



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Shirley Construction Corporation
File: B-240357
Date: November 8, 1990

Daniel R. Weckstein, Esq., Vandeventer, Black, Meredith & Martin, for the protester.
Craig R. Schmauder, Esq., and Linda J. Selinger, Esq., Department of the Army, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under solicitation for design and construction of a commissary, evaluation and assignment of points for innovative design features is proper, notwithstanding solicitation's general description of desired commissary as one operated and designed under standards similar to those found in commercial food stores, where solicitation provided that offerors would receive quality points for innovative or creative proposals and there is no language in the evaluation criteria requiring that design features meet only commercial food store standards.
2. Where solicitation provided that the lowest priced offeror would not necessarily receive award, and that the award would be based on the combination of technical merit and price which is most advantageous to the government, agency properly awarded to higher priced offeror since agency reasonably determined that the technical advantage associated with higher-rated proposal warranted the price premium.

DECISION

Shirley Construction Corporation protests the award of a contract to Donohoe Construction Company under request for proposals (RFP) No. DACA65-90-R-0001, issued by the Army Corps of Engineers, Department of the Army, Norfolk District, for the design and construction of a commissary at Fort Eustis, Virginia. Shirley alleges that the agency failed to follow the RFP evaluation criteria in evaluating proposals, and that Shirley should have received the award as the lowest priced, technically acceptable offeror.

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The RFP, issued on November 17, 1989, contemplated the award of a firm, fixed-price contract and sought prices and technical proposals for the design and construction of a commissary. Prior to the closing date for receipt of proposals, the agency issued six amendments to the solicitation.

Parts I and II of the RFP, as amended, described how the proposals would be evaluated in order to determine the successful offeror. Specifically, amendment No. 1 indicated that the government would award a contract to the most advantageous proposal considering price, technical, and other factors. With regard to price, the RFP advised offerors that the government may award the contract to an offeror who is not the low offeror if the higher priced proposal is sufficiently more advantageous than the lower priced offer.

Amendment No. 1 also described the factors that the agency would use in the technical evaluation. The following four technical evaluation criteria were listed in descending order of importance: (1) fundamental and aesthetic design; (2) building and site engineering; (3) offeror qualifications; and (4) total time of performance. Each of these criteria contained subcriteria, which were also identified in descending order of importance.

The solicitation established few minimum requirements, and advised offerors that innovative, creative, or cost-saving proposals that met or exceeded the requirements were encouraged. It also stated that offerors who submitted such proposals would receive quality points.

The agency received six proposals by the January 17, 1990, closing date. After it evaluated the proposals, the technical evaluation team decided that four of the six offerors, including Donohoe and Shirley, were in the competitive range. Discussions were held with these four offerors and a request for best and final offers (BAFO) was issued with a March 29 due date. Based on the findings and recommendations of the technical evaluation team, the Source Selection Board recommended that the award be made to Donohoe, the technically superior, third-low offeror, because it would be most advantageous to the government. The agency awarded the contract to Donohoe on June 22. Shirley filed a protest in our Office on July 9 and was formally debriefed by the agency on July 12.

COMMERCIAL FOOD STORE STANDARDS

Shirley challenges the agency's evaluation of Donohoe's proposal, arguing that the agency improperly considered and then arbitrarily assigned Donohoe additional points for

features that normally are not found in commercial food stores. Shirley alleges that such an evaluation is inconsistent with the solicitation's general description of the project, which states that "[t]he primary purpose of the commissary is to provide grocery items . . . in a facility designed and operated under standards similar to those found in commercial food stores." In essence, the protester contends that it prepared its offer based on the view that--by calling for the design to be based on commercial store standards--the agency was not interested in an upgraded design with features exceeding those found in commercial stores.

The protester's position gives greater significance to the reference to commercial store standards in the RFP's general project description than is warranted when the RFP is viewed as a whole. The RFP clearly did not require that the designs proposed be limited to those found in commercial stores. The agency specifically drafted the RFP to encourage offerors to meet or exceed the RFP's minimum requirements and to investigate alternate approaches that may yield a high level of technical quality while maintaining reasonable construction, operating, and maintenance costs. Even the general project description on which the protester relies states only that the agency desires a facility "designed and operated under standards similar to those found in commercial food stores." (Emphasis added.) By setting out minimum requirements only, and advising offerors that additional points would be given for innovative proposals, the RFP clearly encouraged offerors not to be bound by any particular design approach.

With regard to the specific areas of the awardee's proposal which the protester challenges, the record shows that the agency's evaluation was reasonable. While Shirley challenges the agency's decision to assign additional points for retention of trees in Donohoe's proposed parking lot construction plan, the solicitation advised offerors that "[i]t would be desirable for the proposed landscaping plan to incorporate existing oak trees." Similarly, the solicitation specifically listed ceramic tile as acceptable for floor and wall applications; accordingly, the evaluation was not objectionable on this basis.1/

1/ Moreover, to the extent that Shirley objects to the RFP's inclusion of ceramic tile as an acceptable finishing option and argues that ceramic is unacceptable because it has potential serious health and sanitation drawbacks, these allegations are untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990), because the protester should have raised these arguments prior to the closing date for receipt of proposals.

We also disagree with the protester's assertion that the agency improperly assigned additional points to Donohoe for its proposed warehouse and pallet space because Donohoe's space exceeded that requested by the solicitation. The solicitation specifically provides that "square footages, room requirements . . . are to be determined by the design/build contractor unless specified. . . ." Since the solicitation did not specify any maximum square footage for the warehouse area or for the pallet space, we see no reason to object to the agency's evaluation of Donohoe's proposed space in this regard. Nor do we find unreasonable the agency's conclusion that Donohoe's design was superior to Shirley's design in this area, based on Donohoe's proposed larger warehouse and pallet space, since a larger space would accommodate more items should the commissary's inventory increase.

Finally, Shirley contends that the agency improperly rewarded Donohoe for its plan to provide crawl space access to refrigeration piping for food storage coolers. The RFP required that refrigeration piping run in an accessible utility trench and that all refrigerant piping be located to facilitate service and replacement. While the agency concedes that Donohoe's feature exceeds the RFP's minimum requirements, it states that Donohoe's proposed crawl space access was found to be most advantageous to the government because it maximizes accessibility, flexibility and maintainability. Since the RFP stated that innovative, creative, or cost-saving proposals which meet or exceed the minimum requirements are encouraged and will receive quality points accordingly, we find that the agency reasonably determined that Donohoe's proposed crawl space access would be more advantageous in terms of facilitating service and replacement, as called for by the RFP, and properly scored Donohoe's proposal accordingly.

EVALUATION OF PRICE

Where, as here, a solicitation indicates that price will be considered but does not indicate the relative importance of price and technical factors, they are considered approximately equal in weight. Bachy/Bauer/Green Joint Venture, B-235950, Sept. 18, 1989, 89-2 CPD ¶ 240. Shirley contends that since the agency report on the protest incorrectly stated that "price is subordinate to technical factors (except where competing proposals are determined to be substantially equal technically)," the agency must not have followed the proper evaluation procedure, with price and technical scoring being equal. The protester also asserts that price was never considered during the evaluation and that the contracting officer merely selected the offeror with the highest technical score, regardless of the price differential.

The agency agrees with the protester that the statement in the agency report is both incorrect and inconsistent with the language in the RFP; however, the agency contends that the erroneous statement does not reflect the actual manner in which the proposals were evaluated. In this regard, the agency states that while the technical evaluation team did not know the proposed price for each proposal, the Source Selection Board considered price, and thus adhered to the RFP's award criteria before selecting Donohoe. Moreover, the agency reports that given the technical inequality of the two offerors as shown by their technical scoring difference, the agency correctly concluded that price was not the controlling factor in determining the successful awardee.

Our examination of the record, including our in camera review of confidential source selection materials which were not disclosed to the protester, reveals that while the agency considered price equal to the technical factors, the agency correctly concluded that price was not the controlling factor in selecting the awardee. In this regard, the project manager met with the Source Selection Board on April 11 to review and discuss the evaluation process and the RFP's language concerning the agency's basis of award. After the discussion, the project manager presented an overview of the technical evaluation findings, including BAFO scores, and the proposed price for each proposal. Following the overview, the project manager specifically discussed the perceived weaknesses and strengths of each proposal. Based on the findings and recommendations of the technical evaluation team, the Source Selection Board concluded that award to Donohoe would be most advantageous to the government. With regard to Donohoe's price, the agency determined it fair and reasonable based on the technical analyses of the proposed design, and comparison to the other proposals in the competitive range and the government estimate.

Based on our review of the record, notwithstanding the incorrect statement in the agency report, we find no evidence that supports the protester's position that the agency incorrectly assumed that price was subordinate to technical factors. Rather, we find that the agency correctly concluded that in light of the technical inequality of the proposals, price was not the controlling factor in determining which proposal was most advantageous to the government.

TECHNICAL/PRICE TRADEOFF

The protester argues that even assuming that the agency followed the evaluation procedure required by the solicitation, the agency failed to make a reasonable technical/price tradeoff. The protester contends that since its price was 35 percent lower than the awardee's and its technical score

was only 17 percent lower than the awardee's, the government could not reasonably determine that the award to Donohoe, the higher priced offeror, was most advantageous to the government.

In a negotiated procurement, the government is not required to make award to the firm offering the lowest price unless the RFP specifies that price will be the determinative factor. University of Dayton Research Inst., B-227115, Aug. 19, 1987, 87-2 CPD ¶ 178. Since the RFP did not provide for award on the basis of the lowest priced technically acceptable proposal, but instead stated that the award would be made to the offeror whose offer is most advantageous to the government, considering price and other factors, the contracting officer had the discretion to determine whether the technical advantage associated with Donohoe's proposal was worth its higher price. This discretion exists notwithstanding the fact that price and technical factors were of equal weight. McShade Gov't Contracting Servs., B-232977, Feb. 6, 1989, 89-1 CPD ¶ 118. Agency officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Thus, technical/price tradeoffs may be made subject only to the test of rationality and consistency with the established evaluation factors. Id.

Shirley's BAFO was low priced at \$6,645,202, compared to Donohoe's third-low BAFO of \$8,984,000. While the technical evaluation team determined that Shirley's proposal met the minimum requirements, it received the lowest technical score. Specifically, the technical evaluation team found that Shirley's proposed design had several drawbacks in each technical evaluation area. For example, Shirley received the lowest technical score in the functional and aesthetic design area, the most important technical area, because the technical evaluation team found Shirley's proposed warehouse area to be small. Moreover, the team found that the design exhibited a poor flow of perishables from the receiving dock through the warehouse to the coolers, which are located in the center of the facility. With regard to the building and site engineering area, the team found that Shirley's site design merely met the solicitation's minimum criteria. Shirley's proposed design included exterior face brick with sheathing, metal stud and gypsum wallboard finish on the interior, which resulted in the evaluation team's finding that the overall quality of the proposal in terms of material quality and maintainability was of a minimum acceptable quality.

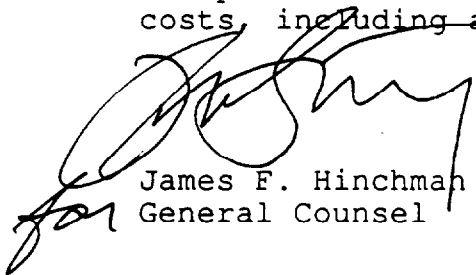
On the other hand, Donohoe's proposal was rated as the best technical proposal of the four which were received. This rating was superior to the rating that Shirley's proposal received in every area except the total time of performance,

the least important factor. In view of the fact that Donohoe's proposal was significantly higher rated than Shirley's across the board, and particularly in the functional and aesthetic design area, which was listed as the most important technical factor, we find that the agency reasonably determined, consistent with the evaluation criteria, that Donohoe's proposal was significantly superior to Shirley's and, as compared to the other higher rated proposal, that it was most advantageous to the government.

Shirley contends that the agency has failed to maintain the integrity of the competitive bidding system because the evaluation of offers under the RFP at issue was inconsistent with the evaluations under other solicitations with similar evaluation criteria. The protester cites two other commissary procurements where its design subcontractor was selected for award based on the same basic design as proposed in the current procurement and a third procurement where another, lower priced offeror was selected despite the technical advantage offered by the protester's subcontractor. The protester in essence argues that it reasonably assumed that the evaluation in this case would result in an award to the low priced, technically acceptable offeror, and prepared its offer accordingly.

Each procurement action is a separate transaction; thus, the evaluation conducted under one is not relevant to the propriety of the evaluation under another for purposes of a bid protest, especially when there are different evaluation team members, different offerors, and varying proposals. See Ferrite Eng'g Labs, B-222972, July 28, 1986, 86-2 CPD ¶ 122. Rather, the issue is whether the evaluation is consistent with the evaluation criteria in the RFP. Given our finding that the evaluation was proper, we see no basis to challenge the selection of Donohoe.

The protest and the claim for proposal preparation and protest costs, including attorneys' fees, are denied.



James F. Hinchman
General Counsel