



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dewberry & Davis

File: B-247116

Date: May 5, 1992

Del Stiltner Dameron, Esq., Alison L. Doyle, Esq., and Nathan A. Tash, Esq., McKenna & Cuneo, for the protester. Paul Shnitzer, Esq., Crowell & Moring, and H. Robert Field, Esq., for Greenhorne & O'Mara, Inc., an interested party. Robert S. Brock, Esq., Federal Emergency Management Agency, for the agency.

Catherine M. Evans, Esq., John M. Melody, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency made award to low priced, technically acceptable offeror despite solicitation evaluation scheme providing that technical merit was more important than price, without providing a reasonable basis for finding that protester's apparently significant technical advantage was not worth a cost premium.

DECISION

Dewberry & Davis (D&D) protests the award of a contract to Greenhorne & O'Mara, Inc. (G&O) under request for proposals (RFP) No. EMW-92-ER, issued by the Federal Emergency Management Agency (FEMA) for standby disaster assistance. D&D, the incumbent contractor, alleges that the agency improperly made price the most important evaluation factor for award, contrary to the evaluation scheme set forth in the RFP.

We sustain the protest.

The solicitation contemplated award of a time and materials-type contract to provide FEMA with disaster relief assistance. The RFP requested fixed hourly rates for various labor categories, with a base amount of 16,000 direct labor hours, 2 evaluated options of 5,000 hours each, and an unevaluated third option for 350,000 hours. The RFP stated that technical merit would be more important than price in the award decision, but noted that price could become the deciding factor if proposals were found to be technically equal.

The technical evaluation factors and their values were as follows:

1. Demonstrated experience and competence (40 points)
2. Competence of key personnel (25 points)
3. Understanding and approach (20 points)
4. Special factors (10 points)
5. Organization and management plan (5 points)

Price was not to be assigned a numerical score, but was to be evaluated to determine its realism and its reflection of the offeror's technical understanding.

Three firms submitted initial proposals by the October 10, 1991, closing date. Following the initial evaluation by the technical evaluation panel (TEP), the proposals were assigned overall narrative ratings of acceptable, unacceptable, or unacceptable but capable of being made acceptable. The contracting officer's representative (COR) provided guidance to the TEP in this regard by advising it that a rating of acceptable meant that the firm could perform the work and had no major shortcomings or fatal flaws in its proposal. The COR also advised that award could be made based on an acceptable proposal offering the lowest price, barring a finding that a higher priced offer was technically superior.

The TEP's initial report found that the D&D proposal had "numerous strengths" and was "significantly better" than the other two. The initial evaluation results were as follows:

<u>Offeror</u>	<u>Score</u>	<u>Rating</u>
D&D	97.7	Acceptable
Sverdrup Corp.	71.8	Acceptable
G&O	70.3	Acceptable

After evaluating offered prices, the contracting officer found all three proposals to be in the competitive range, and held written discussions with the offerors. Discussions with G&O addressed several proposal deficiencies, including the limited experience of the project manager and assistant project manager with similar work, lack of demonstrated ability to execute multiple tasks for the East and West Coast areas simultaneously, and failure to present a complete understanding of all tasks in the statement of work. In contrast, the agency required only minor clarifications from D&D, such as a fully loaded hourly rate for one employee and identification of specific skills for some resumes. All three firms submitted revised proposals, with the following results:

<u>Offeror</u>	<u>Score</u>	<u>Rating</u>	<u>Evaluated Price</u>
D&D	98.9	Acceptable	\$109,964.30
Sverdrup	77.8	Acceptable	170,054.80
G&O	74.3	Acceptable	88,550.47

The TEP found as strengths of D&D's revised proposal that it had demonstrated an understanding of the disaster assistance program, had sound organization and an excellent management plan, possessed excellent program managers and competent professionals, was able to respond rapidly and field numerous specialists for extended periods of time, and had demonstrated experience in disaster assistance. The TEP discerned no weaknesses in the proposal. As for G&O's revised proposal, although it received a slightly higher score than its initial proposal, the TEP noted that the firm had failed to mitigate the agency's concern about its management experience, specifically noting that the firm's responses to the discussion questions:

"did not enhance the TEP's view of [its] proposal. [G&O's] managers do not possess similar experience in managing this type of contract and we consider this a major weakness.

"It was the opinion of the TEP that if this contractor was selected that considerable time and effort, which equates to money, would be expended by the program office and each impacted region in completing the task assignment."

The report concluded that D&D's proposal was "significantly better and ranked substantially higher than the other two," and advised the contracting officer to "consider each contractor's proposal based on our ranking."

After evaluation of best and final offers (BAFO), the contracting officer executed a negotiation memorandum recommending award to G&O on the basis of its low price. In this regard, the contracting officer stated,

"[n]otwithstanding the panel's preference for the higher rated technical company (Dewberry & Davis), Federal Acquisition Regulations are too firmly imbedded in the philosophy and practice of the 'low bidder' and 'minimal needs of the government' to make any other rational choice in this matter beside the firm of Greenhorne & O'Mara.

"As iterated by the technical evaluation panel in their report, all three offerors were deemed to be 'acceptable.' It should be noted that even though Dewberry & Davis has a substantially higher

technical score, this does not impact the competition. As evidenced by the panel's comments, they feel Dewberry & Davis is the most qualified (and preferred from a program standpoint) of the three offerors, and Greenhorne & O'Mara is the least preferred, and on the low end of the acceptable spectrum. However, the panel was neither willing to deem Greenhorne & O'Mara as 'unacceptable,' nor make a case of technical superiority for Dewberry & Davis. The situation at hand is a perfect example of the old adage of 'the government drives Chevrolets, not Cadillacs.' It is evident that the government's minimal needs in this situation can be met by Greenhorne & O'Mara at a substantially lower cost than the services proposed by Dewberry & Davis."

The day after the contracting officer executed this determination, he asked a supervisor of one of the TEP members to explain the wide disparity between the technical scores of D&D, which appeared to be technically superior, and G&O, which offered the lowest price. According to the contracting officer, the supervisor advised that unless D&D's superiority was "significant," G&O's technical acceptability at a lower price would qualify that firm for award. The supervisor stated that he had discussed the proposals with his employee and did not consider D&D's proposal significantly superior. The contracting officer then "conceptually rescored" D&D's proposal, and determined that D&D "had a better technical proposal but not a superior one." The contracting officer concluded that there were no significant technical differences between the proposals, that G&O had previously performed "in a technically excellent manner," and that the award therefore should be based on price. Accordingly, award was made to G&O on December 19; D&D subsequently filed this protest.

D&D contends that the record does not provide a reasonable basis for the agency's determination that its proposal was not technically superior to G&O's and therefore did not warrant payment of a higher price. In this regard, D&D maintains that the individual evaluation worksheets, evaluation summaries and the selection decision show that the TEP considered D&D's proposal superior to G&O's, and that deficiencies in G&O's proposal were never resolved to the panel's satisfaction. Noting that the contracting officer acknowledged the TEP's findings in his decision document, D&D argues that the contracting officer failed to give those findings any weight in the award decision. D&D concludes that the agency's decision to make award based on cost, without regard to D&D's technical superiority, was improper.

In a negotiated procurement, contracting officials have broad discretion in determining the manner and extent to which they will make use of technical and cost evaluation results. TRW, Inc., 68 Comp. Gen. 511 (1989), 89-1 CPD ¶ 584. However, they do not have the discretion to announce in the solicitation that they will use one evaluation plan, and then follow another; once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria in making its award decision or inform all offerors of any significant changes made in the evaluation scheme. Greenebaum and Rose Assocs., B-227807, Aug. 31, 1987, 87-2 CPD ¶ 212.

Of course, a contracting agency properly may find that a significant difference in technical scores does not represent a corresponding difference in technical merit and make award based on cost; the propriety of such a selection turns on whether the contracting agency's judgment of the significance of that difference was reasonable in light of the RFP evaluation scheme. Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321; PharmChem Laboratories, Inc., B-244385, Oct. 8, 1991, 91-2 CPD ¶ 317. Where cost is secondary to technical considerations under an RFP evaluation scheme, as here, selection of a lower priced proposal over a proposal with a higher technical score requires an adequate justification, *i.e.*, some showing the agency reasonably concluded that, notwithstanding the point differential between the two proposals, they were essentially equal. PharmChem Laboratories, Inc., *supra*; DynCorp, B-245289; B-245289.2, Dec. 23, 1991, 71 Comp. Gen. 129, 91-2 CPD ¶ 575. The Federal Acquisition Regulation (FAR) requires agencies to document their selection decisions to show the relative differences between proposals, their weaknesses and risks, and the basis and reasons for the selection decision. FAR § 15.612(d)(2). Where there is inadequate supporting rationale in the record for a decision to make an award to a lower priced offeror with a lower technical ranking notwithstanding a solicitation's emphasis on technical factors, we cannot conclude that the agency had a reasonable basis for its decision. Hattal & Assocs., 70 Comp. Gen. 632 (1991), 91-2 CPD ¶ 90; PharmChem Laboratories, Inc., *supra*.

The record here fails to establish how the contracting officer's selection decision was consistent with the RFP's evaluation scheme, which stated that technical merit was considered more important than price. The evaluation documents show that the TEP considered D&D's proposal superior to G&O's, while the contracting officer believed that D&D had submitted "a better proposal" than G&O. The contracting officer did not provide--and in responding to D&D's protest still has not provided--a cogent rationale in support of his determination that D&D's superior rating was

not worth its 20 percent higher price, given the RFP's emphasis on technical factors.

The contracting officer's selection decision did not refer at all to the RFP's technical evaluation criteria. In fact, as discussed above, the decision document expressly discounted the need for technical superiority based on a perceived FAR preference for award to the "low bidder" based on the "minimal needs of the government." This perception of the FAR caused the contracting officer to focus on G&O's low cost instead of on D&D's technical superiority in reaching his award decision, contrary to the RFP's emphasis on technical merit over cost, as well as the FAR § 15.612(d) requirement that award decisions be based on the factors stated in the RFP. See John Snow Public Health Group, Inc., 59 Comp. Gen. 498 (1980), 80-1 CPD ¶ 366 (agency improperly based selection decision on preference for "Chevrolet" instead of "Cadillac" proposal when the solicitation emphasized technical factors).

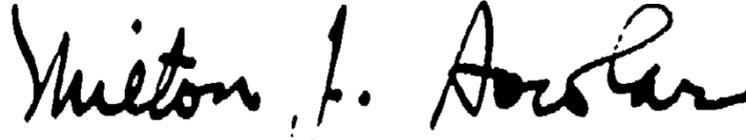
The decision document also did not discuss any of the differences between D&D's and G&O's proposals, or otherwise offer any support for the contracting officer's ultimate conclusion that D&D's proposal, while superior to G&O's, was not "substantially" superior such that it warranted payment of a higher price. This unsupported semantical distinction is refuted by the evaluation documents which explain why the TEP considered D&D's proposal "significantly better" than G&O's. The contracting officer did not adequately explain why he discounted the TEP's conclusion as to the significance of the technical differences, and, in particular, did not address the outstanding deficiencies in G&O's proposal. For example, the contracting officer did not address the TEP's view that G&O's managers lacked the proper experience, and that "considerable time and effort, which equates to money," would be required to complete assigned tasks. Obviously, this finding by the TEP potentially had a dual impact in the evaluation, since it brought G&O's relative technical capability into question as well as raising the possibility that G&O's cost of performance ultimately may increase due to this deficiency.

In sum, the contracting officer may have converted the selection basis from the one described in the solicitation, which emphasized technical superiority, to one in which award would go to the acceptable, low priced proposal. At a minimum, the contracting officer's selection memorandum does not explain his conclusion that D&D's proposal was not so superior to G&O's as to warrant payment of a price premium. While both proposals earned an adjectival rating of acceptable, the approximately 25 percent differential between D&D's and G&O's numerical scores appears to have been based on substantial differences in the quality of the

two technical proposals.¹ While there was a \$21 million price difference between the two proposals, the record does not show what effect this difference would have had in a proper technical/cost tradeoff. See FAR § 15.612(d)(2); Hattal & Assocs., supra.

Accordingly, we sustain the protest. By letter of today to the Director of FEMA, we recommend that the agency either make award to D&D as the technically superior offeror with a reasonable price, or make a proper cost/technical tradeoff decision documenting the reasons that D&D's acknowledged superiority is not worth the cost premium. If the agency determines that award to D&D is appropriate, it should terminate G&O's contract for the convenience of the government and make award to D&D. We also find D&D entitled to reimbursement of the costs of filing and pursuing the protest.

The protest is sustained.


for Comptroller General
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¹FEMA's counsel argues that the difference between the two firms' technical scores primarily was due to D&D's incumbency advantage, and asserts that agencies may discount incumbency advantages in making award decisions. However, there are no references to an incumbency advantage in the decision document and evaluation documents. The record does not support the assertion that D&D's incumbency advantage was a factor in the decision. See generally DynCorp, B-245289; B-245289.2, supra.