



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

Decision

Matter of: Met-Pro Corporation

File: B-250706.2

Date: March 24, 1993

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DIGEST

Protest of award to offeror whose slightly higher priced proposal was properly evaluated as technically substantially superior to protester's is denied where, even though the agency failed to contemporaneously document the basis for its price/technical tradeoff and the agency's proposal evaluation plan improperly assigned technical factors and price relative weights different from those established by the solicitation, it is clear from the record that the protester was not prejudiced as a result.

DECISION

Met-Pro Corporation protests the award to ABB Paint Finishing of a contract under request for proposals (RFP) No. DAAC67-92-R-0008, issued by the Department of the Army, Letterkenny Army Depot, for an emission control system. Met-Pro contends that ABB's proposal was selected on the basis of evaluation criteria different from those called for by the RFP.

We deny the protest.

Letterkenny issued the RFP on February 7, 1992, for an emission control system to substantially reduce volatile organic content fumes from the agency's vehicle painting facility. The RFP contains separate line items for the purchase of zero, one, two, three, or four replacement paint

booths together with the emission control system; there is no line item for paint booths without an emission control system. According to the RFP, the number of replacement paint booths purchased would depend on the availability of funds.

The RFP requires offerors to include in their technical proposals (not their price proposals) an estimated annual operating cost for the proposed system, but provides little guidance about how that cost is to be calculated and does not state whether, or how, operating cost will be taken into account in evaluating proposed prices. The RFP provides for a firm, fixed-price contract covering the emission control system, paint booths, and installation.

The RFP sets forth detailed technical criteria to be applied in the evaluation of proposals, including, as the least important technical evaluation factor, management/personnel and company experience. Section M of the RFP is silent as to the relative weight to be assigned to technical factors and price in the source selection process. Section M does advise offerors that:

"The Government reserves the right to award to other than the lowest priced offeror. The award decision shall be made on the basis of an assessment of evaluation results as a whole (rating and cost, including realism considerations), not score alone. Consequently, the contracting officer may award to an offeror, the price or cost of which is not the lowest, but which is sufficiently more advantageous to the Government."

In two other places, Section M repeats that the agency intends to award on the basis of the proposal offering the "greatest value," rather than the lowest priced, technically acceptable proposal. The proposal evaluation plan (PEP) provided to the Source Selection Evaluation Board (SSEB), but not to the offerors, states: "The relative importance of cost or price in relation to technical merit factors is as follows: 'merit is significantly more important than cost'"

By the April 14, 1992, due date, four proposals were received, of which two were ultimately eliminated from consideration for reasons irrelevant to this protest. The two remaining proposals were ABB's and Met-Pro's.

Discussions were conducted with ABB and Met-Pro through letters identifying deficiencies in their technical proposals. Among the deficiencies of which Met-Pro was advised was its noncompliance with the RFP requirement that

the proposal include paint booths as part of a completely operational system. Revised technical proposals were then requested, received by the July 10 due date, and evaluated, followed by further written discussions. Those discussions led the agency to request that the offerors submit another round of revised technical proposals by August 5, 1992. The SSEB reached consensus scores for these second revised proposals, and assigned a score of 157.5 points to ABB's second revised technical proposal and 120 points to Met-Pro's. In other words, ABB's technical score was approximately 24 percent higher than Met-Pro's. The SSEB also wrote a detailed narrative setting forth the advantages and disadvantages of each proposal, and an analysis of the benefits that the government could obtain from the technical advantages of ABB's proposal.

Through amendment 0002, dated August 19, 1992, the contracting officer informed offerors that discussions were closed. The amendment revised various RFP clauses and deleted others, but made no reference to Section M. The amendment also stated:

"Comment in regard to the solicitation/specification will no longer be entertained since all offerors have been determined technically acceptable.

"Notice is hereby given that this is your opportunity to submit revised price proposals in the form of a Best and Final Offer. Best and Final Offers are due in this office by 12:00 E.S.T. on 2 September, 1992."

Both companies submitted timely BAFOs. Met-Pro's BAFO price for the emission control system and four paint booths was \$5,724,514, while ABB's price for that line item was \$5,971,512. That is, ABB's price was approximately 4 percent higher than Met-Pro's. The difference in price grew as the number of paint booths offered declined: for the emission control system with no paint booths, ABB's price was approximately 29 percent higher than Met-Pro's.

Consistent with the terms of the RFP, the determination concerning the number of replacement paint booths purchased was made on the basis of the availability of funds at the time of award. Because adequate funds were available, the contracting officer, who was also the source selection authority (SSA), determined that the agency would purchase the maximum number of paint booths, four, together with the emission control system.

The SSA adopted the SSEB's technical evaluation and analysis as well as its conclusion that ABB's proposal offered

significant advantages to the government. The SSEB had noted that Met-Pro's proposal had received higher scores than ABB's under management/personnel and company experience, but concluded that this was not as important to the agency as the areas in which ABB's proposal was superior. In this regard, the SSEB's analysis noted that the RFP states that management/personnel and company experience are the least important technical evaluation factors.

Based on this analysis, the SSA determined that ABB's significant technical advantages were worth the additional cost. Accordingly, award was made to ABB on September 29, 1992.

The contemporaneous record does not explicitly indicate whether the SSA considered technical and price factors to be equal, or whether she weighted technical factors more heavily than price. Moreover, there is no contemporaneous record of the SSEB's performance of a price/technical tradeoff between ABB's and Met-Pro's proposals, although the agency asserts that the SSEB performed such a tradeoff.

THE TECHNICAL EVALUATION

Met-Pro disputes three aspects of the evaluation of the technical proposals. According to the protester, the agency failed: (1) to assign Met-Pro's proposal the minimum number of points required, pursuant to the PEP, for proposals found to be technically acceptable; (2) to give Met-Pro credit for its allegedly lower operating costs; and (3) to consider the alleged acquisition price advantage Met-Pro offered if its emissions control system were purchased without any replacement paint booths.

Met-Pro argues that the PEP required the agency evaluators to assign a fixed number of points to aspects of proposals which were technically acceptable and as to which no additional clarification was needed. In the protester's view, the assignment of fewer points to certain aspects of Met-Pro's proposal, even though those aspects were technically acceptable, was inconsistent with the PEP and unreasonable.

Essentially, the protester is arguing that its proposal should have been awarded the higher of two possible scores for certain areas. The higher score at issue was to be applied in the following situation:

"Offer meets minimum requirements; no additional modifications or clarifications are required; response is complete and satisfactory in all areas."

The criteria for the lower score were as follows:

"Offer meets minimum requirements; responds to all requirements; additional clarification may be required; all requests to comply are satisfactory; offeror is qualified to develop Emission Control Equipment."

Met-Pro's position is that once the evaluators determined that no additional clarifications were required regarding Met-Pro's proposal in the areas at issue, these scoring definitions required that Met-Pro's proposal be assigned the higher score. The agency responds that the PEP scoring system afforded the evaluators the discretion to assign a range of scores to technically acceptable proposals.

Although the PEP definitions may be inartfully worded, they do not, as Met-Pro would have it, eliminate the evaluators' discretion in assigning the lower or higher score to a technically acceptable proposal. While the criteria for the higher score may not permit such a score to be assigned where additional modifications or clarifications are required, the criteria for the lower score do not preclude assigning the lower score even if no clarifications are required. That is, the fact that additional clarifications may be required if the lower score is assigned does not dictate that such clarifications must be needed to permit assignment of the lower score.

In any event, the protester misperceives the role of numerical point scores. While such scores may be useful as guides in decision-making, they cannot of themselves supply the basis and reason for an award decision. U.S. Defense Sys., Inc., B-245563, Jan. 17, 1992, 92-1 CPD ¶ 89. Indeed, point scores are not binding on the agency's source selection officials, because they often reflect the disparate subjective judgments of evaluators. Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD ¶ 427.

Thus, even if Met-Pro's allegation of incorrect point scoring were correct and the higher numerical scores should have been assigned to Met-Pro's proposal for each of the disputed areas, the Army would nonetheless retain the

discretion to determine that the technical superiority of ABB's proposal was worth the associated price premium. Even inaccuracies in point scores may not render a source selection decision fatally flawed, where the record makes clear that the agency did not rely solely on the differential in point scores in the source selection. See Central Texas College, 71 Comp. Gen. 164 (1992), 92-1 CPD ¶ 121.

In this procurement, the point scores clearly were not determinative of the award decision. The elements of ABB's technical superiority were explicitly set forth in the contemporaneous evaluation documents, and those elements of technical superiority go far beyond the slight numerical scoring issues raised by Met-Pro. As noted above, Met-Pro does not contest any of the substantive elements of ABB's technical superiority. Specifically, Met-Pro raises no challenge to the agency's conclusion that ABB's system offered numerous unique design advantages providing a more efficient, safer emission control system which produces fewer secondary pollutants. Consequently, we conclude that Met-Pro's challenges to the precise scores given for technically acceptable aspects of its proposal do not call into question the reasonableness of the agency's overall evaluation of the two competing proposals.

The next disputed area of the technical evaluation concerns the operating costs. Met-Pro contends that its proposal was improperly assigned the same technical score for operating costs as ABB's, even though the SSEB identified high operating costs as a disadvantage of ABB's proposal.

This challenge is flawed in the same way as the challenge to the scoring of technically acceptable proposals, in that it assumes that the numerical scores are the sum and substance of the evaluation process. As Met-Pro correctly notes, the evaluators explicitly identified high operating costs as a disadvantage of ABB's system. That fact renders the quibble over the number of points assigned immaterial, since the precise score did not mislead the SSEB into eliminating consideration of the ABB system's high operating costs.

In any event, we note that the bulk of the difference in operating costs between the two competing systems arises because the two offerors appear to have calculated the applicable costs differently. ABB's calculation appears to include labor and indirect costs, while Met-Pro seems to have assumed a narrower definition of operating costs. The difference in actual comparable operating costs may thus have been more apparent than real. Further, in light of the limited role that operating costs were assigned in the RFP's evaluation scheme, where they were evaluated solely as one of seven criteria within one subfactor of the technical

factor, any error in assigning numerical scores to the competing proposals' operating costs was de minimis and without impact on the overall evaluation.

The protester's final challenge to the technical evaluation involves the agency's determination to purchase the emission control system with four replacement paint booths. Met-Pro's BAFO prices for the paint booths were so high that the company's 29-percent price advantage over ABB's proposal, if the agency did not purchase any paint booths, dropped to a 4-percent advantage when the SSA determined to purchase four booths. Accordingly, the protester contends that the agency should have purchased the emission control system from Met-Pro and acquired the paint booths through a separate procurement.

The RFP advised offerors that the decision about the number of paint booths to be purchased was dependent on the availability of funds at the time of award, and did not provide any line item for paint booths without an emission control system. If Met-Pro felt that combining the emission control system with paint booths for this acquisition was improper, it was required to protest the terms of the RFP prior to the date on which proposals were due. 4 C.F.R. § 21.2(a)(1) (1992). Not having done so, it has no basis after award to protest the agency's decision to purchase four paint booths because funding was available at the time of award--as that decision is fully consistent with the terms of the RFP.¹

THE RELATIVE WEIGHTING OF TECHNICAL AND PRICE FACTORS

The parties disagree both about the relative weighting of price and technical factors that was required to be applied in the price/technical tradeoff and about the relative weighting that actually was applied. The parties do agree, however, that, because Section M of the RFP is silent as to the relative weight of price and technical factors, they are to be considered approximately equal in importance under the evaluation scheme set forth in the initial RFP. See Associates in Rural Dev., Inc., B-238402, May 23, 1990, 90-1 CPD ¶ 495.

¹We note as well that the agency advised Met-Pro during the course of discussions that its proposal was deficient for not offering "a completely operational system that includes the paint booths," and Met-Pro's response indicated that the company understood that the agency intended to purchase the system as an integrated whole.

The PEP improperly provided that significantly more importance should be assigned to technical factors than to price, which was inconsistent with the RFP evaluation criteria. See Federal Acquisition Regulation (FAR) § 15.608(a). We note that the agency concedes that the PEP erred in this regard. The parties thus agree that, at least until amendment 0002 was issued, price and technical factors should have been given equal weight.

Met-Pro argues that amendment 0002 changed the evaluation criteria to mandate award on the basis of the lowest priced, technically acceptable proposal.² Met-Pro bases this argument on the language in the amendment stating that all remaining proposals were considered technically acceptable, and the amendment's limiting BAFOs to price revisions. Met-Pro contends that the agency's failure to make award on the basis of the lowest priced, technically acceptable proposal prejudiced Met-Pro because, had it known the evaluators intended to do otherwise, it would have insisted on being allowed to change its technical proposal in its BAFO and, in particular, to enhance its technical proposal to score additional points for technical merit.

The agency counters that amendment 0002 did not require the agency to award on the basis of the lowest priced, technically acceptable proposal, and instead left Section M unchanged. Accordingly, the Army argues that, even after issuance of amendment 0002, the agency was permitted to perform a price/technical tradeoff in which a higher price could be paid to obtain a superior technical proposal. The agency points out that the RFP explicitly and repeatedly reserves the government's right to award to other than the lowest priced proposal and that the RFP statements to that effect were not deleted by amendment 0002.

We find Met-Pro's interpretation of amendment 0002 unreasonable. Nothing in the amendment sets forth a new relative weighting of price and technical factors, refers to Section M of the RFP, or otherwise explicitly addresses the basis for selecting a contractor. Accordingly, the RFP did not require award on the basis of the lowest priced,

²Met-Pro also argues that amendment 0002 was defective because it limited the offerors to modifying their price proposals. This argument is untimely. Alleged improprieties incorporated in solicitations through amendments must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1992). Thus, if Met-Pro believed that it was improper for the agency to limit BAFOs to price revisions, the company was required to protest that issue by September 2, 1992, the due date for the submission of BAFOs.

technically acceptable proposal, even after issuance of amendment 0002. The agency thus had the discretion to select a higher priced, superior technical proposal if that selection was otherwise reasonable, as long as the price/technical tradeoff was performed by assigning approximately equal weight to price and technical factors. See Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 169.

The protester contends, however, that the actual price/technical tradeoff was not performed on this basis. According to Met-Pro, the SSEB and the SSA must be assumed to have complied with the PEP and therefore to have assigned significantly greater weight to technical factors than to price. As explained above, if that occurred, it was inconsistent with the evaluation criteria set forth in the RFP and thus improper.

The contemporaneous record does not indicate whether the technical factors were given weight equal to, or greater than, price in the deliberations of the SSEB and the SSA. The protester argues that the lack of contemporaneous documentation is itself improper and constitutes a violation of FAR §§ 4.801(b) and 15.608(a)(2).

In its initial report to our Office, the agency included a statement from the SSA quoting the language in the PEP to the effect that technical merit was significantly more important than price. The protester's comments on the agency report pointed out that the PEP and the SSA's quotation from it indicated that the agency considered technical factors more important than price. The agency then responded that, in fact, both the SSEB (in its award recommendation) and the SSA (in the source selection) considered price as approximately equal to technical factors. The agency stated that it reconvened the SSEB members and that they had confirmed that, in their deliberations before award, they had assigned approximately equal weight to technical factors and price. Thus, according to the agency, neither the SSEB members nor the SSA weighted the factors in accordance with the PEP's language. The agency does not explain how or why the SSEB members and the SSA decided to ignore the PEP language directing evaluators to assign significantly more weight to technical factors than to price.

We need not resolve the dispute concerning the weighting actually applied by the SSEB and the SSA, because, in the factual context of this source selection decision, the precise weighting scheme used is not determinative and, even if the agency used the improper weighting, it is clear from

the record that Met-Pro was not prejudiced. Prejudice is an essential element of a viable protest. Lithos Restoration Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.

As explained in the preceding section, the technical evaluation of the competing proposals was proper, and it was appropriate for the agency to elect to award a contract for four paint booths together with the emission control system. In determining which proposal merited this award, the agency was required to choose between Met-Pro's proposal, which offered a slight price advantage (approximately 4 percent), and ABB's proposal, which was found to offer significant technical superiority, measured both in point-score terms (approximately 24 percent) and, more importantly, in terms of the anticipated impact on performance of the technical differences.

In that context, award to ABB was plainly reasonable and, indeed, may well have been the only reasonable result. This is true even though, as Met-Pro argues, the agency failed to maintain adequate contemporaneous documentation concerning the price/technical tradeoff that was the basis of the source selection decision. See Waddell Eng'g, Corp., 60 Comp. Gen. 11 (1980), 80-2 CPD ¶ 269; KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447. In this regard, it is telling that Met-Pro does not allege that its proposal should have been selected in a price/technical tradeoff-- only that it was the lowest priced, technically acceptable proposal. It is because award to ABB was clearly appropriate in a price/technical tradeoff, with price and technical factors weighted equally, that Met-Pro was not prejudiced by the PEP language or the inadequate contemporaneous source selection documentation.³

The protest is denied.


for James F. Hinchman
General Counsel

³Although the lack of prejudice leads us to deny the protest, we are bringing to the attention of the agency both the improper weighting scheme in the PEP and the lack of adequate contemporaneous documentation of the SSEB's and the SSA's price/technical tradeoff analysis.