



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SYS
File: B-258700
Date: January 31, 1995

Devon E. Hewitt, Esq., and R. Timothy Hanlon, Esq., Shaw, Pittman, Potts & Trowbridge, for the protester.
Jacob B. Pompan, Esq., Pompan, Ruffner & Werfel, for Technology, Management & Analysis Corporation, an interested party.
Mari G. Bellizzi, Esq., and Eric A. Lile, Esq., Department of the Navy, for the agency.
Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly evaluated performance risk associated with the proposed awardee's proposal which contained allegedly low labor rates and an uncompensated overtime policy is denied where, based on Defense Contract Audit Agency reports, the agency reasonably determined that the rates proposed and the overtime policy were consistent with the offeror's payroll data and normal business practices.
2. Where solicitation contemplated award of a fixed-price time-and-materials contract, agency properly based its comparison of prices on rates offered in proposals and not on rates which, at the time of award, an offeror may be paying similarly qualified personnel.
3. Where solicitation provided that the agency intended to evaluate proposals and make award on the basis of initial proposals without conducting discussions, agency was not required to conduct discussions with the protester and properly made award on the basis of initial proposals.

DECISION

SYS protests the proposed award of a contract to Technology, Management and Analysis Corporation, (TMAC) under request for proposals (RFP) No. N00600-93-R-3115, issued by the Department of the Navy for automated data processing (ADP) technical services to be performed principally at the Naval Air Systems Command Headquarters in Crystal City, Virginia.

SYS alleges that the Navy unreasonably evaluated TMAC's technical proposal, based its award selection on an incorrect understanding of TMAC's price, and improperly awarded the contract on the basis of initial proposals.

We deny the protest.

BACKGROUND

The RFP contemplated the award of an indefinite quantity, time-and-materials contract for ADP services to be performed over a base year with 4 option years. Supplies and services furnished under the resulting contract will be ordered by issuance of delivery orders. The RFP set forth minimum qualifications for personnel who would perform the contract requirements and estimated the number of hours per year for required labor categories, such as program manager, computer programmer, and computer systems analyst. Offerors were to specify the hourly rate for each labor category. The RFP provided that the total evaluated price would be derived by "[m]ultiplying each offeror's proposed rate for each labor category times the number of manhours for that labor category set forth in the [RFP]" and adding other direct costs which were requested by the RFP.¹

The RFP provided that award would be made to the offeror "whose offer is considered in the best interest of the Government, cost and other factors considered." It provided that the agency may elect to pay a price premium of up to approximately 35 percent to select a technically superior proposal. The RFP also cautioned that the agency "intends to evaluate proposals and award a contract without discussions with offerors (other than discussions conducted for the purpose of minor clarification)."

The RFP listed the following technical evaluation factors in descending order of importance: (1) technical approach; (2) key personnel; (3) management plan; and (4) corporate experience. The RFP stated that the "[e]valuators will be advised that the following adjectives should be used as general guidance in assessing" the technical proposals: outstanding; better; acceptable; marginal; and unacceptable. The RFP also contained a "risk assessment" clause which stated that unrealistically low pricing which leads to a concern that the offeror will be unable to provide quality services/personnel over the life of the contract at the price proposed may result in a reduced technical rating.

The agency received 17 proposals. Three proposals, including the protester's and the awardee's, were rated

¹Those other direct costs are not relevant to the protest.

"better," while the remainder were rated as either marginal or unacceptable. The agency found that, "[o]verall, the SYS proposal demonstrated a slightly higher level of technical competency" than the other two "better" proposals. TMAC's price, \$6,845,200, was the lowest of the three proposals and more than a million dollars lower than the protester's. The agency found that the strengths offered by SYS' proposal "do not represent factors that would materially affect overall performance to the extent that [the price] premium is warranted." Accordingly, the agency determined that TMAC's proposal would provide the best value to the government and notified the unsuccessful offerors that TMAC was the apparent successful offeror.

PROTEST ALLEGATIONS

Evaluation of TMAC's Proposal

SYS contends that the Navy improperly evaluated the awardee's proposal by (1) assigning it the same overall adjectival rating as the protester's superior proposal and (2) failing to take into account risk associated with allegedly low direct labor rates and overhead rates applied to direct labor contained in TMAC's proposal.

It is not the function of this Office to evaluate technical proposals de novo; rather, in reviewing protests against allegedly improper evaluations, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the evaluation criteria listed in the solicitation. Rome Research Corp., B-245797.4, Sept. 22, 1992, 92-2 CPD ¶ 194. A protester's disagreement with the agency's judgment is itself not sufficient to establish that the agency's evaluation was unreasonable. PHH Homeequity, B-244663, Oct. 7, 1991, 91-2 CPD ¶ 316.

SYS has not provided any evidence or support for its position that the agency's rating of TMAC's proposal as "better" was unreasonable. The record shows that TMAC's proposal was rated "better" under the first two evaluation factors and acceptable under the last two. Given that the first two evaluation factors were considered to be more important than the last two and the fact that there is no adjectival rating between "better" and acceptable, we see nothing improper in assigning an overall rating of "better." While the protester correctly points out that its proposal was rated as "better" under all four evaluation factors, the agency was clearly aware of this fact and took it into account in its evaluation, noting that SYS' proposal "demonstrated a slightly higher level of technical competency." Accordingly, the agency's evaluation was unobjectionable.

With respect to the protester's concern that TMAC's proposal presents performance risk, i.e., an inability to retain qualified personnel, based on low direct labor rates and overhead, the record shows that the agency performed a risk assessment analysis on TMAC's proposal in which it compared direct labor and indirect rates with Defense Contract Audit Agency (DCAA) recommendations. The Navy found that TMAC's proposed direct labor rates were lower than the DCAA recommended rates--the most current rates available based on TMAC's recent payroll data for similarly qualified personnel. The Navy determined that the higher current rates were due to escalation that had occurred since the proposal was prepared in the prior fiscal year. Thus, the proposed rates were consistent with the actual rates being paid at that time, and the Navy concluded that the proposed rates did not present any risk concerns. Concerning TMAC's overhead rate, the agency found that the rate was confirmed by two recent DCAA audit reports.

SYS' argument that TMAC will be unable to retain qualified personnel is based solely on its assertion that TMAC's labor rates are lower than the other offerors' and those of SYS, the incumbent contractor. However, the Navy's risk assessment was based upon TMAC's actual payroll and overhead data and not merely a comparison of rates among different vendors. The protester's contention essentially would have the agency impose the identical considerations which it obtain for its own labor force on TMAC which, in our view, constitutes mere disagreement with the judgment of the agency, which was supported by DCAA, and was reasonably based. We have no basis to question the agency's risk assessment or its conclusion that TMAC will be able to successfully perform the contract at the proposed price.²

Evaluation of TMAC's Price

SYS next argues that the agency should have used TMAC's evaluated price, not its proposed price, as the basis for price comparison with SYS' price. The protester's position is based upon a chart contained in the cost evaluation record showing an "evaluated" price for TMAC of \$7,013,149.20. The adjustment was based primarily on the

²Similarly, the protester asserts that TMAC's use of uncompensated overtime presented a risk that the firm would not provide uninterrupted high-quality work. The agency found, however, that TMAC's use of uncompensated overtime is historically supported and has been confirmed by DCAA as the normal work week at TMAC for professional employees and therefore presented no risk. The protester's disagreement with the agency does not provide a basis to sustain the protest.

use of DCAA's "recommended" rates, which were based on the most recent TMAC payroll data available to DCAA which included a raise not in effect when the proposal was submitted.

The Navy recognized that the proposed rates are lower than those currently paid to the proposed or comparable personnel, however, the agency properly considered the proposed price as the basis for proposal comparison. While the agency used the term "evaluated" price, in our view, this does not represent the estimated price the government will be obligated to pay as it would in a cost-type contract where the government is obligated to reimburse the contractor based on actual rates paid. The time-and-materials contract here has elements of both fixed-price and cost-type contracts. The contract price is fixed to the extent that offerors were required to propose labor and burden rates for each of the labor categories involved in performance; on the other hand, the number of hours each offeror will require to perform the necessary services may vary depending on the tasks involved in each work order and the contractor's efficiency at performing those tasks. See Research Management Corp., 69 Comp. Gen. 368 (1990), 90-1 CPD ¶ 352. Since the rates to be paid under the contract are fixed by TMAC's proposal, we conclude that the agency was not required to adjust TMAC's price upward to reflect DCAA recommended rates for purposes of comparing TMAC's price to the other offerors' prices.³

Award on Basis of Initial Proposals

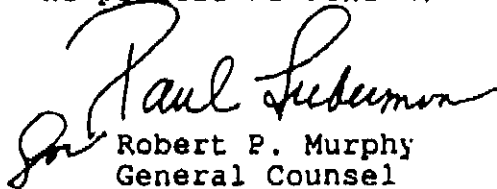
Finally, the protester alleges that the agency should have held discussions and requested best and final offers (BAFO). It states that the Navy's failure to permit offerors to amend their price proposals prevented the agency from awarding the contract based upon the proposal most advantageous to the government since it would have lowered its price in a BAFO. In this respect, SYS explains that the agency delayed awarding the contract until 8 months after initial proposals were submitted and that, by that time, DCAA had approved new, lower overhead and general and administrative rates for SYS, which the firm would have incorporated into its BAFO.

A Department of Defense agency may make an award on the basis of initial proposals and not conduct discussions or allow offerors to revise their proposals where the

³Similarly, contrary to the protester's contention that the agency should have adjusted TMAC's price upward based upon its use of uncompensated overtime, given the fixed-price nature of the proposed rates, no adjustment was necessary.

solicitation advises that proposals are intended to be evaluated, and award made, without discussions with the offerors, unless discussions are determined to be necessary. 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. V 1993). Here, the RFP so advised and warned offerors to submit their best terms from a price and technical standpoint in their initial proposals. Thus, all offerors, including SYS, were on notice that the agency might not conduct discussions, and the overhead and general and administrative rates in question were part of fixed-price labor rates offered by SYS. Under the circumstances, there is nothing improper in the agency's decision to award on the basis of initial proposals.⁴ Analytical Chemists, Inc., B-256037, Apr. 29, 1994, 94-1 CPD ¶ 283.

The protest is denied.


Robert P. Murphy
General Counsel

⁴SYS also argues that flaws in the agency's evaluation of TMAC's price and risk improperly skewed the selection decision by overstating the price premium associated with SYS' proposal. Because we have found nothing improper in the agency's evaluation of TMAC's proposal, including price, we have no basis to question the selection decision.