

Morrow
148647



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

Decision

Matter of: E.J. Richardson Associates, Inc.
File: B-250951
Date: March 1, 1993

Edward J. Richardson for the protester.
Kenneth A. Lechter, Esq., Department of Commerce, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably made award based on cost where the technical proposals were found to be substantially equal.
2. Agency conducted meaningful, and not misleading, discussions, where protester with highly rated, higher cost technical proposal was advised of the specific technical weaknesses in its proposal and that the agency was interested in a cost effective approach.
3. There is no evidence that the Chairman of the technical review team, who had some official business contacts with a subcontractor of the awardee, had an improper conflict of interest that improperly influenced the award.

DECISION

E.J. Richardson Associates, Inc. protests the award of a contract to the University of Maine under request for proposals (RFP) No. 52-EANF-2-00066, issued by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), Norfolk, Virginia, for the development of an econometric simulation model of the North American lobster industry.

We deny the protest.

On August 4, 1992, NOAA issued the RFP to obtain a contractor to furnish, under a cost-type contract, the necessary personnel, material, equipment, services and facilities to design and develop an umbrella model of the "North American Lobster Industry" for the Northeast Fisheries Science Center

(NEFSC) in Woods Hole, Massachusetts.¹ The RFP required the contractor to design a computer-based, quantitative dynamic bioeconomic and market umbrella simulator, and to develop data collection methods, collect data, estimate and develop the umbrella simulator components, and make the simulator operational within an estimated 2 years from commencement of the contract. The RFP required the contractor to deliver, install and successfully test the simulator within a "Sun workstation environment" at NEFSC.

The RFP requested the submission of detailed technical and cost proposals, and provided for the award to be made to the responsible offeror whose offer, conforming to the requirements of the solicitation, was considered most advantageous to the government, cost or price and other factors considered. The RFP further advised that cost would be considered as follows:

"Although it is an important factor, price is not expected to be the controlling factor in the selection of a contractor under this solicitation. The degree of its importance will increase with the degree of equality of proposals with regard to other factors on which the selection will be based and where competing proposals are determined to be substantially equal technically, price will be the controlling factor. Weights will be assigned to the technical proposal and to the cost proposal, with technical being slightly more important than cost."

The technical factors, listed in descending order of importance, were personnel and organization qualifications, technical approach, and understanding the task.

By the September 4, 1992, closing date, Richardson and Maine responded to the RFP. The technical proposals were evaluated against the technical evaluation factors on a 100-point scale² by a three-member technical review team. Based upon the initial evaluation of technical and cost factors, the contracting officer determined both offerors to be within the competitive range. Written discussion questions and

¹The umbrella model was to be used as a framework for evaluating the lobster industry in all its principal sectors, from harvesting to final domestic and import demand, so that the market impact of regulations could be regularly evaluated, along with the harvest implications of market changes.

²Personnel and organization qualifications was worth 40 points, technical approach was worth 30 points, and understanding the task was worth 30 points.

a request for best and final offers (BAFO) were sent to offerors on September 11 and BAFOs were submitted by September 21. Further oral discussions were conducted on September 25 and 28, and final proposal revisions were submitted on September 28.

The proposals were finally evaluated as follows:

<u>Contractors</u>	<u>Technical Score</u>	<u>Cost</u>
Maine	90.0	\$538,047
Richardson	93.3	553,600

The contracting officer determined that the proposals were substantially equal and accordingly made award to Maine since its cost was the lowest.³

Richardson argues that since its technical score was 3.7 percent higher than Maine's and its price was 2.9 percent higher, the agency's determination to award solely on the basis of cost cannot be supported; Richardson requests an explanation of the precise technical and cost weights supporting the determination. Richardson does not specifically challenge either the cost or technical evaluation of its or Maine's proposal or the technical scores awarded.

Where an agency reasonably determines proposals as being essentially equal technically, cost may become the determining factor in making an award decision, notwithstanding that the evaluation criteria assigned cost less importance than technical considerations. Arthur D. Little, Inc., B-243450, July 31, 1991, 91-2 CPD ¶ 106. Whether a given point spread between competing offerors indicates superiority of one proposal over another depends on the facts and circumstances of each procurement. Id. While Richardson suggests that the agency was required to assign a precise weight to cost in making the award selection in these circumstances, there is no such requirement, where, as here, the RFP does not so provide. See EMSA Ltd. Partnership, B-245973, Feb. 5, 1992, 92-1 CPD ¶ 148. In this case, the RFP specifically provided that as technical scores became substantially equal, cost would become the controlling factor.

The record shows that despite Richardson's slightly higher technical point score, the agency did not view Richardson's technical approach to be clearly superior to Maine's. The agency found that the closeness of the final technical scores, when viewed in light of the dissimilar nature of the proposed technical approaches, made it virtually impossible

³The agency found both offerors' proposed costs were reasonable and reflective of their technical approaches.

to choose one proposal over the other as being clearly superior in terms of technical excellence. Although Richardson's technical score was slightly higher, the evaluation documentation reveals that in the most significant evaluation factor Maine received the highest technical score, and that Richardson's was rated slightly higher than Maine under the lesser evaluation factors. Thus, the agency had a reasonable basis to conclude that the proposals of Richardson and Maine were substantially technically equal. Therefore, the award selection based on Maine's lower cost was reasonable and in accordance with the RFP. See Vine, McKinnon & Hall, B-245164, Dec. 18, 1991, 91-2 CPD ¶ 561.

Richardson asserts that the agency's discussions with it were misleading in that they focused solely on hardware and software questions, instead of possible cost reductions. Richardson asserts that, since the award was made solely upon cost, the agency should have pointed out that its proposal was not cost effective. Richardson complains that although in its BAFO and in response to the oral discussions it proposed various alternatives, such as alternate software development approaches and lease vis-a-vis purchase of the computer to be used during the contract, to promote cost effectiveness, the agency did not apprise Richardson of the preferred approach.

Contracting agencies are required to hold meaningful written or oral discussions with offerors whose proposals are in the competitive range; this obligation is not satisfied where an agency misleads an offeror into believing that its proposal is of such high quality that changes in its BAFO would serve no useful purpose. See Capstone Corp., B-247902, July 9, 1992, 92-2 CPD ¶ 12. Agencies need not afford offerors all-encompassing discussions, however, or discuss every element of a technically acceptable proposal that received less than the maximum possible rating; rather, agencies need only point out deficiencies and lead offerors into the areas of their proposals which require amplification. Environmental Sys. and Servs., Inc., B-244213, Oct. 2, 1991, 91-2 CPD ¶ 283.

The record demonstrates that Richardson was provided meaningful, and not misleading, discussions, and that Richardson had an adequate opportunity to revise its technical and cost proposals.⁴ Both Richardson and Maine were advised of all

⁴Although Richardson questions the propriety of the agency's first holding written discussion and later holding oral discussions, the procuring agency has the discretion to hold written or oral discussions. See Federal Acquisition Regulation § 15.610.

evaluated weaknesses in their proposals during written discussions, and Richardson concedes that the agency advised it that a purpose for the oral discussions was to provide Richardson the opportunity to propose a more cost effective hardware and software solution. While Richardson argues that the agency, during discussions, should have focused more on the cost elements of its proposal, given that this was the ultimate award selection basis, Richardson's costs were not considered excessive for its technical approach; thus, this was not a deficiency in the proposal that was required to be pointed out. Global Assocs., B-244367.3, Feb. 26, 1992, 92-1 CPD ¶ 229. Contrary to Richardson's assertion, the agency was not required to choose which alternatives presented by Richardson would be most advantageous to the government; indeed, the agency properly placed the burden of choosing the optimal technical/cost approach on Richardson, as was contemplated by the RFP.⁵ See Environmental Sys. and Servs., Inc., supra.

Richardson specifically complains that the agency did not advise it during oral discussions that the use of a Sun-compatible computer in developing the software was acceptable. According to the agency, the oral discussions were conducted to make sure that the offerors were aware that the simulator must be able to operate in a Sun workstation environment, and the contracting officer's notes of the discussions, supported by affidavit, state that Richardson was specifically told that the RFP allowed for the use of a Sun-compatible solution. Richardson alleges that, although the Sun workstation environment requirement was expressly raised during these discussions, the agency never told Richardson that a Sun-compatible computer solution, as opposed to Richardson's higher-cost Sun computer solution, to developing the software would be acceptable. We need not resolve this dispute. Since Richardson's proposal of a Sun computer to develop the simulator was acceptable under the RFP (in fact, Richardson received a higher rating than Maine under the relevant evaluation factor), the agency had no duty to apprise Richardson of other acceptable solutions. See HospitalKlean, Inc., B-245158 et al., Dec. 17, 1991, 91-2 CPD ¶ 550. In this regard, we note that the RFP only requires that the delivered simulator must work in NEFSC's

⁵The record clearly reflects that Richardson recognized its responsibility to choose the best technical/cost approach. Richardson's final cost/technical proposal revisions evidence that it was Richardson's business judgment, after exploring various alternative technical approaches, to propose the software and hardware solutions that it did as a superior technical approach to meeting the agency's requirements.

"Sun workstation environment," and did not specify how the software is to be developed by the contractor.

Richardson finally asserts that the award to Maine was tainted because a conflict of interest existed between the Chairman of the technical proposal review team and the University of Rhode Island--which is a proposed subcontractor to Maine. Richardson asserts that the Chairman oversees and directs a cooperative fishery economics research program between the NEFSC and the Department of Resource Economics at the University of Rhode Island. Richardson alleges that the Maine proposal may have been submitted under the auspices of this NEFSC/University of Rhode Island cooperative agreement, and that the Chairman therefore viewed the Maine proposal more favorably because the Chairman may have desired to expand this cooperative agreement through use of funding available under this RFP. Further, Richardson states that the Chairman loaned a University of Rhode Island faculty member, who was a part of the Maine proposal, an advanced desk-top computer prior to the issuance of the RFP in order to allow the testing of a "fishing vessel simulation" software program, which Richardson claims is similar to the simulator that is the subject of this RFP.

When a protester alleges bias or conflict of interest on the part of a evaluation official, we focus on whether the official exerted improper influence in the procurement on behalf of the awardee or against the protester. See Charles Trimble Co., B-250570, Jan. 28, 1993, 93-1 CPD ¶ ; George A. Fuller Co., B-247171.2, May 11, 1992, 92-1 CPD ¶ 433.

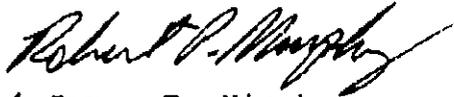
Here, we find no evidence of an improper conflict of interest or of an improperly influenced award decision. First, the record contains no evidence of bias; Richardson received the higher technical score and it was the contracting officer's decision to make award to Maine based on its lower cost. Richardson's claims regarding the Chairman's alleged motive to subsidize the University of Rhode Island cooperative agreement are tenuous at best. The record shows that the University of Rhode Island was one of four universities employed in the Maine proposal and its contribution to the total proposal effort was a relatively small subcontract. There is no evidence that the Maine proposal was being submitted under the auspices of the University of Rhode Island cooperative agreement with NEFSC or that it was subsidized by that cooperative agreement. The agency further advises that the Chairman does not direct or control the activities or funding of the cooperative agreement, and

the Chairman has submitted an affidavit denying any ulterior motives or any bias.⁶

With regard to the loaned computer, the Chairman and the University of Rhode Island faculty member in question have stated, in sworn affidavits, that the loaned computer and the work connected with its use were not related to the requirement in this procurement, nor was the computer used in the preparation of Maine's proposal.⁷ Richardson's allegation that the computer and the work connected with it provided Maine with a competitive advantage is based upon Richardson's belief that Maine's solution may have been based on the "fishing vessel simulation" software developed on the loaned computer. Our review of Maine's proposal does not support this assumption, since Maine's proposal is based upon commercially developed software.

In sum, we find that Maine was awarded the contract not because of undue influence or favoritism, but because its proposal represented the best value to the government, cost and other factors considered.

The protest is denied.


for James F. Hinchman
General Counsel

⁶Indeed, the Chairman asserts that in the recent past Richardson was awarded a contract in a competition between the awardee and Richardson, in which he served in a similar capacity.

⁷The Chairman advises that the research community for lobster research is a small community and that he, Richardson, and the University of Rhode Island faculty member are all personal and professional colleagues.