



Comptroller General
of the United States

3171910

Washington, D.C. 20548

Decision

Matter of: Maxwell Laboratories, Inc.

File: B-253737

Date: October 19, 1993

Kenneth M. Thomas, Maxwell Laboratories, Inc., for the protester.

Wayne L. Evelhoch, Department of Energy, for the agency.

Paula A. Williams, Esq., Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Award to technically superior, higher-priced offeror is unobjectionable where award on that basis is consistent with the solicitation evaluation criteria and selection officials reasonably determined that the superior technical merit of successful proposal was sufficiently significant to justify award at higher price.

DECISION

Maxwell Laboratories, Inc. protests the award of a subcontract to STI Optronics, Inc., the incumbent contractor, under request for proposals (RFP) No. 93-30RP-001, issued by the Department of Energy's (DOE) management and operations (M&O) contractor, University of Chicago, Argonne National Laboratory.¹ Maxwell basically contends that Argonne's award to a higher-priced offeror was improper because Maxwell submitted a technically acceptable proposal at a lower price.

¹Argonne is subject to our bid protest jurisdiction as an M&O contractor that effectively awards subcontracts "by or for" the government. 4 C.F.R. § 21.3(m) (1993); United Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374. Such contractors are not directly bound by federal procurement law, but must conduct procurements according to the terms of their contracts with the agency and their own agency-approved procedures. We will review a procurement to determine whether it conforms to the "federal norm." Chesapeake Laser Sys., Inc., B-242350, Apr. 8, 1991, 91-1 CPD ¶ 358.

We deny the protest.

The RFP, as amended, provided for the acquisition of undulator A insertion devices for the Advanced Photon Source (APS) project under construction at the Argonne Illinois site.² The RFP contemplated the award of a fixed-priced subcontract to the responsible offeror whose conforming offer was determined to be the most advantageous to the government, price and other factors considered. The RFP provided that the technical evaluation criteria were more important than price and listed the following technical evaluation criteria, in descending order of importance: experience; mechanical design; magnetic design; magnetic measurement; magnetic material; key personnel; facilities; and schedule, delivery and installation.³

The RFP stated that price proposals were not to be point-scored; price would be evaluated based on the total of the base and option quantities. The RFP further stated that price would be weighed against the apparent advantages of individual technical proposals to determine if technically superior proposals, excluding price considerations, were worth any price differentials.

Argonne received five proposals, including offers from Maxwell and STI. After evaluation of initial proposals by members of the source evaluation board (SEB), four offers were determined to be within the competitive range. The technical ratings and prices of the competitive range offerors were as follows:

²The undulators produce high-intensity, high-brightness photon beams to be used in the APS storage ring. According to the agency, an undulator A, a particular type of undulator of hybrid design, is one of the highest technical risk components of the APS.

³The rating plan, which was not disclosed to offerors, established that the maximum score for the technical proposals was 1,140 points and established a weighing system for each technical criterion.

<u>Offeror</u>	<u>Technical Score</u>	<u>Proposed Prices⁴</u>
STI	1,066	\$8,943,982
Offeror A	772	9,055,049
Maxwell	719	4,145,633
Offeror B	531	4,010,238

Following discussions with each competitive range offeror, revised proposals were received and evaluated; best and final offers (BAFO) were then requested and received. The SEB reopened price discussions and requested revised BAFOs limited to price only. The SEB's final evaluation of the proposals was as follows:

<u>Offeror</u>	<u>Technical Score</u>	<u>Revised BAFO Prices</u>
STI	1,081	\$7,288,052
Offeror A	818	5,497,233
Maxwell	726	4,145,633
Offeror B	596	4,083,464

STI's proposal was considered excellent, especially in terms of experience with hybrid insertion devices. STI proposed a design that met or exceeded the RFP's requirements. While Maxwell's proposal was considered satisfactory, the evaluators concluded that Maxwell had a general lack of experience with hybrid undulators. Maxwell's magnetic design relied on newly formulated, very strong magnets which were untested in insertion devices and the evaluators were uncertain about their stability. The evaluators noted that Maxwell's proposal lacked information on previous undulators and magnetic measurement techniques. Also, the evaluators believed that Maxwell's low price indicated that Maxwell had potentially underestimated the contract performance risk.

The SEB considered STI to be superior to all other offerors in experience with hybrid insertion devices, quality of staff, and magnetic design and measurement. Based on the critical role of undulators in the project, the SEB believed that selection of any of the other significantly lower-ranked offerors would increase the technical risk to an

⁴The proposed prices include the base plus option quantities. In addition, since there were offers of foreign products in competition with offers of domestic products from small businesses; in accordance with the Buy American Act, a 12-percent differential was added to the prices offered by the foreign product vendors. See 41 U.S.C. § 10a et seq. (1988) and Federal Acquisition Regulation § 25.105.

unacceptable level that offset any cost savings offered by the lower-priced proposals. The SEB recommended award to STI because of its technical superiority and low technical risk.

The source selection official (SSO) accepted the SEB's findings and conclusions and selected STI for negotiation of a contract. Award was subsequently made to STI at a negotiated price of \$6,448,666 and this protest followed.

The gravamen of Maxwell's protest is that it should have been awarded the contract because the firm submitted a technically acceptable proposal at a lower price. The protester alleges that the SSO conducted an improper price/technical trade-off because price was not given the appropriate weight as set forth in the solicitation.

A selection official may award to an offeror with a higher technical score and higher price where he reasonably determines that the price premium is justified considering the technical superiority of the awardee's proposal and the result is consistent with the evaluation criteria. Macron Apparel Corp., B-253008, Aug. 11, 1993, 93-2 CPD ¶ 93; Oregon Iron Works, Inc.; Lakeshore, Inc., B-250528 et al., Jan. 29, 1993, 93-1 CPD ¶ 82. Based on our review of the record, we find that the SSO reasonably determined that STI's proposal was so technically superior that, despite Maxwell's lower price, STI's proposal was the most advantageous to the government.

STI's proposal contained no significant weaknesses, reflected an excellent technical understanding, and demonstrated extensive directly applicable experience. For example, the evaluators noted that STI has made 11 insertion devices, 9 of which are hybrid undulator devices, similar to the type required under this RFP. In essence, the evaluators found that the STI design already satisfied Argonne's requirements and demonstrated an ability to measure all the quantities required by the specifications. None of the other offerors approached STI's demonstrated experience.

By contrast, Maxwell has very little experience in designing and manufacturing undulators. Maxwell has built only one hybrid device, using magnets other than the magnets required by the RFP. The evaluators considered Maxwell's experience in building this hybrid device as only somewhat applicable since there had been no stringent measurement requirements as required by this solicitation. In this regard, the evaluators concluded that Maxwell did not demonstrate knowledge of the levels of accuracy achievable with the measurements required here.

STI also proposed a mechanical design that met or exceeded the RFP's requirements, including a pre-aligned mounting platform. The evaluators noted that STI's analysis and suggestions for use of magnetic force compensating springs was good, addressing areas that Argonne had not fully developed; STI already has a well-tested magnetic measurement bench and was the only offeror to propose double-checking multipole measurements by offsetting the scan and seeing if the multipole fields change as they should. On the other hand, the evaluators found that Maxwell provided insufficient information with regard to its magnetic measurement techniques; its mechanical design of the holders for the magnets and poles was not compatible with the APS' vacuum chamber; its magnetic design and magnetic material relied on newly formulated magnets which were untested in insertion devices and the evaluators were not sure if the magnets would be sufficiently stable, which provided another unacceptable risk element to its proposal. Under these circumstances, we think the agency reasonably concluded that STI's technical proposal was superior to Maxwell's proposal.

The RFP stated that technical merit was more important than price and that price would be weighed against the apparent advantages of individual technical proposals to determine if technically superior proposals were worth payment of a price premium. Thus, the selection of a higher-priced, technically superior proposal is not inconsistent with the weight given price by the RFP--obviously, the more superior a proposal, the more that superiority could outweigh another proposal's lower price. In our view, the SSO properly weighed the technical merit and costs of STI's and Maxwell's proposals and reasonably found that the protester's price advantage was not worth its significantly higher risks and deficiencies discussed above.

Maxwell contends generally that STI's higher technical score was improperly based on Argonne's bias in favor of STI. Maxwell argues that this bias is the result of STI's performance of the prototype contract. Maxwell also argues that the evaluators' application of 26 percent of the available evaluation points to the experience factor is further indication of bias toward STI which gained a large part of its experience from contracts with Argonne.

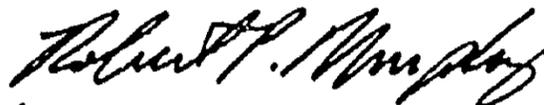
We will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Northwestern Travel Agency, Inc., B-244592, Oct. 23, 1991, 91-2 CPD ¶ 363. In addition to producing credible evidence showing bias, the protester must show that the bias translated into agency action which unfairly affected the protester's competitive position. Id. It is not unusual for an offeror to enjoy an advantage in

competing for a government contract by reason of incumbency, and there is no requirement for procuring activities to equalize or discount such advantages, so long as the advantage is not the result of preferential treatment or other unfair action by procuring officials. See Liberty Assocs., Inc., B-232650, Jan. 11, 1989, 89-1 CPD ¶ 29. Here, the solicitation provided that experience was the most important technical evaluation factor. As we have found that the record supports the agency's conclusion that STI submitted the technically superior proposal with demonstrated experience in hybrid undulators, we have no basis to question the motives of the evaluators.

Further, we believe that the assignment of 26 percent of the available points to the experience evaluation factor was not inconsistent with the stated evaluation criteria. The RFP listed eight evaluation factors in descending order of importance with experience listed as the first and most important factor. While the experience factor was evaluated at approximately twice the value of the next important factor, it was worth 300 out of a total of 1,140 available points. Moreover, since the protester scored significantly less than the awardee under all evaluation factors, the protester has not shown how it was prejudiced by DOE's evaluation plan. To the extent the protester argues that the mere listing of experience as the most important evaluation factor gave STI an unfair competitive advantage, its protest is untimely since it is based on an alleged impropriety apparent from the solicitation and was not filed prior to the closing time for receipt of proposals.
4 C.F.R. § 21.2(a)(1) (1993).

As noted previously, the SEB considered STI's specific experience in developing the prototype and similar hybrid undulators under the experience technical evaluation factor and found that STI's experience offered real advantages to the government based on the critical role that the undulators will play in the successful operation of the APS facility. Based upon the record before us, we have no basis to question the reasonableness of Argonne's evaluation and award selection.

The protest is denied.


for James F. Hinchman
General Counsel