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

Decision

Matter of: Automaker, Inc.

File: B-249477

Date: November 24, 1992

Sharon M. Hogge for the protester.
Lenore K. Strakowsky, Esq., Department of the Navy, for the agency.
Kenneth A. Redden, and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Award to the offeror submitting a slightly higher-priced, technically superior proposal under a request for proposals which gave greater weight to technical merit than price is justified where the contracting agency reasonably determined that the acceptance of the awardee's proposal was worth the higher price based on a comparative evaluation of the offerors' past quality performance.

2. Protest objecting to the agency's finding that the awardee's price, which was 20 percent higher than the price it submitted under a prior contract, was reasonable is denied where the agency found the awardee's price was lower than the government estimate and that its prior lower contract price was based on significantly greater quantities than solicited under the current request for proposals.

DECISION

Automaker, Inc. protests the award of a contract to AC, Inc. under request for proposals (RFP) No. N68335-92-R-0012, issued by the Department of the Navy for Harpoon missile containers. The protester basically challenges the agency's evaluation of the proposals.

We deny the protest in part and dismiss it in part.

The solicitation, issued as a small business set-aside on August 30, 1991, by the Naval Air Warfare Center, Aircraft Division, Lakehurst, New Jersey, contemplated the award of a firm, fixed-price contract for 45 Harpoon missile

containers.[1] The solicitation advised that the award would be made to the offeror whose proposal represented the best value to the government, price and technical factors considered. Specifically, although Section M of the solicitation stated that price was of significance in determining the successful offeror, Section M also provided that past quality performance (technical) was more important. Price was worth 40 points and past quality performance 60 points.

Nine offerors submitted initial proposals by the November 20 closing date. All technical proposals were then forwarded to the Naval Weapons Station-Earle, Colts Neck, New Jersey (NWS-Earle) for evaluation. As an aid to evaluating the past performance of the offerors, the solicitation advised that the evaluators would use a Red-Yellow-Green evaluation point criteria. Under this procedure, also explained in the solicitation, offerors were assigned points in the following three categories: production of the same or similar items 25 points; quality deficiency reports (QDR) 15 points; and letters of concern, cure notices, and show cause letters 20 points. An offeror who manufactured the identical item would receive 25 points. An offeror who manufactured similar items would receive 20 points. An offeror who had not manufactured the same or similar items would receive zero points. Similar point breakdowns would be made under the other two categories. Full points would be given to companies with no deficiency reports, etc. Offerors would lose points if they had been issued deficiency reports, etc., with consideration given to whether or not acceptable corrective action had been taken by the contractor.

Upon receipt of the technical evaluations from NWS-Earle, the agency rejected four of the offerors as unacceptable and included the remaining five--RDS Manufacturing, Inc., Oak Harbor Tech., Creative Craftsmen, AC, and Automaker--in the competitive range. During discussions, Automaker was advised that its technical proposal had failed to state whether the company had previously made the same or similar items to those required under the current solicitation and that it had failed to supply copies of all, if any, show cause letters and corrective action responses from prior government contracts. On February 24, 1992, Automaker submitted revised technical information indicating that its previous performance on the Phoenix missile shipping and storage container contract constituted experience on the same or a similar item. Automaker also provided a show

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[1]Originally, the solicitation called for 39 missile containers.

cause letter issued during the Phoenix missile container contract along with the company's response to the show cause letter. (Automaker's Phoenix missile container contract had been terminated at no cost to either itself or the government through a settlement agreement with the contracting officer.)

On March 2, Automaker submitted its best and final offer (BAFO). While verifying Automaker's revised technical information, NWS-Earle learned that Automaker was issued a QDR by the Navy for a first article unit that had failed testing under the Phoenix missile container contract and that Automaker's corresponding corrective action plan was considered unacceptable.

In accordance with the evaluation criteria stated in the solicitation for MDRs and as a result of the QDR issued to Automaker under the Phoenix missile container contract, NWS-Earle assigned Automaker zero points in the QDR category. This accounted for the reduction of Automaker's technical evaluation score from 40 points, based on its initial offer in which Automaker did not identify the QDR, to 25 points, based on its BAFO, a difference of 15 points, for a combined technical price score of 65. On June 30, after RDS Manufacturing, Inc. was found nonresponsible and declined to seek a certificate of competency from the Small Business Administration, RDS was eliminated from the competition leaving Automaker as the next low offeror. AC was found technically superior and received 60 points, the maximum number of technical evaluation points, and 30.59 for price, for a combined score of 90.59. AC's prior performance was found significantly superior to that of Automaker's. Although Automaker's price was $118,729 less than AC's price, the agency determined that AC's BAFO constituted the best overall value to the government. This protest to our Office followed.

The evaluation of technical proposals is a matter within the discretion of the contracting agency since that agency is responsible for defining its needs and the best method of accommodating them. Professional Safety Consultants Co., Inc., B-247331, Apr. 1, 1992, 92-1 CPD ¶ 404. In reviewing an agency's technical evaluation, we will examine the record to ensure that the evaluation was reasonable. Id.

The protester principally argues that the agency improperly downgraded its technical proposal when the agency considered its deficient performance under the Phoenix missile container contract. A letter from the contracting officer attached to the previously executed no-cost settlement agreement for the Phoenix missile container contract stated, "Automaker's ability to receive future contracts is not affected." The protester therefore argues that this

contracting officer's statement precludes the Navy from using any information from the Phoenix missile container contract to downgrade the protester's technical proposals under any future contracts, including the one at issue.

In response, the contracting officer who authored the letter states that the letter was intended to convey that, by agreeing to the settlement, Automaker had avoided having a termination for default on their past performance record. The contracting officer points out that even if Automaker had eventually completed the contract, the QDR would have remained in the file and available for consideration under future solicitations. Thus, according to the agency, the statement was not intended to preclude consideration of the QDR under future solicitations.

We do not find that the Navy was precluded from considering Automaker's performance under the prior contract. The record shows that the contracting officer's letter was dated after the no-cost agreement was executed and was not part of the agreement. The agreement consisted only of Automaker's waiver of any charges against the government because of the termination and Automaker's release of the government from all obligations under the contract. The agreement did not include any commitment from the Navy not to use information concerning the issuance of the QDR in future evaluations of Automaker's experience.

Regarding the specific evaluation at issue, the technical evaluation plan, in accordance with the solicitation's evaluation of past performance, provided that if an offeror had received a QDR in the past 2 years and acceptable corrective action was not taken, that offeror would receive zero points out of a possible 15 in the QDR category. For this reason, the agency downgraded Automaker's initial technical proposal from 40 points to 25 points.[2] We therefore conclude that the agency's evaluation was reasonable and in accordance with the solicitation's stated evaluation criteria.

Next, the protester argues that inappropriate evaluation factors, such as the risk of timely delivery, were considered by the agency due to the unusual length of the procurement cycle. As a preliminary matter, we find nothing

[2]Moreover, the record shows that even with the full 15 points in the QDR category, the protester's proposal would still not have received the highest overall score for technical and price combined and, in fact, would remain significantly below the awardee's combined score.

unusual about the length of this procurement cycle. A 10-month procurement cycle is not unusual when dealing with the award of a negotiated contract, especially when, as in this case, several amendments were issued and a preaward survey was conducted on the apparent awardee. Furthermore, we find no evidence in the record supporting the protester's assertion that the agency used evaluation criteria not expressly stated in the solicitation.

The protester also contends that there was no basis to determine the awardee's price to be fair and reasonable. The awardee's unit price for a similar contract in 1990 was 20 percent lower than its unit price for the current contract. The 1990 contract, however, was for a quantity of 348 units while the current contract requires a quantity of only 45 units. According to the record, the contracting officer considered the 20 percent increase in unit price to be caused, at least in part, by the significant decrease in the quantity ordered. In addition, the contracting officer noted that the awardee's unit price was well below the government estimate. We, therefore, find nothing unreasonable about the contracting officer's acceptance of the awardee's unit price.

Three additional issues were raised by the protester.

First, the protester complains that the solicitation was issued as a small business set-aside, but that the Navy failed to identify in the solicitation the Standard Industrial Classification (SIC) code used to determine the size of the small business. The omission of the SIC code is an obvious defect apparent on the face of the solicitation. Improprieties apparent from the solicitation must be protested prior to the initial closing time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1992); Cleveland Telecommunications Corp., B-247964.3, July 23, 1992, 92-2 CPD ¶ 47. In this case, Automaker did not protest the omission of the SIC code until after the initial closing time. Accordingly, this portion of the protest is dismissed.

Second, the protester contends that the awardee, AC, is not a small business since AC is dominant in its field of operation. The determination of a firm's small business size status is a matter solely for review by the Small Business Administration. 4 C.F.R. § 21.3(m)(2); TeleLink Research, Inc., B-247052, Apr. 28, 1992, 92-1 CPD ¶ 400. The contracting officer reports that he had no reason to question AC's small business self-certification and the protester did not file a challenge to AC's size status when it was advised of the proposed award to AC. This issue is therefore dismissed as a matter not for consideration by this Office.

Finally, the protester argues that it was placed at a disadvantage because the contracting officer refused to provide it with procurement history information which the awardee possessed as the incumbent. It is not unusual for an incumbent to enjoy a competitive advantage, and such advantage, so long as it is not the result of preferential treatment or other unfair action by the government, need not be discounted or equalized. Consultants & Designers, Inc., B-247923.2, July 22, 1992, 92-2 CPD ¶ 40. The protester does not allege that the incumbent advantage here is the type which the government is required to equalize. Moreover, there is no law or regulation that generally requires the disclosure of the procurement history of items being purchased by the government, provided the information contained in the solicitation is adequate to permit offerors to compete intelligently. See Plastics Design, Inc., B-219239, July 26, 1985, 85-2 CPD ¶ 98. In any event, the protester was not prejudiced since it did obtain the disputed procurement history from the Navy's Cruise Missile Project Program Executive Officer before it submitted its initial proposal. Accordingly, this portion of the protest is also dismissed.

The protest is denied in part and dismissed in part.

Robert P. Murphy
for James F. Hinchman
General Counsel