



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: RTF/TCI/EAI Joint Venture

File: B-280422.3

Date: December 29, 1998

Robert T. Findley for the protester.

Craig E. Hodge, Esq., and Terese M. Harrison, Esq., Army Materiel Command, for the agency.

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DIGEST

1. Agency evaluation of protester's proposal and oral presentation is reasonable where it was performed in accordance with stated evaluation criteria and reflects valid criticisms of protester's proposed approach.
2. Agency's source selection in which price was considered only in the competitive range determination, while improper, did not prejudice the protester where the awardee's proposal was evaluated as significantly superior to the protester's and the awardee's price was significantly lower than that proposed by the protester.

DECISION

RTF/TCI/EAI Joint Venture (RTF) protests the award of a contract to Earth Tech, Inc. under request for proposals (RFP) No. DAAA09-97-R-0271, issued by the U.S. Army Industrial Operations Command, for the disposal and decontamination of government property at the Longhorn Army Ammunition Plant (LHAAP). RTF argues that the agency's evaluation and award determination were flawed.

We deny the protest.

The RFP, issued on October 10, 1997, sought fixed-price proposals on a commercial item basis (see Federal Acquisition Regulation (FAR) Part 12) for the liquidation of personal and installed property and, as necessary, decontamination of property prior to sale. The RFP included a statement of objectives (SOO) (Attachment 001) which outlined the essential tasks that each offeror was to address in its proposed scope of work. Offerors were expected to develop a scope of work with an innovative approach to satisfy the government's SOO requirements. As set forth in the SOO synopsis, the 24-month work effort consisted of: explosive contamination coding; assessing personal property and marketable installed property market value; assessing installed real property salvage value; developing a marketing plan

maximizing property sales values; publication and distribution of sales brochures; conducting liquidation actions and sales; maintaining a property disbursement audit trail and accounts receivable ledger; managing property removal; identifying environmental/health hazards that interfere with the property liquidation process; and environmental testing and decontamination of buildings. The majority of these tasks were to be accomplished by the successful offeror for the fixed price proposed.¹

With regard to the liquidation of personal, installed, and salvageable real property, the SOO explained that it was the government's intent to sell and remove that property, using best commercial practices for the disposal process, leaving only buildings that had been cleaned inside and out of accumulated scrap and debris, and with the objective of maximizing proceeds. It also was the government's intent that potential contaminated personal property be disposed of in a safe and efficient manner; that qualified buyers of contaminated property be made fully aware of the contaminated/decontaminated status of the property; that property containing hazardous material as part of its original functional operation be sold for its intended purpose; and that the contractor attempt to sell equipment containing asbestos, hazardous materials, PCB capacitors, and explosives for their intended use. If the contractor was unsuccessful at selling property for its intended purpose or to a qualified scrap dealer, the contractor remained responsible for proper disposal. The government retained the right to determine whether any particular sale was in the best interests of the government.

The contractor is responsible for complying with all existing federal, state, and local environmental laws and regulations including obtaining appropriate environmental permits required for contract performance. Notwithstanding other contract provisions, the government retains the risk, responsibility, and obligation to pay for and remedy all pre-existing conditions at LHAAP, including remediation and corrective actions.

In accordance with attachment 003, "Instructions for Offerors," proposals were to include sections on experience, past performance, technical plan including a five-page environmental plan concerning the building assessment and optional environmental actions, a two-page integrated master schedule, a seven-page quality

¹With respect to the work not covered under the fixed-price proposal, the RFP provided for two optional tasks: closure of three hazardous waste sites at LHAAP and the environmental decontamination of specifically identified buildings. In this regard, not later than 90 days after contract award, the successful offeror is required to submit a detailed decontamination plan and competitive cost proposal on how best to clean the identified buildings to Environmental Protection Agency standards. Performance of optional tasks depends upon negotiation after review of the plan and cost proposal.

assurance surveillance plan (QASP), and a scope of work meeting the SOO requirements. Attachment 003 also provided guidance for the oral presentations for offerors included in the competitive range.

Attachment 004, "Evaluation Factors and Steps for Award" provided that award would be made to the offeror whose proposal was determined to represent the best value, based on an integrated assessment of the evaluation factors. The first of two evaluation steps included evaluation of experience, past performance, price, and technical plan, and described their relative importance. Attachment 004 specifically stated that "[t]hese factors will be used in determining a competitive range" and that only those offerors included in the competitive range would be considered for the Step-2 oral presentation. The oral presentation was to be evaluated in two areas: (1) addressing the offeror's approach to meet the SOO requirements, the technical plan for disposal/decontamination of government property at LHAAP including the environmental and quality assurance surveillance plans, and (2) how revenue generated by the sale of property would be controlled.²

Four offerors, including Earth Tech and RTF, submitted proposals by the January 22, 1998 closing date. In the initial evaluation of proposals, the agency discovered that two of the offerors had submitted offers with cost-type provisions. Because the agency believed that the RFP was not clear that only fixed prices could be proposed, the agency issued amendment No. 0008 to add "It is the Government's intent to award a firm-fixed price contract as a result of this solicitation." The amendment also referred offerors to a question and answer section on an agency Internet web site for "[f]urther clarification of what is included in the firm-fixed price proposal."

The amendment also advised offerors that the agency would open negotiations in order to obtain information necessary to make the competitive range determination. The agency furnished all offerors with a list of evaluated strengths and deficiencies and provided them with the opportunity to submit revised offers. One offeror withdrew from the competition and the others, including RTF and Earth Tech, submitted revised proposals. RTF lowered its price from \$20.7 million to \$17.9 million, and Earth Tech raised its price from \$1.7 million to \$3.7 million. All three offerors were included in the competitive range.

In accordance with the evaluation scheme, each of the offerors made a 1-hour oral presentation and participated in a 1-hour question and answer period in which only clarification questions were asked. These presentations were videotaped. The evaluation team for the oral presentations was different from that which evaluated the written proposals because the agency did not want the Step-2 evaluators to be

²It is the government's intent that proceeds from the sales of property be used to defray the costs of the optional tasks.

influenced by the prices proposed. Oral presentations were scored under the following factors: approach to liquidation, contaminated property, and QASP (45 points); identification of hazardous substances, compliance with environmental regulations/maintenance of permits (40 points); and physical inventory and property control system (25 points). RTF's final oral presentation score was 80.25 points of 110 possible points and Earth Tech's score was 90.9. Based on these evaluations, the agency determined that Earth Tech's proposal represented the best value and awarded it the contract on April 30, 1998.

After receiving notice of the award and a debriefing, RTF filed a protest with our Office. Among other things, RTF argued that the evaluators were biased against the protester and had improperly evaluated the oral presentation without taking into account the written proposals. The agency notified our Office that it intended to take corrective action and we dismissed the protest as academic.

Prior to the reevaluation, the agency notified all three offerors that it would select a new evaluation team. In accordance with the reevaluation plan, the new team reviewed the technical section of each proposal, but not the past performance, experience, or price sections. After reviewing the oral presentation videotapes, including the clarification segment, the evaluators had no additional clarifications to request. The team's review of each proposal/presentation resulted in a score of 54 of 110 points for RTF and 98 of 110 points for Earth Tech. Based upon an integrated assessment of all the proposals, the source selection authority determined that Earth Tech's proposal offered the best overall value to the government. After receiving notice of the award and a debriefing, RTF filed this protest.

RTF raises a number of issues concerning the conduct of the reevaluation of proposals.³ Where there is a challenge to the evaluation of proposals in a negotiated procurement, it is not the function of our Office to evaluate the proposals *de novo*. Rather, we will examine an agency's evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of competing proposals is primarily a matter within the contracting agency's discretion. Advanced Tech. and Research Corp., B-257451.2, Dec. 9, 1994, 94-2 CPD ¶ 230 at 3; Information Sys. & Networks Corp., B-237687, Feb. 22, 1990, 90-1 CPD ¶ 203 at 3.

³RTF has raised a number of arguments in support of its protest and the agency has responded to each one. We have reviewed them all and find that none has merit. For example, while RTF contends the agency did not use the same evaluation criteria in the reevaluation, the record establishes that the agency used the same criteria. This decision will address only the more substantial issues.

RTF first contends that the evaluators were not provided sufficient information on which to make their evaluations. Specifically, RTF observes that the evaluators did not have all non-price material from the offerors' proposals.⁴ Based on our review of the record, we find nothing improper in the conduct of the reevaluation.

In accordance with the stated evaluation criteria, Step 1 in the original evaluation assessed the written technical proposal, past performance and experience, environmental plan and QASP, and price to determine the competitive range. Step 2 was to observe each competitive range offeror's oral presentation and focus on each offeror's approach to meeting the disposal/decontamination SOO requirements and the offerors' approach to controlling the revenues from sales. The purpose of the corrective action reevaluation was to repeat Step 2, augmented with relevant, non-price portions of the proposals. In this way, the agency wanted to ensure that the evaluators reviewed all aspects of the proposed approaches, not just what the offerors chose to include in their oral presentations. Thus, the new evaluators were given the technical proposal, environmental plan, and QASP, all dealing with proposed approach. They did not receive the past performance, experience, and resume portions of the proposals, all of which dealt with the offerors' qualifications to perform because those aspects had already been evaluated in determining the competitive range.

Contracting officials in negotiated procurements have broad discretion in taking corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Rockville Mailing Serv., Inc., B-270161.2, Apr. 10, 1996, 96-1 CPD ¶ 184 at 4. We will not object to an agency's corrective action so long as the action taken is appropriate to remedy an impropriety. Id. Here, the Step 1 evaluation established the competitive range and did not need to be reevaluated. The only reason for furnishing the other written portions was due to the overlap between them and the oral presentation. Because only the technical plan, QASP and environmental plan were relevant to the offerors' approaches, the agency reasonably decided not to furnish the entire written proposals to the evaluators for review.⁵ Limiting the scope of the reevaluation, where only a portion

⁴RTF also complains that the evaluators did not have a copy of the oral presentation slides. While they did not have a copy of the presentation slides, this was not prejudicial to the protester. We have reviewed the videotape of the presentation and note that virtually all of the slides are clearly shown on the tape. Those portions which are blocked by the overhead projector were either read by RTF's representative or are easily understood from the context of the presentation.

⁵We reach the same conclusion with regard to RTF's complaint that the evaluators did not have the amendments to the RFP or the offeror questions and agency answers which were furnished to the offerors. The amendments for the most part
(continued...)

of the original evaluation was potentially flawed, is a reasonable method to avoid undue delay in the source selection process. See Serv-Air, Inc., B-258243.4, Mar. 3, 1995, 95-1 CPD ¶ 125 at 2-3.

RTF argues that the evaluators should have reviewed the balance of its proposal because important information about its approach is contained in its personnel resumes, subcontractor experience, and past performance. It is plain from the RFP that an offeror's technical approach was to be reflected in the technical plan. The RFP advised offerors that the technical plan was to include an environmental plan, QASP, integrated master schedule, and a scope of work to meet the SOO requirements (RFP, Attachment 003, part II). RTF's decision to include "approach"-type information in other areas of its proposal reflects its business judgment and does not mean that the agency erred in failing to reconsider all non-price portions of the proposals. Further, we note that RTF's revised technical proposal, submitted prior to the original oral presentation, specifically added information about the relevant experience of the protester and its key personnel, as well as information about its subcontractors. Thus, much of the information which RTF claims was not considered was before the evaluators for review in the reevaluation. In any event, after RTF complained about this matter at its debriefing, the agency had the evaluators review the portions in question and none found that the additional information provided any basis for changing their evaluation.⁶

⁵(...continued)

made minor additions and deletions to the SOO. Amendment No. 0008 referred offerors to a list of questions and answers, some of which concerned clarification of whether specific tasks were within the scope of the SOO requirements. However, the stated purpose of the amendment was to make clear that performance on the basic contract, including the clarified tasks, was to be covered in a lump-sum, fixed price. The evaluators were not reviewing the oral presentation to determine whether the offerors were going to perform any specific task; rather they were reviewing it to evaluate each offeror's approach. Thus, we agree with the agency that review of the amendments and questions and answers were not material to the reevaluation.

⁶In addition, the agency observes that the technical proposal was only relevant to the technical approach portion of the Step-2 evaluation. Thus, even if RTF's score were increased to the 60 point maximum for this portion, its technical score would remain 10 points less than that which Earth Tech's proposal received. Because Earth Tech's technical score would still be higher and Earth Tech proposed a significantly lower price, Earth Tech's proposal would remain the best value and the award determination would not change.

RTF next challenges virtually all of the evaluators' criticisms of its oral presentation and technical plan.⁷ In RTF's view, the evaluators either misunderstood RTF's proposal or were biased against RTF. An offeror is responsible for affirmatively demonstrating the merits of its proposal and risks the rejection of its proposal if it fails to do so. DBA Sys., Inc., B-241048, Jan. 15, 1991, 91-1 CPD ¶ 36 at 4, citing Vista Videocassette Servs., Inc., B-230699, July 15, 1988, 88-2 CPD ¶ 55 at 5. Based on our review of the evaluation criteria, the evaluations, technical proposal and oral presentation, and the agency's and RTF's protest submissions, we find the agency was reasonable in identifying various matters as deficiencies or weaknesses, and that RTF's arguments to the contrary constitute mere disagreement with the agency's technical judgment which does not render the evaluation unreasonable. Medland Controls, Inc., B-255204, B-255204.3, Feb. 17, 1994, 94-1 CPD ¶ 260 at 5. In this regard, most of the evaluation criticisms are attributable to RTF's failure to make clear the details of its approach in its technical plan and oral presentation.

For example, under the liquidation of property subfactor, the agency found that RTF demonstrated a weak and disjointed approach to liquidation. Specifically, it found that the overall tone of the written and oral presentations was that the vast majority of the property was scrap and would be treated as such without any attempt at negotiated or forced sale. RTF argues that this criticism is without merit because its technical plan states that RTF spoke with knowledgeable used equipment dealers who were familiar with the LHAAP used personal property. RTF also described a 6-week period during which all prospective buyers would have an opportunity to inspect all personal and installed equipment and to submit bids on them. The completion of this process would confirm that all remaining items were scrap. RTF believed some 90 to 95 percent of the property was scrap based on the expertise of its personnel, its discussions with the used equipment dealers, and on a newspaper quote from an LHAAP official that private sector manufacturers would not want much of the property due to its highly specialized nature. Notwithstanding RTF's view, its written proposal devoted only two and one-half pages to property liquidation and during its 1-hour oral presentation, RTF spent only

⁷RTF also argues that the evaluation was flawed because subfactors and their relative weights were not identified in the RFP. The absence of subfactors and weights is readily apparent from a review of the RFP. Allegations of solicitation improprieties must be raised prior to the closing time for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1998). Since RTF did not raise these issues until after contract award, these issues are not timely raised. Moreover, we note that the RFP did disclose the relative weights of subfactors in Step 1 and RTF was provided a copy of the Step-2 subfactors as part of its original debriefing.

12 minutes on this subject.⁸ Thus, while RTF's assessment and plan were described in its technical and oral presentations, both could reasonably be found to lack sufficient detail. In this regard, they did not identify the used equipment dealers referred to, their qualifications, or the supporting rationale for their opinions. Nor did the proposal or presentation discuss how RTF determined that a 6-week offering on a 2-year contract was a reasonable method to determine the scrap and non-scrap status of more than 6,000 items of property. In short, RTF's proposal failed to adequately demonstrate why the agency should have confidence in RTF's assessment. We believe that the agency was reasonable in concluding that RTF's stated experience and limited market methodology for determining scrap value were not an adequate substitute for a detailed description of its approach to making that determination.

In another instance, RTF failed to receive the maximum number of points under the first subfactor of the environmental factor. This subfactor assesses the offerors' approach to identifying hazardous substances and preparing a detailed decontamination plan and cost proposal for turning over buildings. In the evaluation, the agency noted that RTF had not included a decontamination plan or cost proposal. RTF argues that this evaluation is unfair because the RFP did not require the submission of the decontamination plan and cost proposal for identified buildings until 90 days after contract award. However, the SOO (Attachment 001 at ¶ 3.3.3.1) required offerors to identify all excess personal property that had the potential to be contaminated and code that equipment. If there were no buyer for contaminated property, the contractor remained responsible for its disposal (¶ 3.3.6) including decontamination (¶ 3.3.4). RTF's proposal provides very little information on its approach to determining the presence of contaminants or how they would accomplish needed decontamination. Because there is a substantial amount of property other than buildings which could require decontamination, the agency reasonably downgraded RTF's proposal under this subfactor. To the extent the agency improperly withheld points under this subfactor, RTF was not prejudiced. In this regard, all offerors were penalized for failure to submit the cost proposal. Further, if RTF's proposal score were increased to the maximum for this subfactor, its overall score would still be significantly lower than Earth Tech's score.

RTF also claims that the evaluators were biased against it. This bias allegedly is evidenced by the evaluators' lack of familiarity with the requirements of the RFP and their consequent failure to recognize the superiority of RTF's proposal. The composition of a technical evaluation panel is within the discretion of the contracting agency. In the absence of evidence of bad faith or actual bias, we have

⁸By comparison, Earth Tech devoted 34 pages to its written liquidation and marketing plans and spent 18 minutes during the oral presentation on these subjects.

no reason to question the composition of the panel. EBA Eng'g. Inc., B-275818, Mar. 31, 1997, 97-1 CPD ¶ 127 at 4. Government officials are presumed to act in good faith; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Triton Marine Constr. Corp., B-250856, Feb. 23, 1993, 93-1 CPD ¶ 171 at 6. In addition to producing credible evidence showing bias, the protester must demonstrate that the agency bias translated into action that unfairly affected the protester's competitive position. Id.

Here, there is no evidence of bad faith or bias or that any alleged bias translated into a lower evaluation score than was otherwise justified. In fact, as explained by the agency, a different evaluation team was chosen to conduct the reevaluation in order to ensure that the original evaluation would not influence them. The fact that the evaluators may not have had the familiarity with LHAAP that RTF believed they should have had, does not constitute bias. As explained by the agency, in view of the size of LHAAP (8,500 acres), the number of buildings involved (450), and the number of salvage items (more than 6,000), evaluation emphasis was on the offerors' approach to successful marketing and disposal, rather than focusing on the specific accomplishment of any given task. Thus, familiarity with LHAAP itself was not as important as the expertise to assess the validity of the offered approaches. The record shows that each evaluator was well qualified to evaluate the offerors' approaches. Moreover, since the record establishes the propriety of the agency's evaluation of RTF's proposal, there is no basis to question the motives of the evaluators.

RTF next speculates that Earth Tech's contract does not impose on it all the action items set forth in a list of questions and answers.⁹ The list verified that a number of items not specifically discussed in the RFP are within the scope of the SOO requirements. For example, the list states that all steam and air lines, rails and roadbed, and fences throughout LHAAP are to be removed/salvaged. The agency agrees that all the items identified by RTF are requirements under the RFP and Earth Tech's contract. The awardee's failure to specifically identify them in its proposal does not eliminate Earth Tech's responsibility to dispose of all excess personal property leaving only stripped out buildings (Attachment 001 at ¶ 3.1). In view of the magnitude of the requirements, the agency reasonably concluded that

⁹RTF also argues that the award to Earth Tech is improper because that firm's initial proposal was not responsive to the RFP's requirement for a fixed-price offer. This argument is without merit. The agency explains that Earth Tech and another offeror included cost reimbursement elements in their initial proposals. While the agency always contemplated award of a fixed-price contract, the RFP did not use the term "fixed-price." Since two offerors had misunderstood this aspect of the procurement, and initial evaluations had identified deficiencies in all proposals, the agency issued amendment No. 0008 to make clear that only a lump sum offer was acceptable and to open negotiations with all offerors.

no manageable document could detail every item and task required for contract compliance. Thus, the SOO format was used and the agency evaluated proposals on the stated approaches to accomplishing the objectives, rather than on whether there was a specific agreement to accomplish thousands of discrete tasks. While RTF was not allowed access to Earth Tech's proprietary proposal and contract, we have reviewed both and find nothing to indicate either that Earth Tech has taken exception to any of the requirements or that it is not obligated to perform all requirements encompassed by the SOO and the list of questions and answers.

RTF's arguments are based in part on its opinion that Earth Tech is incapable of performing all of the requirements for the price it proposed. The submission of a below cost offer is not itself legally objectionable. Oshkosh Truck Corp., B-252708.2, Aug. 24, 1993, 93-2 CPD ¶ 115 at 6 n.3. Whether a contract can be performed at the offered price is a matter of the offeror's responsibility. Id. We will not review an agency's affirmative determination of responsibility absent circumstances not present here. 4 C.F.R. § 21.5(c).

In a related argument, RTF contends that due to the significant difference in proposed prices, it was improper for the agency not to perform a separate price reasonableness evaluation. Here the agency evaluated price as part of Step 1. This is a fixed-price contract, based on SOO requirements and the offerors' approaches to them. Since there were four offerors, three of whom were included in the competitive range, and each had a unique proposal, the agency reasonably concluded that there was adequate price competition. Where, as here, there is adequate price competition, no additional information is necessary for determining price reasonableness. FAR §§ 15.802(a)(1), 15.804-5(b) (June 1997).¹⁰

RTF also appears to argue that the agency erred by failing to consider price in the final award determination, and the record supports this argument. The agency maintains that the RFP's evaluation scheme made clear that price was to be considered only in Step 1 and that the award would be based only on the Step-2 evaluation. We disagree.

Notwithstanding the agency's intent to keep Step 1 and Step 2 separate and make the award determination solely on the results of the oral presentation, the evaluation scheme states that award would be made "to the offeror whose proposal is determined to represent the 'Best Value' to the Government. . . . [and] [b]est

¹⁰RTF had earlier complained that if Earth Tech's price were considered reasonable, the agency should have eliminated RTF from the competition as having no reasonable chance for award. In this regard, the agency specifically apprised RTF in discussions that its price may be excessive. While RTF heeded this advice and lowered its price, its determination not to lower it further represents its business judgment and does not make the evaluation unreasonable.

value is determined by an integrated assessment of the evaluation factors." RFP, Attachment 004 (emphasis added). In view of the stated intent to make a best value determination based on that integrated assessment, the RFP does not clearly indicate that price would not be considered after the evaluation in Step 1. This is especially true, where, as here, offerors were given the opportunity to revise their prices and technical proposals.

If the evaluation scheme had clearly limited the price evaluation to Step 1 only, the evaluation would be flawed. As a general rule, the Competition in Contracting Act of 1984 (CICA) requires contracting agencies to include cost or price as a significant evaluation factor that must be considered in the evaluation of proposals. 10 U.S.C. §§ 2305(a)(2)(A), 2305(a)(3)(A)(ii) (1994); Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 9-10; see FAR § 15.605(b)(1)(i). A source selection which fails to give significant consideration to cost or price is inconsistent with CICA and cannot serve as a reasonable basis for award. Electronic Design, Inc., B-279662.2 et al., Aug. 31, 1998, 98-2 CPD ¶ 69 at 8; Boeing Sikorsky Aircraft Support, supra.

Accordingly, the agency's failure to specifically consider the offerors' proposed prices as part of the award determination was improper. Under the circumstances of this case, however, the error did not prejudice RTF. No trade-off was needed here because Earth Tech's high-scored proposal offered the lowest price. Since RTF's price was higher, consideration of price merely serves to reinforce the overall superiority of Earth Tech's proposal. While RTF's proposal and oral presentation (receiving 54 of 110 points) showed adequate knowledge of the inventory process and property control system, it demonstrated a weak approach to liquidation, and generally failed to provide much detail on its approaches to decontamination. In contrast, Earth Tech's proposal and presentation (receiving 98 of 110 points) showed a strong knowledge of the inventory process, a demonstrated comprehensive and systematic approach to inventory, coding, marking, decontamination, sales and accountability for sale proceeds, and included a detailed decontamination plan and site assessment. In view of Earth Tech's far superior proposal and presentation and its price, \$14 million less than that proposed by RTF, it is clear that if the agency had specifically considered price in its best value determination, the award would still have been made to Earth Tech.

The protest is denied.

Comptroller General
of the United States