



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Halter Marine, Inc.

File: B-255429

Date: March 1, 1994

Anil Raj for the protester.

Albert J. Joyce, Esq., Panama Canal Commission, for the agency.

C. Douglas McArthur, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where record contains no evidence that agency considered protester's best and final offer, which offered a price reduction, in its selection decision.

DECISION

Halter Marine, Inc. protests the award of a contract to Swiftships, Inc. under request for proposals (RFP) No. CNC-92050 AG-28, issued by the Panama Canal Commission for a 53-foot pilot/linehandler launch. Halter asserts that the agency did not justify its selection of a higher-priced proposal.

We sustain the protest.

BACKGROUND

On August 5, 1993, the agency issued the solicitation for a fixed-price contract to construct, outfit, and deliver an aluminum, twin-screw, diesel-engine launch to be constructed in accordance with the RFP's specifications. The solicitation provided for award of a contract to the offeror whose proposal was most advantageous to the agency, and stated that award might be made to other than the low priced offeror if the evaluation showed that a higher-priced proposal was significantly superior to the lower-priced one. The RFP also reserved to the agency the right to make award without discussions.

The RFP listed four evaluation factors, in descending order of importance--technical merit, quality control capability, experience, and warranty--it also advised that the

evaluation process might include discussions and site visits with offerors in the competitive range. The RFP gave the following guidance about the four evaluation factors:

"1. Technical Merit: Offerors shall provide sufficient technical information to evaluate the relative merits of their proposals, particularly in regards to the proposed systems for noise reduction and corrosion control.

"2. Quality Control Capability: Offerors shall provide information to demonstrate that while regularly engaged in building vessels of the kind described in these specifications, they have exercised an effectual control over quality as contemplated in [Federal Acquisition Regulation (FAR) §] 52.246-2, "Inspection of Supplies."

"3. Experience: Offerors shall provide information regarding their experience within the last five years of successfully having constructed launches similar to the one described in these specifications.

"4. Warranty: Offerors shall comply with the terms and conditions of [FAR § 52.246-17], which requires a warranty of one year from date of final acceptance. However, offerors proposing a longer warranty will be scored higher."

The evaluation scheme provided for numerical scores of up to 45 points for each proposal, calculated as set forth below. First, numerical scores from 1 (poor) to 5 (outstanding) were to be awarded under each technical evaluation factor. After scoring evaluation factors, the evaluators were to use different weights for different factors in totaling the scores. The factors of technical merit and quality control received triple weight, and each was worth up to 15 points; experience received double weight and was worth up to 10 points; the warranty evaluation factor received no extra weight, and was worth up to 5 points.

Six initial offers were submitted on September 16. The agency's technical evaluation committee (TEC) reviewed the offers and determined that four of them were unacceptable, while two of them--those of the protester and the awardee--were included in the competitive range. The TEC also advised the contracting officer, by memorandum dated September 22, that it planned to perform further analysis of the two competitive range proposals.

The contracting officer sent to Halter, by facsimile dated September 23, two pages of discussion questions, all but one of which concerned the protester's quality control program.¹ There is no record of the questions posed to Swiftships, beyond the report of a site visit conducted on September 24. In this regard, the evaluators explained that a site visit was necessary to evaluate the Swiftships proposal under the technical merit and quality control capability evaluation factors. The record shows that, in part, evaluators were seeking Swiftship's assurance that it would avoid the quality problems encountered under prior launch contracts with Halter.²

The first written evaluation of the two competitive range proposals was prepared on September 27, after the site visit to Swiftships, and the same date as Halter responded to the agency's discussion questions. The scores of the two offerors under each of the evaluation factors were as follows:

	<u>Halter</u>	<u>Swiftships</u>
Technical Merit	9	12
Quality Control	6	12
Experience	6	6
Warranty	<u>4</u>	<u>3</u>
TOTAL	25	33

The evaluation narrative accompanying the numerical scores explains that Halter's low score under the technical merit evaluation factor was based on "[p]aint [p]roblems on the past launches as yet unresolved," the use of nonconforming materials under its prior contracts, the "lack of adequate covered assembly/outfitting areas," the "lack of adequate capacity cranes," and the "separation of offices from [the] work area." The narrative also explained the basis for Swiftships' superior ratings under the technical merit and quality control evaluation factors, its rating of superior for the experience factor, and satisfactory for the warranty factor.

¹The one question which did not concern the quality control program, concerned Halter's ability to ensure that non-specified materials would not be used during construction.

²In its report on this protest, the Panama Canal Commission explains that Halter has built almost all of the Commission's recently-purchased launches. The agency also includes evidence of serious workmanship problems in the last 2 Halter-built launches.

With respect to prices, Halter offered a price of \$622,741, while Swiftships offered a price of \$644,877.08. The TEC concluded its memorandum detailing the initial evaluation with a recommendation of award to Swiftships. The TEC estimated that the extra cost of quality surveillance for Halter, and the additional value of Swiftships' offer to use higher-grade 5086 aluminum alloy even where not required, made the Swiftships offer a better value for the government.

On September 28, offerors were asked to provide best and final offers (BAFOs) by the next day, September 29. Also, on September 28, the contracting officer prepared a memorandum for the record disagreeing with some of the conclusions reached by the TEC. Specifically, the contracting officer determined that Halter's proposal should be downgraded from "less than satisfactory" to "poor" under the quality control evaluation factor, thus lowering Halter's score under this factor from 6 to 3. In addition, the contracting officer upgraded Swiftships's score under the experience factor from "satisfactory" to "superior." As a result of these changes, Swiftship's total score rose from 33 to 35, while Halter's total score dropped from 25 to 22.

In his memorandum, the contracting officer also states that he agrees with the TEC that the "hidden costs" in the Halter proposal made the Swiftships proposal more advantageous to the government. Further, the contracting officer's September 28 memorandum concludes that award should be made to Swiftships because:

"the price difference in accepting the lower price proposal would not be in the best interest of the government. Technical merit and quality control are of greater importance than the lower priced proposal."

On September 29, as requested, Halter submitted its BAFO and lowered its price by more than \$30,000, to \$592,000. Swiftships offered no change to its price of \$644,877.08. On September 30, the agency awarded a contract to Swiftships.

By letter dated October 7, the contracting officer notified Halter that the award had been made on September 30, and Halter filed a timely protest thereafter. Since Halter did not receive the letter until more than 10 days after award--most of which passed before the contracting officer prepared the notification letter--the agency refused to stop performance on this contract.

DISCUSSION

In reviewing protests against an agency's technical evaluation and decision to eliminate a proposal from consideration for award, we review the record to determine whether the agency's judgments were reasonable and in accordance with the listed evaluation criteria and whether there were any violations of procurement statutes or regulations. CTA, Inc., B-244475.2, Oct. 23, 1991, 91-2 CPD ¶ 360. Here, we find that the agency made its price/technical tradeoff decision, resulting in award to Swiftships, prior to receiving BAFOs. In addition, it appears that the evaluation focused almost entirely on Halter's performance under prior contracts, and failed to consider the evaluation factors set forth in the RFP.

Our review of the record shows that the TEC's recommendation of award to Swiftships was made at the time of initial evaluations, and prior to receipt of Halter's BAFO, in which Halter lowered its price by more than \$30,000. The TEC's recommendation was based upon its attempt to quantify the additional merit of the Swiftships' proposal. In this regard, the TEC concluded that accepting Halter's proposal would require the agency to expend an additional \$38,000 to maintain an inspector onsite at Halter's facility,³ and that Swiftships' proposed use of a higher-quality aluminum alloy for the ship's hull was worth an additional \$6,000. Thus, the TEC calculated that this \$44,000 advantage of Swiftships' proposal more than offset Halter's \$22,000 lower price.

While we have no basis to question the TEC's conclusions in its memorandum,⁴ there is nothing in the record to show that after Halter lowered its price in its BAFO by \$30,000, the TEC or the contracting officer considered whether Halter's lower price was offset by Swiftships' higher quality. Using the calculations of the TEC, it appears that Halter's price reduction might have offset the claimed value of the Swiftships proposal--i.e., once Halter lowered its price to \$592,000, even if one includes the additional

³The additional \$38,000 represents the difference between the cost of an on-site inspector at Halter's facility (\$50,700) less the per diem cost of an inspector visiting Swiftships' facility on occasion (\$12,700).

⁴Agencies frequently attempt to quantify additional costs related to an offeror's unique approach, and where such attempts have a reasonable basis, we will not question them further. See Allied Signal Aerospace Co., B-250822; B-250822.2, Feb. 19, 1993, 93-1 CPD ¶ 201.

cost of an on-site quality inspector (\$38,000) and the cost of the higher-quality aluminum alloy (\$6,000), its evaluated price of \$636,000 is lower than Swiftships' price of \$644,877.08

After Halter filed its comments on the agency report noting that the contracting officer's memorandum was prepared before BAFOs were received, the agency filed a one-page submission stating that the memorandum adopting the TEC's cost technical tradeoff was misdated. According to the agency, the contracting officer's memorandum should have been dated September 29--the day BAFOs were received--rather than September 28. While we do not reach a conclusion regarding the correct date of the contracting officer's memorandum, the record contains no evidence that the agency made its price/technical tradeoff using Halter's lower BAFO price. The contracting officer's memorandum--regardless of whether it was prepared the day before or the day of receipt of BAFO's--references and adopts the TEC's analysis as conducted on the initial proposals. In addition, there is nothing to indicate that the TEC ever revisited its tradeoff decision. Since the tradeoff recommendation was based on prices that have since been sufficiently altered to suggest that the selection decision might have changed, we have no basis to conclude that the award has a reasonable basis.⁵

In addition, the solicitation here gave no indication of the overwhelming weight given to past performance in the evaluation of technical merit and quality control capability, the two most heavily weighted factors. Instead, the only guidance for addressing technical merit related to noise reduction and corrosion control. It is fundamental that offerors must be advised of the basis upon which their proposals will be evaluated. Sci-Tec Gauging, Inc., Sarasota Measurements & Controls, Inc., B-252406; B-252406.2, June 25, 1993, 93-1 CPD ¶ 494. In particular, contracting agencies are required by the Competition in Contracting Act of 1984 (CICA) to set forth in the solicitation, at a minimum, all significant evaluation factors that the agency expects to consider and their relative importance. 41 U.S.C. § 253a(b)(1) (1988); H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203.

Although evaluators favorably considered Halter's proposal for noise control, their assessment under the technical

⁵We also note that after the protester argued this point in its comments, the agency did not rebut the substance of the contention; rather, it simply stated that the memorandum was incorrectly dated, and that the correct date was September 29.

merit and quality control evaluation factors largely reflected their consideration of Halter's experience under its previous launch contract. Evaluators identified their major concerns under the technical merit factor as paint problems on prior launches, and the use of other than 5086 alloy in hull construction--one of the alleged problems under earlier contracts. In addition, the evaluators commented on the lack of covered areas for welders, the lack of adequate capacity cranes, and the isolation of corporate headquarters from the shipyard, which according to the agency, might have been responsible for problems in Halter's prior contracts. In our view, none of these concerns relate either explicitly or implicitly to the statement of work or to the solicitation's description of the technical merit evaluation factor.

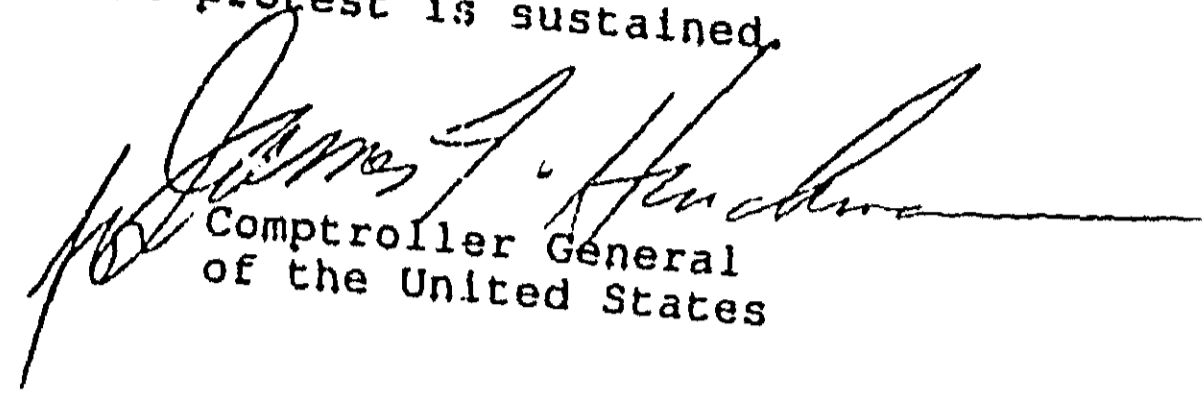
Under the quality control evaluation factor, the evaluators focused on Halter's past performance problems in the areas of welding defects, shaft alignment, and material control. While the evaluation scheme envisioned that the agency would consider experience in constructing similar launches over the past five years, there is no indication that past performance problems would assume this level of importance in the evaluation of other factors. In short, the agency gave overwhelming emphasis to past performance by repeated consideration of that factor in conjunction with the other major factors. The Center for Educ. and Manpower Resources, B-191453, July 7, 1978, 78-2 CPD ¶ 21; see also Management Servs., Inc., B-206364, Aug. 23, 1982, 82-2 CPD ¶ 164; Earth Envtl. Consultants, Inc., B-204866, Jan. 19, 1982, 82-1 CPD ¶ 43. This repeated assessment of the proposal based on the agency's unfavorable experience with the protester was inconsistent with the solicitation criteria and rendered the evaluation unreasonable.

Since Halter did not qualify for an automatic stay of performance because its protest was not filed within 10 calendar days of contract award, and the work here is substantially performed, it is not feasible to recommend that the agency terminate Swiftships' contract. Instead, we find that the protester is entitled to its proposal preparation costs and the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d)(1) and (2) (1993); RBE, Inc., B-252635, July 16, 1993, 93-2 CPD ¶ 27. In accordance with 4 C.F.R. § 21.6(f), Halter's certified claim for such costs, detailing the time expended and costs incurred, must be

submitted to the agency within 60 days after receipt of this
decision.

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The protest is sustained.


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