



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Perez Housing Maintenance

File: B-249309

Date: November 12, 1992

Michael E. Harvey for the protester.
Donald E. Barnhill, Esq., East & Barnhill, for BMAR & Associates, Inc., an interested party.
Timothy A. Beyland, Department of the Air Force, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under a negotiated defense agency procurement where offerors were advised that discussions were not contemplated, agency properly could conduct discussions with competitive range offerors where discussions were believed necessary to determine the proposal most advantageous to the government.

DECISION

Perez Housing Maintenance protests the award of a contract to BMAR & Associates, Inc., under request for proposals (RFP) No. F23606-91-R-0034, issued by the Department of the Air Force for military family housing maintenance services at Whiteman Air Force Base (AFB), Missouri. Perez argues that acceptance of BMAR's offer was improper because BMAR lacks the required experience and only acquired the necessary experience--by proposing the use of an experienced large business subcontractor--after discussions were conducted.

We deny the protest.¹

¹Perez, the third low responsible offeror, also protests the lack of required experience in the second low responsible offeror, Boling Heating Cooling & Electrical. This contention was apparently made to establish Perez's status as an interested party under our Bid Protest Regulations. We need not consider this basis of protest because our resolution of
(continued...)

The RFP, a 100-percent small disadvantaged business (SDB) set-aside, provided for the award of a firm, fixed-price contract for a base period of 1 year with four 1-year options. The RFP stated that award would be made to the lowest-priced, technically acceptable offeror and listed four evaluation criteria: past performance; staffing; quality control; and understanding of the performance work statement requirements. The RFP advised offerors that "[f]ailure . . . to thoroughly comply with all four (4) technical evaluation areas . . . shall render the offer unacceptable."

The RFP incorporated Federal Acquisition Regulation (FAR) § 52.215-16(c) (Alternate III) (FAC 90-7), which stated in pertinent part:¹

"The [g]overnment intends to evaluate proposals and award a contract without discussions with offerors. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the [g]overnment reserves the right to conduct discussions if later determined by the [c]ontracting [o]fficer to be necessary."

The RFP provided, in the event discussions were held, that:

"[T]he [c]ontracting [o]fficer shall conduct discussions on price, method of performance, quality control, pricing plans, time of performance, and other contract terms with all [o]fferors determined to be technically qualified and in the competitive price range. Discussions will be concluded if a mutual understanding has been reached with a qualified [o]fferor. This mutual understanding will become the basis for the [o]fferor's [BAFO]. . . ."

¹(...continued)

Perez's protest of the award to the low offeror, BMAR, renders Perez's protest of Boling academic.

¹10 U.S.C. § 2305(b) (4) (A) (ii) (Supp. III 1991) authorizes agencies such as the Air Force to make contract awards, after evaluation of proposals, on the basis of "initial proposals, without conducting discussions with the offerors (other than for the purpose of minor clarification), unless discussions are determined to be necessary, if the solicitation states the agency's intent to do so. See Macro Serv. Sys., Inc., B-246103; B-246103.2, Feb. 19, 1992, 92-1 CPD ¶ 200.

Thirteen proposals were submitted by the October 23, 1991, closing date. Three proposals were eliminated, one because it was not from an SDB concern and two because they did not include required information. The agency also found BMAR and five other firms otherwise technically unacceptable. BMAR was found technically unacceptable in part because of its lack of required past performance experience. The remaining four proposals were found to be technically acceptable.

On November 14, the Whiteman AFB procurement office requested the Strategic Air Command (SAC) headquarters' authorization (business clearance) to award to Perez on the basis of initial proposals. SAC headquarters expressed concern that the agency record did not support an award on the basis of initial proposals without discussions and directed the contracting officer to reevaluate the proposals. On November 21, the evaluators reevaluated the proposals and on November 25, the Whiteman AFB procurement office sent SAC headquarters additional justification for the proposed award to Perez. SAC headquarters responded by questioning the consistency of the evaluation and requesting a narrative resolving the discrepancies. The evaluators reconvened on December 5 and re-reviewed the proposals. The next day, the Whiteman AFB procurement office furnished the reevaluation results to SAC headquarters with the advice that:

"The team is thoroughly convinced that no amount of clarification through discussions could render any of the original technically unacceptable offers acceptable."

After receiving the third evaluation and the accompanying recommendation for an award without discussions, SAC headquarters and Whiteman AFB personnel engaged in a series of phone conversations between December 9 and 13 concerning the adequacy of the award documentation, and on December 18 these officials met to consider whether discussions could make several of the deficient proposals acceptable. After Whiteman AFB officials conceded that several unacceptable offers could be made acceptable through discussions, SAC headquarters, on December 31, notified Whiteman AFB that there would be no business clearance approval unless discussions were conducted with offerors whose proposals were in the competitive range. Based on this advice, 12 proposals (that is, all the proposals received except for the one submitted by the non-SDB concern) were included in the competitive range. On January 22, 1992, the agency opened discussions with letters to the unacceptable offerors outlining their respective deficiencies.

Meanwhile, several months earlier, on November 22, BMAR had entered into an agreement with Ogden Government Services--a large business with extensive past performance experience--under which BMAR would subcontract agreed upon percentages of the work to Ogden.³ BMAR incorporated its use of Ogden in its BAFO and it was found acceptable.

The agency evaluated the offerors' revised proposals and found all 12 offerors were technically acceptable. All the offerors were then requested to submit BAFOs by March 30. The five low-priced offerors were:

Low offeror	\$3,133,289.15
Second offeror	3,232,281.80
BMAR	3,302,172.40
Boling	3,497,982.18
Perez	3,608,588.94

The agency received negative pre-award surveys on the two lowest-priced offerors and determined them nonresponsive. Both determinations were referred to the Small Business Administration (SBA) for consideration under its certificate of competency (COC) program, and in both instances SBA refused to issue COCs. BMAR was found responsible and was awarded the contract on June 29. This protest followed.

Perez initially protested that BMAR lacked the RFP-required experience. Specifically, the RFP stated that the evaluation of past performance would be based on "the [o]fferor's experience in providing quality, large scale, military family housing maintenance requirements." Perez argued that BMAR had never held a large scale military family housing maintenance contract, and urged that this failing barred BMAR's proposal from further consideration because of the following RFP provision:

"NOTE: Failure on the part of the [o]fferor to thoroughly comply with all four (4) technical evaluation areas as stated above shall render the offer unacceptable and nonresponsive to the terms of this solicitation."

Perez learned from the agency report that the Air Force considered BMAR's subcontract with Ogden as essentially curing BMAR's deficient past performance and making BMAR's BAFO acceptable. Perez does not argue that BMAR and Ogden, together, lack the required past performance, or that Ogden's experience should not be considered. Instead, Perez

³The agreement was formulated to comply with the SDB subcontracting restrictions.

contends that the agency should not have afforded BMAR the opportunity to cure its deficient proposal by opening discussions. Perez characterizes the agency action in this regard as improper "technical leveling." We disagree.

The RFP expressed the agency's intent to make an initial proposal award, but also advised that discussions would be conducted if "necessary." Here, the record indicates that SAC headquarters did not view Whiteman's documentation as adequately supporting the finding that several proposals were technically unacceptable, and that SAC ultimately concluded that competitive range discussions were needed to determine the proposal most advantageous to the government. We see nothing unreasonable or improper with this conclusion. See Latecoere Int'l, Inc.--Advisory Opinion, B-239113.3, Jan. 15, 1992, 92-1 CPD ¶ 70, where we found reasonable an agency's decision to conduct discussions because of concerns that the initial proposal selection was not adequately documented.

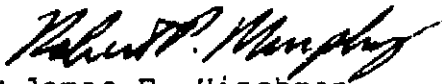
A prerequisite to conducting discussions is the establishment of a competitive range. We cannot say that the Air Force acted unreasonably in including BMAR's proposal in the competitive range given BMAR's low price and apparently correctable deficiencies. Id. Once the Air Force opened discussions, BMAR was then free to revise its proposal with an explanation of how its subcontract arrangement with Ogden would cure the evaluated deficiency in its past performance. See Fordel Films, Inc., B-186841, Oct. 29, 1976, 76-2 CPD ¶ 370. The agency properly considered Ogden's experience, as explained in BMAR's BAFO, in finding BMAR technically acceptable, since the solicitation allowed for the use of subcontractors to perform the contract and did not prohibit the consideration of a subcontractor's experience in the evaluation of proposals. See Premier Cleaning Sys., Inc., B-249179.2, Nov. 2, 1992, 92-2 CPD ¶ ____ (where a large business subcontractor's experience was properly considered on an SDB set-aside).

'Perez states in its comments on the agency report

"The basis of our allegation of technical leveling is that 3 different times Whiteman AFB [procurement office] determined that BMAR was not technically acceptable and was not susceptible of being technically acceptable, and then, at the insistence of SAC [headquarters], finally had to make BMAR technically acceptable through the use of discussions."

We find no merit in Perez's contention that the award to BMAR resulted from improper technical leveling. Technical leveling, as defined in FAR § 15.610(d), arises only where, as a result of "successive" rounds of discussions, the agency has helped to bring one proposal up to the level of other proposals, such as by pointing out inherent weaknesses that remain in the proposal because of the offeror's lack of diligence, competence, or inventiveness after having been given an opportunity to correct them. CBIS Fed. Inc., 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308; Price Waterhouse, B-222562, Aug. 18, 1986, 86-2 CPD ¶ 190. Technical leveling does not occur merely by repeated evaluations of the proposals, where the offerors are not given the opportunity to revise their proposals after each evaluation. Here, the agency properly advised the unacceptable offerors of their proposal deficiencies during one round of discussions, which was proper meaningful discussions and not technical leveling. In any case, the record reflects that BMAR entered into its subcontracting arrangement with Ogden 2 months before the opening of discussions and not in response to successive opportunities to revise its proposal.

The protest is denied.


James F. Hinchman
General Counsel