its relationship with Mr. Kwart. Lithos contends, without explanation, that this demonstrates bad faith on the part of GSA. The record, however, does not show that GSA was involved in any way with Mr. Kwart's discharge, and we fail to see how the discharge of someone designated as an alternate conservator (which the RFP did not require) demonstrates bad faith on the part of the agency.

team and had failed to provide any description, as required by the RFP, of its facilities or equipment/tools. From our review of the record, we find no reason to question the agency's relative evaluation.

Lithos has disputed a number of other less significant aspects of the relative evaluation of its and Cathedral's proposals. For example, Lithos contends that GSA underestimated the quality of its experience in the restoration work of the Columbus Monument in New York City. The record shows that Cathedral has a very impressive array of restoration projects and, from our review, we have no basis to question GSA's relative rating in this area. We similarly are not persuaded that Lithos's other specific complaints about the technical evaluation do not adversely impact on the reasonableness of the relative technical evaluation of the proposals.


Lithos protests that GSA failed to give appropriate consideration to price in its evaluation of proposals.⁹ There is no requirement, in a negotiated procurement, that award be made on the basis of low cost or price unless the RFP so specifies. Henry H. Hackett & Sons, B-237181, Feb. 1, 1990, 90-1 CPD ¶ 136. Here, the RFP provided that technical considerations were more important than price. The record shows that GSA, in its selection decision, considered Lithos's and the other offerors' low offered prices, but reasonably determined that Cathedral's technical superiority, as represented by its high technical score, justified its higher price. Award may be made to a higher-rated, higher-priced offeror where the decision is consistent with the evaluation factors and that agency reasonably determines that the technical superiority of the higher-priced offer outweighs the price difference. Oklahoma Aerotronics, Inc.--Recon., B-237705.2, Mar. 28, 1990, 90-1 CPD ¶ 337. Here, while GSA did not evaluate key personnel in accordance with the RFP methodology, we find the award selection was otherwise justified, and that Lithos was not prejudiced by the evaluation deficiency, given Lithos's significantly lower technical rating and that GSA actually evaluated the relative qualities of the key personnel.

⁹Lithos also objects that GSA failed to determine the reasonableness of Cathedral's scaffolding price to perform the contract and that Cathedral's scaffolding prices were substantially higher than that bid by Lithos. However, the record does not support Lithos's contention, inasmuch as Cathedral's scaffolding price is only slightly higher than Lithos's.

Lithos also contends that award to Cathedral was improper because one of the joint venture partners (Brisk) also participated in the procurement as a subcontractor to Offeror A. Lithos contends that this created an organizational conflict of interest. We disagree. Subpart 9.5 of the FAR, which governs conflicts of interest, generally requires that contracting officials avoid, neutralize or mitigate potential conflicts so as to prevent unfair competitive advantages or conflicting roles that could impair a contractor's objectivity. Space Servs. Inc. of Am., Space Vector Corp., B-237986; B-237986.2, Apr. 16, 1990, 90-1 CPD ¶ 392. These restrictions are intended to avoid putting a contractor in a position to favor its own capabilities. E TEK, Inc., 68 Comp. Gen. 537 (1989), 89-2 CPD ¶ 29. Lithos does not allege any facts that could arguably give rise to an organizational conflict of interest, such as access to proprietary information that was improperly obtained from a government official or to source selection information relevant to the contract that was not available to all competitors. See FAR §§ 9.505(b)(2), 9.505-4; Scan-Tech Sec., B-243741, May 22, 1991, 91-1 CPD ¶ 501.

Lithos finally contends that Brisk improperly provided Offeror A with a substantially higher price to perform subcontract work that it bid as a joint venturer with Cathedral.¹⁰ In essence, Lithos contends that by this action Brisk made Offeror A's proposal noncompetitive and made its own low-priced proposal appear reasonable. Lithos's speculation in this matter is not supported by the record which shows that the services Brisk offered to perform as Offeror A's subcontractor were much more extensive than those Brisk would perform as joint venture partner.

The protest is denied.


James F. Hinchman
General Counsel

¹⁰Lithos does not contend that there was any collusion between Offeror A and Cathedral or Brisk or a violation of the certificate of independent pricing; and the record shows that there was not.