



United States General Accounting Office  
Washington, DC 20548

## Decision

**Matter of:** S. J. Thomas Co., Inc.

**File:** B-283192

**Date:** October 20, 1999

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Marc Lamer, Esq., Kostos and Lamer, for the protester.  
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GAO, participated in the preparation of the decision.

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### DIGEST

Where solicitation anticipates cost/price evaluation only as to offerors' proposed mark-up rates, with no other cost or price information, and comparison of mark-up rates does not necessarily indicate proposals' relative cost to the government, solicitation scheme improperly fails to consider cost to the government.

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### DECISION

S. J. Thomas Co., Inc. (Thomas) protests that request for proposals (RFP) No. GS-03P-99-AZD-0047, issued by the General Services Administration (GSA) for repairs and alterations to government buildings, is defective because its evaluation scheme does not include evaluation of price or cost to the government.

We sustain the protest.

Issued on May 28, 1999, the RFP solicited proposals for fixed-price indefinite-quantity contracts for general repair and alteration services, with design/build capabilities, at government facilities in Philadelphia and surrounding Pennsylvania counties, southern New Jersey, and Delaware. RFP vol. I, at 1. The RFP contemplates award of three contracts, two of which will be awarded pursuant to full and open competition and one of which will be awarded pursuant to the Small Business Administration's 8(a) program. RFP amend. 1, ¶ 8, at 3. The fixed-price contracts will be for base periods of 1 year with options for 4 additional years. *Id.* ¶ 13, at 5. All work will be performed pursuant to delivery orders that may, at the discretion of the contracting officer, be competed among the awardees. RFP vol. I,

§ 300, ¶ 8.0, at 95-96. The RFP states that GSA will order a minimum of \$33,333.33 of work from each contractor during each year of the contract. Id. § 1.10, at 91.

The RFP includes a set of general specifications or “Masterspecs” describing in general terms how construction work should be performed, but does not include any detailed specifications describing the type of work that will be required under future task orders. The RFP also does not state the labor categories (or include estimates of the number of hours within any labor category) that will be needed to perform the work.

The only pricing information that the RFP requires offerors to include in their proposals for evaluation purposes is their mark-up rates, which are to include all contractor overhead, general and administrative costs, bonds, insurance, other indirect costs, profits, and other fees that the firm will use, on a “not to exceed” basis, for the pricing of projects. RFP amend. 2, at 3-4. The solicitation directed offerors to “break out these mark-up rates separately and provide explicit detail as to . . . how they will be applied to direct labor and material costs for a project.” Id.

The RFP states that contract awards will be based on the submission of the technical and pricing data deemed by GSA to represent the greatest value to the government. RFP amend. 1, ¶ 2, at 2. The RFP lists the technical evaluation criteria, in descending order of importance, as follows:

- A. Past performance on similar projects
- B. Technical and organizational approach
- C. Key personnel qualifications

RFP vol. I, at 116-18. The RFP states that technical information will be weighted significantly heavier than price information. RFP amend. 1, ¶ 2, at 2.

The protester contends that the RFP is improper because it requests no information regarding, and contemplates no evaluation of, an offeror’s basis for bidding a project, and the protester argues that evaluation of the mark-up rates alone will be meaningless. Protest at 5-6. Thomas asserts, for example, that one offeror proposing lower mark-up rates than a second one may, in fact, be submitting a proposal representing a higher cost to the government if that first offeror’s proposal is premised on the assumption that a greater number of labor hours will be needed to complete a particular project. Protester’s Comments on GSA’s Dismissal Request at 1-2. Specifically, the protester contends that the RFP is deficient because it does not require offers to include sufficient price or cost information to allow the agency to evaluate price or cost to the government as required under Federal Acquisition Regulation (FAR) § 15-304(c)(1).<sup>1</sup> Protest at 5.

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<sup>1</sup>Thomas filed its protest before the closing date on July 12, 1999. The agency advises us that awards will be held in abeyance pending resolution of the protest.

The agency responds that, since it has no way of knowing what work will be required during the term of the contracts, it cannot describe the work with specificity. The agency reports that the number of required labor hours is necessarily task-specific and would have to be derived from an offeror's analysis of the level of effort necessary to perform a particular task and that labor rates are a function of Davis-Bacon wage determinations. The agency also reports that the costs of materials are subject to change based upon market conditions.

While recognizing that the mix and number of labor hours (as well, presumably, as material costs) may vary among firms, it is the agency's position that the uncertainty about which specific projects will need to be performed means that the legal requirement that the agency consider cost or price in the evaluation is satisfied by consideration of the mark-up rates alone. Agency Report at 6. In particular, the contracting officer rejects the use of sample tasks in the solicitation and evaluation process because it would offer pricing only for the specific sample job, and would not create a contractual commitment. In the words of the contracting officer's analysis, sample task pricing presents only a "one-time snapshot analysis of price or cost" and has "no obligatory lasting impact." Contracting Officer's Statement of Fact and Position at 4.

Therefore, GSA contends, it has required offerors to provide, and it will evaluate, only proposed mark-up rates because they are the one common basis for comparison of proposals. Furthermore, GSA asserts that it will evaluate price and other factors--including proposed labor hours or level of effort, material costs, and other task-specific costs--when it competes award of individual delivery orders among the three awardees. Agency Report at 6-8.

Cost or price to the government must be included in every RFP as an evaluation factor, and agencies must consider cost or price to the government in evaluating competitive proposals. 41 U.S.C. § 253a(c)(1)(B) (1994); FAR § 15-304(c)(1). While it is up to the contracting agency to decide upon the appropriate method for evaluation of cost or price in each procurement, an agency must use an evaluation method that provides a basis for a reasonable assessment of the cost of performance under the competing proposals. See Health Servs. Int'l, Inc.; Apex Env'tl., Inc., B-247433, B-247433.2, June 5, 1992, 92-1 CPD ¶ 493 at 4; KISS Eng'g Corp., B-221356, May 2, 1986, 86-1 CPD ¶ 425 at 4. Here, we conclude that GSA's methodology provides no reasonable basis to compare the cost of the competing proposals.

The agency correctly notes that there will be a price competition that will take into account the competing firms' differing number and mix of labor hours and material costs, whenever individual task orders are competed. That competition, however, will not include firms whose proposals are not selected for an "umbrella" contract in the competition at issue in this protest. The RFP anticipates that the agency will award only three umbrella contracts (one of which will be to an 8(a) firm), which will entitle only the firms holding those contracts to compete for individual task

orders. The statutory requirement that cost or price be considered in the evaluation and selection of proposals for award is not satisfied by the promise that cost or price will be considered later, during the award of individual task orders. Instead, the statutory requirement means that the agency cannot eliminate a proposal from consideration for award of an umbrella contract without taking into account the relative cost of that proposal to the government. SCIENTECH, Inc., B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33 at 7.

The question presented here is whether GSA's consideration of the mark-up rate alone, without taking into account potential differences in offerors' labor rates, number of hours, mix of labor categories, and material costs, represents adequate consideration of a proposal's cost to the government, as the agency contends. We conclude that it does not.

In our view, the mark-up rate is too unreliable an indicator of a proposal's relative cost to the government. As the agency recognizes, the actual cost to the government for the task orders issued under the contracts will reflect contractors' labor rates, mix and number of labor hours, and material costs, in addition to the mark-up rate. The uncertainty concerning labor rates, the number and mix of labor hours, and material costs does not mean that those cost elements will play no role in determining the relative cost to the government of performance by different firms.<sup>2</sup> Not only are they certain to play a key role--the difference among offerors with respect to those cost elements could far outweigh the difference with respect to mark-up rates.<sup>3</sup> Accordingly, considering only mark-up rates fails to represent the agency's best estimate of the likely relative cost to the government of the proposals competing for umbrella contracts.

A more specific concern we have with the agency's exclusive reliance on offerors' mark-up rates as a basis for the cost evaluation here is that, while the agency correctly points out that a contractually binding mark-up rate has the advantage over sample task labor hours of representing a significant element of cost that the agency will actually incur, the mark-up rate, as described in the RFP, is itself problematic as

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<sup>2</sup>The agency appears to believe that there is no uncertainty regarding relative labor rates because all offerors' labor rates will simply be the prevailing Davis-Bacon wage determination rates. The record does not make clear whether any labor category proposed might be exempt from those wage determinations or whether, in the context of the fixed-rates for these contracts, offerors will be permitted to propose to charge the government other than the wage determination rates.

<sup>3</sup>For example, and consistent with the protester's argument, if Offeror A estimates that a particular project will require a large number of labor hours at high labor rates and includes high material costs, then Offeror A's proposed price could very well turn out to be higher than Offeror B's, even though Offeror A proposes a lower mark-up rate than Offeror B.

an indicator of a proposal's cost to the government. The RFP sometimes refers to an offeror's mark-up rate in the singular, thus suggesting that there could be a straightforward comparison of each offeror's mark-up rate, but elsewhere the solicitation refers to an offeror's "rates" and requests an explanation of how the rates will be applied to labor and material costs. RFP amend. 2, at 4. This suggests that an offeror could propose one rate for materials and another for labor, or, at the least, that offerors may propose different ways to apply their proposed rates. Yet, if this is the case, the agency's comparison of one offeror's rates to another's would be meaningless without an estimate of the expected ratio of labor costs to material costs (or some other mechanism to take into account offerors' differing ways of applying their rates). In short, a simple comparison of mark-up rates will not provide a rational basis to assess the relative cost of the proposals competing for umbrella contracts.

We recognize the legitimacy of some of the contracting officer's concerns about using sample tasks to estimate the relative costs to the government of the competing proposals. We have previously acknowledged the artificial nature of prices offered in the context of sample tasks. *See, e.g., SCIENTECH, Inc., supra*, at 7-8. Moreover, we agree with the contracting officer that where, as here, there is the expectation of binding price competition when the contractors compete for actual tasks under individual task orders, the non-binding character of sample-task prices makes their use appear of limited value. The limitations of sample tasks, however, do not provide reasonable justification for an agency, as GSA has done here, to use mark-up rates as the sole cost factor that may eliminate a proposal from consideration for an umbrella contract, thus preventing that offeror from competing in the price competitions for actual task orders. We recognize that GSA does not at this time know exactly what repair and alteration services it will order under these contracts during the next 5 years. However, that is the case with all indefinite-quantity contracts and does not relieve GSA of its obligation to evaluate cost to the government here.<sup>4</sup> If used intelligently, sample tasks can provide insight into competing offerors' technical and staffing approach and thus provide a reasonable basis to assess the relative cost of the competing proposals.<sup>5</sup> *See id.; High-Point Schaer*, B-242616, B-242616.2, May 28, 1991, 91-1 CPD ¶ 509 at 6-8.

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<sup>4</sup>An alternative to sample tasks is the use of historical information garnered from past projects of a similar nature to estimate the types and quantities of labor and materials that the agency would require over the life of these contracts, incorporating those estimates into the RFP, and requiring offerors to submit proposals based upon them for evaluation purposes. *See, e.g., Health Servs. Int'l, Inc.; Apex Envtl., Inc., supra*, at 4. This method allows an agency to see the effect, in the context of the historical ordering pattern, of offerors' differing cost elements, such as labor rates.

<sup>5</sup>Where offerors are asked to propose the handling of a hypothetical or sample task, it is important that responses be evaluated on both the technical and cost side, since  
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In sum, while the agency has considerable flexibility in fashioning the precise method for evaluating cost or price that it finds appropriate, the current solicitation fails to provide an adequate basis to compare the relative cost to the government of competing proposals, and we therefore sustain the protest. We recommend that the agency amend the RFP to require submission of information sufficient to allow the agency to consider cost to the government in its evaluation and selection process, and that the agency solicit proposals anew on that basis. With regard to the cost elements at issue in this procurement, we provide the following points. First, as the agency points out, mark-up rates can provide a useful element that could be made contractually binding. Second, the agency can request proposed labor rates, which would generally also be made contractually binding. In this regard, the agency can confirm whether all proposed labor categories are expected to be subject to Davis-Bacon Act wage determination rates and, for those that are, whether the offeror proposes to charge the government other than those rates. Finally, as to materials and labor hours, we note the two methods discussed above, use of a sample or hypothetical project and use of historical ordering patterns.

We also recommend that Thomas be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). The protester should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General  
of the United States

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otherwise an offeror could propose a "gold-plated" proposal (to win in the technical evaluation) or an unrealistically low price (to win in the price competition).