GORDON

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Comptroller General
of the United States

Washington, D.C. 20548

1230299

Decision

Matter of: Defense Group Incorporated

File: B-257366; B-257366.2

Date: September 26, 1994

David R. Hazelton, Esq., and Tina E. Sciocchetti, Esq., Latham & Watkins, for the protester.
Paul F. Khoury, Esq., and James J. Gildea, Esq., Wiley, Rein & Fielding, for Advanced Resource Technologies, Inc., an interested party.
John R. Burns, Esq., On-Site Inspection Agency, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably interpreted proposal, which raised the possibility of using a second individual as an alternative program manager, as not rendering the proposal unacceptable, but only of greater risk.

2. Awardee's cost proposal's use of different start dates for the option periods from those in the solicitation, did not require the rejection of its proposal because it committed the offeror to provide the same number of hours of service over the same period of time as required by the solicitation and included all the information that the agency reasonably found necessary for evaluation purposes.

DECISION

Defense Group Incorporated (DGI) protests the award of a contract to Advanced Resource Technologies, Inc. (ARTI) under request for proposals (RFP) No. OSIA01-93-R-0006, issued by the Department of Defense's On-Site Inspection Agency (OSIA). DGI challenges various aspects of the source selection process as unreasonable and inconsistent with the solicitation evaluation criteria.

We deny the protest.

OSIA issued the RFP on August 18, 1993, seeking proposals for systems engineering and technical analysis support services for a base period with five option periods. As the RFP was initially issued, the base period was to run from the award of the contract through September 30, 1994; each of the first four options would cover a 1-year period, and the fifth option would run from October 1, 1998, through January 31, 1999. The agency's intent was that the contract period, including all options, would cover no more than 5 years.

The RFP included two statements of work (SOW). The first covered mission support for the agency's work in planning and implementing requirements arising from arms-control treaties and related agreements to which the United States is a party. The second SOW covered organizational support for the agency's overall operational, managerial, and administrative requirements. The RFP stated that two separate cost-plus-fixed-fee contracts might be issued, one for mission support and the other for organizational support. The competition for the mission support contract was unrestricted, while the competition for the organizational support contract was restricted to small business concerns.[1]

Section L of the RFP, after advising offerors that two separate contracts might be awarded, stated:

> "Large business concerns are prohibited from submitting a proposal as the prime contractor for 'Organizational Support'. Small businesses are encouraged to submit proposals for both efforts however, proposals for both efforts are not required."

Among the clauses in section I of the RFP was Federal Acquisition Regulation (FAR) § 52.219-7(b)(4)(i), Notice of Partial Small Business Set-Aside, which provides that "[t]he contractor(s) for the set-aside portion will be selected from among the small business concerns that submitted responsive offers on the non-set-aside portion." The agency advises that this clause was inserted in the RFP by error.

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[1]Because DGI is challenging only the contract awarded under the set-aside portion (for organizational support), we do not discuss the unrestricted contract (for mission support), except as it relates to the protest.

The RFP also incorporated by reference Department of Defense Federal Acquisition Regulation Supplement § 252.219-7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns.

Section M of the RFP provided that the evaluation criteria, in descending order of importance, were: technical, program management, past performance, and cost. Section M stated that technical was more important than the next two criteria combined. For the technical criterion, the subcriteria, in descending order of importance, were: program manager, personnel, and understanding of the problem. Section M stated that OSIA would evaluate each proposal's proposed cost "to determine if the estimate is reasonable, realistic, cost effective, affordable, and to determine the offeror's understanding of the effort." Section M also provided that "proposals which do not contain the information required for the evaluation or [in which the information] is not provided in sufficient detail for evaluation purposes will be considered unacceptable."

Section M also contained a breakdown of the labor mix by labor category and year of performance, with the explanation that the breakdown would be utilized for evaluation purposes in estimating the cost of the contract. That table showed a total of 3,000 hours in "Year 1," which would run from the award date through September 30, 1994 (which the agency expected to total approximately 8 months); 5,000 hours in each of Years 2, 3, 4, and 5 (corresponding to fiscal years 1995, 1996, 1997, and 1998); and 2,000 hours in "Year 6," which covered the first 4 months of fiscal year 1999.

Section H of the RFP explained the delivery order procedures that would govern contract performance. That section stated that the contracting officer would issue technical instructions, which would contain descriptions of the required effort, and that the contractor would respond with a proposal, including the labor categories and number of hours to complete the effort. The RFP stated that the "labor rates and categories proposed [in response to individual technical instructions] must be in accordance with the categories and rates defined in Paragraph [H.20]."[2] Upon approval of the contractor's proposal, the government would issue a delivery order covering the specific task. Paragraph H.20 stated that "[t]he following labor rates shall be utilized in establishing the cost and fixed fee for efforts completed under this contract," and

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[2]The RFP referred to paragraph H.25, but no such paragraph exists, and it is clear from the context (and not in dispute in the protest) that the reference intended was paragraph H.20.

included a table in which the base rates for each labor category in each fiscal year were to be inserted; a legend at the bottom of the table reads: "TO BE COMPLETED AT TIME OF AWARD."

Several proposals, including those of DGI and ARTI, were received by the September 20, 1993, due date; DGI also submitted a proposal for the non-set-aside contract, while ARTI did not. The agency's source selection evaluation board (SSEB) evaluated the technical proposals and concluded that several, including ARTI's and DGI's, merited a "good" rating. A cost evaluation was conducted with the assistance of the Defense Contract Audit Agency (DCAA). On the basis of these evaluations, the contracting officer determined that all of the proposals received were in the competitive range.

On March 11, 1994, the agency sent letters to the offerors requesting clarification in various areas and inviting offerors to submit best and final offers (BAFO) by March 25. In a March 15 letter, the agency advised offerors that, for purposes of preparing their BAFOs, they should assume that the performance period for the line item covering the base period would begin on April 25, 1994 (instead of simply the undefined date of award, as in the RFP); and the period for the line item for the fifth option would end on April 25, 1999 (instead of January 31, 1999). The letter did not explicitly amend section F of the RFP, which identified the periods of performance, or section B, which contained the description of the line items, including the maximum quantity of hours that could be ordered in each period of performance (3,000 hours for the initial period, 5,000 hours for each full option year, and 2,000 hours for the final-option period).

All offerors, including DGI and ARTI, submitted BAFOs on March 25. The SSEB that had reviewed initial proposals also evaluated BAFOs, except for one member, who was unable to participate in the BAFO evaluation because he was on a temporary duty assignment elsewhere. The remaining members rated both DGI's and ARTI's technical BAFOs as "good." In the cost evaluation, the agency again received assistance from DCAA.

The technical scores assigned to most of the BAFOs were quite close (all but one much lower-scored proposal received technical scores between 82 and 87 out of 100 possible points). Among those closely ranked proposals, DGI's technical proposal was second high, while ARTI's was low. The evaluated costs (essentially, the agency's estimate of probable cost) of DGI's and ARTI's proposals were also relatively close; DGI's evaluated cost was not quite 10 percent higher than ARTI's. Unlike DGI's, ARTI's evaluated cost was considerably higher than its proposed cost, due to various adjustments upward that the agency applied (as discussed below). Among the BAFOs with the closely grouped technical scores, ARTI's evaluated cost was low and DGI's was next low.

Upon review of the BAFO evaluation, the source selection authority determined that none of the higher-rated proposals contained technical differences which justified paying more than ARTI's low evaluated cost. On the basis of that determination, award was made to ARTI on May 10. This protest followed. DGI challenges various aspects of the technical and cost evaluation of its and the awardee's proposals, as well as DGI's eligibility for award. We address each protest ground in turn.

First, DGI contends that ARTI's proposal was ineligible for award because it failed to satisfy the RFP requirement that offerors propose a single program manager. DGI points out that the SOW states that "[t]he contractor shall designate an individual to serve as the Program Manager for this contract" and that the offeror "shall submit by name the proposed program manager." According to DGI, ARTI's BAFO should have been rejected for failure to designate one individual as program manager.

In reviewing a protest against the propriety of an evaluation, it is not our function to independently evaluate proposals and substitute our judgment for that of the contracting activity. General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44. Rather, we will review an evaluation only to ensure that it was reasonable and consistent with the evaluation criteria in the solicitation. Id. The fact that a protester disagrees with the contracting activity's judgment does not establish that the evaluation was unreasonable. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

Here, ARTI proposed one named individual as program manager in its initial proposal. That proposal advised OSIA that this individual would continue to fill an additional function within the company. In the March 11 letter to ARTI, the agency set out its understanding of this situation, and asked whether its understanding was accurate. In response, ARTI stated that the individual no longer held the same additional position, but that he was fulfilling other duties which nonetheless allowed him to work on this procurement on a part-time basis. ARTI added that another individual, who was already proposed for this procurement in a different position, was available to serve as "alternative" or "optional" program manager.

OSIA downgraded ARTI's BAFO as a result of this response, despite the evaluators' agreement with ARTI's assumption that only a part-time program manager was needed (in fact, the RFP estimated that the position would require 427 hours of work each year, that is, less than one-quarter of full time). The evaluators also continued to view the same person as ARTI's proposed program manager, and they therefore left the rating under the "program manager" subcriterion unchanged. Nonetheless, the SSEB was concerned that ARTI's response had "raised the concept of a dual Program Manager function." The SSEB viewed the "concept of two [program managers]" as unacceptable because of the risk of confusion regarding responsibility and responsiveness in supporting OSIA's needs. For that reason, the SSEB lowered ARTI's BAFO score to a number corresponding to an "unacceptable" rating for the "program structure" and "corporate commitment" subcriteria, two of the components of the "management" criterion.

Despite these lowered ratings, the SSEB did not treat ARTI's proposal as unacceptable overall or as having failed to satisfy an RFP requirement. The SSEB simply incorporated the lower scores for the two subfactors into the overall score, which remained high enough to merit a "good" rating.

DGI argues that ARTI's BAFO failed to satisfy what DGI claims was a solicitation requirement that offerors designate a single individual as program manager. We disagree. While ARTI's BAFO may, as the SSEB noted, have "raised the concept" of dual program managers, ARTI's statement that a second person would be available as backup or alternative did not vitiate the company's designation of one person as the program manager. Accordingly, even if we assume, arguendo, that the RFP required rejection of a proposal which designated multiple program managers, the agency's acceptance of ARTI's BAFO was reasonable and consistent with the RFP evaluation criteria.[3] The lowering of ARTI's evaluation rating demonstrates that the agency was cognizant of, and reasonably accounted for, the risks associated with ARTI's statement regarding the proposed program manager.

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[3]DGI contends that, even if offerors were permitted to propose dual program managers, the agency failed to follow the evaluation criteria because it did not evaluate ARTI's second, "optional" person under the criteria that applied to the program manager position. We do not reach this alternative contention because, in our view, the agency reasonably interpreted ARTI's BAFO language as offering a single program manager.

Second, DGI argues that ARTI was ineligible for award because its BAFO did not offer the fifth option period required by the solicitation. This issue relates to the March 15 letter altering the start and end dates of performance. As noted above, that letter did not formally amend the solicitation, and even if the letter is viewed as an amendment, it left the RFP internally inconsistent. The result was a patent defect in the solicitation, since it continued to state that 3,000 hours were expected to be performed in the base period, which had been shortened from approximately 8 months to approximately 5 months; and that 2,000 hours was the maximum number of hours that could be ordered in the final period, which had now been extended from 4 months to approximately 7 months.

DGI and ARTI reacted differently to this inconsistency in submitting their BAFOs. DGI simply ignored it and calculated its proposed costs based on the RFP's estimated number of hours in each period (that is, it used the 3,000-hour figure for the shortened base period and the 2,000-hour figure for the lengthened last option), thus covering a total of 25,000 hours. The result was that DGI's proposal appeared to be based on a ceiling of 2,000 hours for the lengthened (7-month) final option. However, while one RFP provision still imposed a 2,000-hour maximum on the final-option period (due to the agency's failure to revise the RFP in accordance with the new start and end dates), it was plainly less than the agency intended, just as, after the shortening of the base period, the 3,000 hours listed in the RFP and used by DGI clearly overstated the agency's probable needs for that period.

ARTI reacted to the new start and end dates--which established an overall period of performance of precisely 5 years, beginning and ending on April 25--by dividing those 5 years into five periods of 1 year each (a base year and 4 option years), with each period beginning on April 25. Each period was assumed to include 5,000 hours, leading to the required total of 25,000 hours. DGI points out, correctly, that the result of ARTI's consolidation was to change the start and/or end dates of every period of performance and to omit the fifth option entirely; in other words, ARTI's BAFO consolidated the 5 years into five 1-year periods, rather than six unequal periods, four 1-year periods in the middle with shorter initial and final periods covering the remaining 12 months.

Faced with what it termed an "irregularity" in ARTI's BAFO, the evaluators decided to treat ARTI's five sets of rates as covering the first five periods of performance (that is, the first, shortened period and the 4 full-year options). For the final, 7-month option, the evaluators assumed that ARTI was offering the final-option rates that the company had identified in its initial proposal. In this regard, the record shows that the rates proposed by ARTI in its initial proposal were virtually identical to those proposed in its BAFO. Similarly, at the time of award, the agency entered those rates, fully burdened with the indirect costs and escalated at the rate proposed by ARTI, in the table in paragraph H.20 in the contract.

In explaining its actions, the agency argues that all that the RFP required was that the offerors commit to provide a maximum of 25,000 hours in the period between April 25, 1994, and April 25, 1999, and that ARTI's BAFO, while dividing up that period differently from what the agency expected, provided that commitment. The agency contends that the evaluators' acceptance of ARTI's BAFO and their use of the final-option estimated rates from the initial proposal were reasonable, particularly in light of the limited role of offerors' cost estimates both in the evaluation of proposals and in the actual performance of the contract. The agency also argues that DGI could not have been prejudiced by the way ARTI's BAFO was handled, since OSIA's reliance on the final-option rates from ARTI's initial proposal, in fact, raised ARTI's evaluated cost substantially above its proposed cost.

With regard to evaluating proposed costs, the guiding principle is set forth in FAR § 15.605(d), which states that, in awarding a cost reimbursement contract, "the [offeror's] cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs." Much of DGI's protest is founded on the incorrect assumption that ARTI's cost estimates were controlling and that, without cost estimates broken down into the same time periods as were used in the solicitation and a cost estimate for the final-option period, the agency could not perform a meaningful evaluation of the probable cost of ARTI's proposal.

The only item of cost at issue here is ARTI's labor rates. In calculating each proposal's probable labor costs, OSIA began with the offeror's proposed base-period labor rates and adjusted them in accordance with information received from DCAA. That approach, however, was only used for the base-period labor rates; for the option periods, the agency ignored all offerors' labor rates entirely and instead simply escalated the offerors' base-period rates from year to year by identical percentages. The use of the agency's predetermined year-to-year escalation rates thus rendered irrelevant, for the purpose of the calculation of probable cost, the offerors' proposed labor rates for the option years.

We find OSIA's methodology reasonable and consistent with FAR § 15.605(d), since the actual amount of escalation that will eventually be permitted will largely depend on external factors such as inflation, not on the escalation rate assumed in the offeror's BAFO. Normalization of escalation rates is proper where, as here, the actual rate is reasonably not expected to vary by offeror. See Sabre Sys., Inc., B-255311, Feb. 22, 1994, 94-1 CPD ¶ 129. In the context of this methodology, the fact that ARTI's BAFO suggested that rates would be escalated on April 25 of each year, rather than at the end of the fiscal year, was not controlling. The agency reasonably used its own escalation structure, rather than ARTI's, just as it ignored the escalation rate for ARTI and all other offerors in calculating each proposal's probable cost. Similarly, the fact that ARTI's BAFO did not identify an escalation rate from option 4 to option 5 was not significant, since the agency would not have relied on it, if it had been identified. We therefore conclude that, for purposes of calculating the probable cost of ARTI's BAFO and assessing the realism of ARTI's costs, there was nothing improper in the agency's methodology.

We also do not agree with DGI's assertion that the agency was required to reject ARTI's BAFO due to the way it presented the options. ARTI's consolidation of the periods of performance appears to have been nothing more than a reaction to the patent inconsistency between the unchanged division of schedule of hours in the RFP, and the March 15 letter changing the length of the initial and final periods of performance. Nothing in ARTI's BAFO alters the times at which the agency may exercise the options. For the same reason, we do not accept DGI's argument that OSIA was required to reject ARTI's BAFO as unacceptable on its face for failure to offer coverage for the fifth option period. ARTI's BAFO plainly offered the same 25,000 hours of labor over precisely the same 5 years as DGI's BAFO, despite its dividing up that time differently.[4] Similarly, the agency's incorporation, in the table in paragraph H.20, of the final-option labor rates from ARTI's initial proposal represented no more than a reasonable extrapolation of the offeror's estimated rates for that final period, given that

[4]We also disagree with DGI's assertion that OSIA was required by the language of section M to reject ARTI's BAFO for failure to include "the information required for the evaluation." While that clause could have permitted OSIA to reject ARTI's BAFO, if the agency found that it lacked the information needed to evaluate the proposal, the agency had the discretion to determine, as it did, that the information included in ARTI's BAFO was enough to permit an adequate evaluation of the offeror's proposed costs.

the BAFO rates were virtually identical to the rates proposed in ARTI's initial proposal.[5] Thus, we think that ARTI's failure to submit its cost information in the format requested, including not providing express rates for the final option, is immaterial, particularly given that ARTI submitted rates for, and thereby committed itself to, the entire 5-year contract period.

Third, DGI asserts that the agency downgraded the protester's technical evaluation without basis. The score for DGI's BAFO was lower than the score for its initial proposal, even though the evaluators specifically noted that the BAFO contained nothing to cause them to change their assessment. The explanation for the lower BAFO score was that the SSEB deleted the point scores assigned by the SSEB member who had reviewed the initial proposal but did not take part in BAFO evaluations. That evaluator apparently rated DGI's initial proposal very highly, and omitting his score from the calculation of the overall rating for DGI's BAFO caused the score to drop. We see nothing unreasonable in the agency's decision not to include in the BAFO evaluation the rating made by a person who did not participate in that evaluation.

Next, DGI contends that the cost/technical tradeoff that the agency performed here was improper because, contrary to the RFP's preference for technical over cost factors, the source selection official selected ARTI on the basis of cost.

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[5]In any event, the estimated labor rates appearing in the section H.20 table, which reflected ARTI's estimation of the appropriate escalation rate for the option periods, have only limited contractual significance, given that this is a cost reimbursement contract, not one with fixed rates or a fixed price, and the omitted rates affect only the final option. The agency is not contractually bound to reimburse ARTI at these rates. Instead, the rates are to be used only in negotiating the estimated costs and fee of individual task orders for the final option.

We also find no support for the assertion in DGI's comments that an offeror's entries in section B, the list of contract line items, would bind the agency when the options are exercised. DGI cites standard language incorporated in the RFP to the effect that options exercised will be at "the price established" in the line items in section B. In this procurement, section B contained only the offeror's estimate of the total cost for all services for each entire period of performance. Nothing in the solicitation suggests that those entries could serve as either a minimum or a maximum cost, nor could they, in the context of a cost reimbursement contract, represent fixed prices.

Agencies may perform cost/technical tradeoffs--that is, determine whether a proposal's higher rating or point score is worth its higher cost--and the extent to which evaluated technical superiority may be sacrificed to cost concerns is governed only by the test of rationality and consistency with the solicitation's evaluation criteria. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. On the record here, we find that it was reasonable and consistent with the RFP award criteria for the source selection official to determine that the minor difference in technical scores assigned to DGI's and ARTI's BAFOs was not evidence of technical superiority justifying the payment of a higher cost.

DGI also alleges that ARTI was ineligible for award of the set-aside contract because it did not submit a proposal for the non-set-aside contract. DGI points to the solicitation clause stating that the contractor for the set-aside portion would be selected from among the small business concerns that submitted responsive offers on the non-set-aside portion. Because ARTI did not submit a proposal for the unrestricted portion of the procurement, DGI contends that ARTI's proposal for the set-aside portion could not be selected for award.

The RFP provision at issue was patently inconsistent with the clause in section L, which, as noted above, indicated that small businesses, while encouraged to submit proposals for both efforts, were not required to do so. The solicitation's order of precedence clause provided that, in the event of an inconsistency between the instructions and a contract clause, the instructions were to take precedence. Since the provision stating that small businesses were not required to submit proposals for both efforts was part of the instructions in section L, while the requirement that the small business concern selected for award of the set-aside portion have submitted an offer on the non-set-aside portion was contained in a clause in section I, we conclude that the former takes precedence. In any case, it is apparent from reading the RFP as a whole that the submission of a proposal for the non-set-aside portion was not a necessary prerequisite to offering on the set-aside work, but that the standard clause indicating otherwise was erroneously included. Accordingly, small businesses were not required to submit proposals for both efforts.[6]

The protest is denied.

for James A. Spangenberg
Robert P. Murphy
Acting General Counsel

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[6]Finally, DGI argues that ARTI was not eligible for award because, contrary to the certification in its proposal, it was no longer a small disadvantaged business (SDB) concern at the time of award. We need not address this contention or the factual and jurisdictional questions that it raises, because the agency did not assign an SDB preference to ARTI during proposal evaluation or source selection, and the question of whether ARTI was entitled to such a preference is thus of no consequence.