Comptroller General
of the United States

Washington, D.C. 20548

148003

Decision

REDACTED VERSION[1]

Matter of: Jones Operations & Management Company

File: B-248432.2

Date: October 16, 1992

William A. Roberts, III, Esq., Lee P. Curtis, Esq., and Brian A. Darst, Esq., Howrey & Simon, for the protester.
Joseph J. Petrillo, Esq., Michael A. Hordell, Esq., and Eric L. Lipman, Esq., Petrillo & Hordell, for K & M Maintenance Services, Inc., an interested party.
Gregory Petkoff, Esq., James Dever, Esq., and Dennis A. Walker, Esq., Department of the Air Force, 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 finding that awardee's staffing is adequate to meet solicitation requirements is denied, where technical proposal demonstrated awardee's understanding of requirements and where under a fixed-price contract, awardee assumes risk if its approach results in higher costs than anticipated.

2. Use of color adjectival scoring scheme supported by narrative assessment of proposal advantages and disadvantages is not improper so long as the contracting officer is thereby able to gain a clear understanding of the relative merits of proposals.

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[1]The decision was issued on October 16, 1992, and contained proprietary and source-selection sensitive information. It was subject to a General Accounting Office protective order. This version of the decision has been prepared after consideration of the parties' comments identifying those portions of the decision that contained proprietary information.

3. Agency did not act improperly by failing to reject a proposal that did not incorporate terms of collective bargaining agreement into option year prices where awardee's interpretation of solicitation instructions appears reasonable, prices could be evaluated on a common basis, and nothing on the face of the proposal indicated that the awardee intended to violate the Service Contract Act.

DECISION

Jones Operations & Management Company (JOMC) protests the award of a contract to K & M Maintenance Services, Inc., under request for proposals (RFP) No. F09650-91-R-0153, issued by the Department of the Air Force for maintenance of ground support equipment. JOMC contends that the agency did not make award in accordance with the factors set forth in the solicitation.

We deny the protest.

On August 22, 1991, the agency issued the solicitation for a firm, fixed-price contract for maintenance of ground support equipment at Robins Air Force Base (AFB), Georgia, for a base period with four 1-year options. The solicitation contained the standard clause found at Federal Acquisition Regulation (FAR) § 52.215-16 (FAC 90-7) providing for award to the responsible offeror whose proposal was most advantageous to the government, considering price and other factors specified in the solicitation.

The agency established four technical criteria, which were in descending order of importance: production, management, quality, and safety. The solicitation provided for applying two assessment criteria, soundness of approach and understanding of/compliance with the requirement, to each of the technical criteria. The agency advised offerors that it would evaluate cost data for reasonableness, completeness, and realism.

The solicitation contained the clause at FAR § 52.222-41, providing for application of the Service Contract Act of 1965 (SCA) to a contract resulting from the solicitation, essentially obligating the successful offeror to pay employees in accordance with wage determinations issued by the Department of Labor (DOL). FAR § 52.222-47 was added to the solicitation by amendment; that clause basically provided that in the absence of a SCA wage determination, the collective bargaining agreement (CBA) between the incumbent (here, Jones) and the union would apply to the contract and that offerors must consider the economic terms of the CBA. FAR § 52.222-43, also incorporated into the RFP, provided as follows:

"(a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to [CBAs].

"(b) The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

"(c) The wage determination [current at] the beginning of each renewal option period, shall apply to this contract.

"(d) The contract price . . . will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with . . .

(1) The [DOL] wage determination applicable . . . at the beginning of the renewal option period. . . .
(2) An increased or decreased wage determination otherwise applied to the contract by operation of law . . . ." (Emphasis added.)

The agency asked each of the four offerors who had submitted an initial offer to submit a best and final offer (BAFO). Based on the BAFOs, evaluators assigned three offerors, including the protester and the awardee, an overall rating of green (acceptable), with acceptable ratings under all four technical criteria. The source selection authority (SSA) reviewed the evaluators' report, which contained a narrative discussion of the strengths and weaknesses of each proposal, and finding that evaluators had determined the three acceptable proposals to be essentially equal in technical merit, awarded a contract to K & M as the lowest cost offeror on April 10, 1992. This protest followed.

The protester contends that the agency improperly concluded that K & M's proposal was the most advantageous offer. First, the protester argues that K & M's costs were unrealistic because the awardee did not take nonproductive time into account in preparing its cost proposal and additional costs will be necessary to perform in accordance with its proposal. Second, the protester as incumbent contractor asserts that its own historical experience demonstrates that the awardee underestimated the number of preventive maintenance inspections requiring 20 or more hours of labor; this results, the protester argues, in the awardee's unrealistically low estimate of the average number

of hours required for such inspections. Finally, JOMC asserts that K & M's proposal was not technically equal to its offer.

In considering protests against an agency's evaluation of proposals, we will examine the record to determine whether the evaluation was reasonable and consistent with the evaluation criteria. SeaSpace, 70 Comp. Gen. 268 (1991), 91-1 CPD ¶ 179. We find that the record supports the agency's acceptance of the awardee's estimates of nonproductive time and preventive maintenance inspection time as reasonable.

The protester concedes that the awardee's technical proposal expressly acknowledged the proper amount of nonproductive time for each employee.[1] However, the awardee based its cost proposal on the assumption that a lesser amount of nonproductive time would actually be utilized by each employee during contract performance. The record shows that the K & M cost proposal assumed, based upon K & M's experience under similar contracts, that it would not incur the costs of the maximum amount of time which the union employees might claim under the CBA. While the protester argues that the awardee will incur an additional half million dollars to perform as offered, the record shows that the awardee understood its obligations with regard to nonproductive time and that its omission of some potential nonproductive time from its cost proposal was essentially a matter of business judgment. Where, as here, the solicitation provides for award of a fixed-price contract, and the contractor bears the risk should its approach result in a higher cost than anticipated, there is no basis for the agency to withhold award merely because the low offer is allegedly unreasonably low. Motorola Inc., B-236294, Nov. 21, 1989, 89-2 CPD ¶ 484.

Regarding the hours per preventive maintenance inspection (PMI), the agency and awardee basically argue that the protester's reliance on historical experience to establish the alleged unreasonableness of K & M's estimate of hours needed for each PMI is not determinative here. The awardee points out that the protester was only the incumbent for 2 years and identifies its own extensive experience under similar contracts as supporting its estimate of the hours needed. The Air Force reports that it found K & M's proposed approach to PMI acceptable and that the protester's and awardee's rationale for its PMI pricing are almost identical--it is based on prior experience with this type of service. The agency states that it believes that

[1]The protester contends that the awardee did not include the full amount of sick leave to which employees are entitled, which the protester asserts, amounts to 6.5 days per year.

due to the competitive atmosphere for this type of work, the firms sought to offer the lowest possible prices. In its comments on the protest, the awardee elaborates on its rationale for its PMI hourly rate. K & M states that as a result of changes ongoing at Robins AFB, there will be reduced demands on equipment which requires more than 20 hours to inspect. The awardee therefore anticipates that the "mix" of equipment will change to allow a lower average number of PMI hours per piece of equipment. Based on the record, we have no reason to conclude that the awardee's estimate of time for PMIs indicates a lack of understanding of requirements, nor can we find the agency's evaluation of the proposal either unreasonable or inconsistent with the criteria in the solicitation.

In arguing that K & M's proposal was not technically equal to its proposal, the protester maintains that the agency failed to follow guidelines for application of its color adjectival rating scheme, and failed to consider significant strengths associated with JOMC's proposal that entitled the protester to a higher technical rating. The protester contends that the red (unacceptable), yellow (susceptible), green (acceptable), blue (exceptional) rating scheme, as applied by the agency, created an artificial equality of proposals that gave a far heavier weight to low cost than the solicitation indicated. The failure to properly distinguish superior proposals from those merely acceptable, the protester argues, resulted in award to the lowest cost, technically acceptable offeror, contrary to the solicitation which basically called for a cost/technical tradeoff. Specifically, the protester contends that the applicable guidelines provide for a green rating for proposals that meet standards but have weaknesses that are readily correctable, and that its proposal, which contained strengths but no weaknesses under the production and quality criteria, should have received a blue rating in the production and quality categories.

Our review of the proposal analysis report shows that evaluators found strengths in three areas of the K & M proposal and in two areas of the JOMC proposal. Neither offeror had a weakness in any of the four areas of evaluation once discussions had concluded. Our review therefore shows that to the extent the protester argues that its proposal should have received a blue/exceptional rating in the production and quality areas because of its strong points with no weaknesses, the awardee would be entitled to the same rating under three of the evaluation factors. The agency guidelines upon which the protester relies, by their reference to weaknesses that can be "corrected," appear limited in application to the evaluation of initial proposals and not BAFOs, but even if the protester's

interpretation is correct, the record provides no basis for concluding that the SSA unreasonably considered the proposals essentially equal.

Our chief concern in the application of evaluation methods is the ability of the method in question to give the SSA a clear understanding of the relative merits of proposals. See Ferguson-Williams, Inc., 68 Comp. Gen. 25 (1988), 88-2 CPD ¶ 344. Even numerical point scores, when used for proposal evaluation are useful only as guides to intelligent decision-making, and are not generally controlling for award because they often reflect the disparate, subjective judgments of the evaluators. Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD ¶ 427. We have previously examined the use of color adjectival rating schemes, supported as here by narrative assessments of the individual proposals, and have found that they can reasonably convey to the SSA a proper appreciation of the strengths and weaknesses of individual proposals, and we have no basis to conclude that the evaluation scheme used here by the agency created any artificial equality of proposals. See Ferguson-Williams, Inc., supra. We find that the color adjectival rating scheme, in conjunction with the narrative assessments of the evaluators, provided the SSA a reasonable method for discerning the strengths and weaknesses perceived by the evaluators and a reasonable method for recognizing the advantages and disadvantages of award to one offeror as opposed to another. We find no basis on this record to question the SSA's conclusion that the proposals offered no differences in technical merit that were significant enough to dictate award to other than the low priced firm.

The protester lastly contends that the awardee improperly failed to consider the effect of the CBA on option year prices and that its failure to include known wage increases in its option year prices represented a failure to meet a material requirement of the solicitation, for which the agency should have rejected the proposal. The protester points out, in support of its contention, that the other offerors included the anticipated wage increases in their prices.

The protester and two other offerors interpreted the solicitation as requiring inclusion of the CBA annual wage and fringe increases for option years in its total price. The agency and the awardee interpreted the solicitation as requiring offerors to exclude the option year wage increases from their prices. The agency acknowledges that it inadvertently failed to resolve this conflicting interpretation in discussions, but it asserts that its interpretation of the solicitation is correct and, in any event, even if it failed to communicate this interpretation to the offerors, its reevaluation of offers shows that K & M remains low. As

stated above, FAR § 52.222-43 requires an offeror to warrant that its prices do not include any contingencies to cover increased costs; the clause further provides that this warranty only includes contingencies for which the clause provides an equitable adjustment. This provision provided for an equitable adjustment for wage increases in option years. Although the protester's price includes a contingency to cover these costs, we think the solicitation supports the interpretation of the agency and K & M that prices were not to contain such contingencies, for which an equitable adjustment was provided. The agency's view is bolstered by DOL regulations, which state that the Administrator makes two types of determination of minimum required wages--prevailing wage determinations and determinations pursuant to CBAs of predecessor contractors, such as the protester. 29 C.F.R. § 4.50 et seq. (1992). The matter should have been resolved in discussions, but even if we believed the protester's interpretation to be correct, the awardee's interpretation certainly is not unreasonable and therefore provides no ground for rejecting the proposal, where as here, the agency is still able to evaluate prices on a common basis.

In order to ensure that prices were evaluated on a common basis, the agency reconstructed the protester's price to eliminate wage increases for the option years. This reconstruction of the protester's offer shows that although JOMC's price is reduced substantially, the awardee's price remains lower. JOMC does not allege either that the agency's reconstruction is calculated incorrectly or that its price would be lower if K & M's price were reconstructed to include the option year wage increases. We find that the record therefore supports the agency's conclusion that however prices are calculated, the awardee submitted the lower price.

There is no indication in its offer that the awardee does not intend to be bound by the terms of the SCA, or that other offerors were prejudiced by their different interpretation of the solicitation. See SSDS, Inc., B-247596.2, Aug. 7, 1992, 92-2 CPD ¶ 90. Absent any indication that K & M did not intend to comply with its obligations under the SCA, we find no basis to conclude that acceptance of the

awardee's technically equal and lower cost offer was either unreasonable or inconsistent with the factors listed in the solicitation.

The protest is denied.

James F. Hinchman
General Counsel