



Comptroller General
of the United States

Washington, D.C. 20548

Decision

REDACTED VERSION*

Matter of: Deployable Hospital Systems, Inc.

File: B-260778

Date: July 21, 1995

Michael A. Gordon, Esq., and Fran Baskin, Esq., Holmes, Schwartz & Gordon, for the protester.

Barbara S. Kinosky, Esq., and Eric H.D. Sahl, Esq., Bean, Kinney & Korman, and James S. Phillips, P.C., for TVI Corporation, an interested party.

Gregory H. Petkoff, Esq., and Timothy P. Harrison, Esq., Department of the Air Force, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that contracting agency improperly evaluated technical proposals by giving both offerors equal ratings under quality control evaluation factor and subfactor which could be met by a showing of an offeror's experience in manufacturing the item being procured is sustained where the information relied upon by the agency in its evaluation—the proposals and a pre-award survey of the awardee—shows significant distinctions between the two offerors that do not support equal ratings, and the ratings are not otherwise explained or justified.

2. Protest that contracting agency improperly determined that awardee satisfied a definitive responsibility criterion requiring it to provide evidence of recent sales of the item being procured or similar items is sustained where the evidence of compliance provided by the awardee raises questions as to its sufficiency, and where the agency's failure to document its determination that the firm satisfied the criterion does not address or answer those questions, rendering the determination unreasonable.

*The decision issued on July 21, 1995, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[DELETED]."

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The RFP also lists, as less important, several general considerations that will be considered in the technical evaluation, including financial capability and level of experience in similar acquisitions. Along these same lines, section LH-713 of the RFP discusses the contracting officer's need to make a responsibility determination and requires offerors to provide, as a minimum, a list of the three most recent sales of "this or similar items/services" to commercial concerns or government activities and a list of the three most recent contracts for any items/services.

TVI and DHS were the only offerors submitting proposals by the January 18, 1995, closing date. Each offeror submitted a technical proposal, a price proposal, and a training videotape. On January 27, the evaluators rated both offerors "acceptable" under each technical evaluation factor, subfactor, and salient specification listed on a ratings matrix.¹ In an attached memorandum, the evaluators stated that while the proposals were technically—and equally—acceptable, TVI's tents required fewer personnel, less time, and less additional apparatus to erect and break down. They referred to the offerors' videotapes as support for their conclusion, which was confirmed by personnel from the Sixth SOS, who had also viewed the videotapes.

The Defense Contract Management Area Office (DCMAO) conducted a pre-award survey of TVI and its proposed subcontractor for the manufacture of the trailers, Air Technology Systems, Inc.² DCMAO recommended award to TVI based upon satisfactory findings concerning its technical, production, quality assurance and financial capabilities. On February 22, the contracting officer determined that TVI was a responsible offeror.

In her price reasonableness determination, the contracting officer stated that while the proposals were technically equal, TVI was superior with respect to the expeditious setup subfactor. She acknowledged that TVI had not fielded a system complete with trailer package, but stated that, according to pre-award surveys, TVI demonstrated the capability and capacity to provide the trailer to field the total system. She also noted that TVI offered a better [DELETED] than did DHS—[DELETED]. Since both proposals were essentially technically equal, the contracting officer turned to a consideration of price—TVI's offered price was \$1,367,104, and DHS' was \$1,815,755. She stated that the higher price could not be justified for a substantially equal technical solution when TVI offered superior erect/strike time and a better warranty, and determined that TVI's offer was most

¹The possible adjectival ratings were "insufficient data," "unacceptable," "acceptable," or "superior."

²Since DHS had previously provided shelters to this activity, the Air Force determined that a pre-award survey of the firm was unnecessary.

advantageous to the government. On March 6, TVI was awarded the contract without the conduct of discussions³ and, after its debriefing, DHS filed this protest.

DHS argues that the Air Force improperly evaluated proposals with respect to the offerors' experience, which was a consideration in the quality control evaluation factor's subfactor and the general considerations, and improperly determined that TVI satisfied the definitive responsibility criterion. DHS also asserts that the contracting agency improperly evaluated TVI's financial capability under the general considerations.⁴

DISCUSSION

Technical Evaluation

DHS argues that the Air Force improperly determined that the proposals of DHS and TVI were equal under the quality control factor's sole subfactor, given the contents of the two proposals with respect to the firms' experience.

In reviewing protests against allegedly improper evaluations, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the solicitation's stated evaluation factors. DNL Properties, Inc.; et al., B-253614.2 et al., Oct. 12, 1993, 93-2 CPD ¶ 301. In order for us to review an agency's selection determination, an agency must have adequate documentation to support its selection decision. Telos Field Eng'g, B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240. The FAR requires agencies to document their evaluation of proposals and their selection decisions so as to show the relative differences between proposals, their weaknesses and risks, and the basis and reasons for the selection decision. FAR §§ 15.608 and 15.612(d)(2); see also KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447.

After reviewing the agency report and all of its supporting documentation, we conclude that the technical evaluation in this regard is not adequately supported. We also conclude that without adequate support for the technical evaluation under this subfactor, a proper award determination could not be made. See DNL Properties, Inc., et al., *supra*.

³The solicitation included the clause at Federal Acquisition Regulation (FAR) § 52.215-16, Alternate III, which allows for award without discussions.

⁴In its protest, DHS also argued that the Air Force improperly evaluated TVI's proposal under the interoperability subfactor. The agency responded to this allegation in its report, and DHS did not rebut that response in its comments. We consider the allegation to be abandoned and will not consider it. Datum Timing, Div. of Datum Inc., B-254493, Dec. 17, 1993, 93-2 CPD ¶ 328.

The quality control factor and subfactor are defined as follows:

"(4) Quality control is the implementation of a controlling process that can identify and correct any structural or design problem before, during, and after production of the product.

"(a) Firms with an experience level in the manufacturing of similar systems with the capability to build in sufficient quantity/quality to meet delivery. Firms should demonstrate the expertise to predict product quality concerns, i.e., specific inspection techniques and corrective actions might be one area addressed."

Thus, although the language of this provision is somewhat unclear, it appears to contemplate that an offeror could demonstrate its expertise with respect to quality control by virtue of its experience in manufacturing similar systems or through explanations in its proposal of such issues as specific inspection techniques and corrective actions.

The only documents supporting the technical evaluation are a ratings matrix, two brief memoranda, and the price reasonableness determination. The ratings matrix shows an "X" in the boxes corresponding to each evaluation factor and subfactor for both firms, including the quality control factor and its subfactor. It contains no narrative of any sort, no justification for the "acceptable" ratings for either firm, no assessment of the relative differences between the two offerors, and no explanations of their weaknesses and risks. The memoranda, from the evaluators and the Sixth SOS personnel, do not address the quality control evaluation factor at all. The only document mentioning this evaluation factor is the price reasonableness determination, in which the contracting officer acknowledges that DHS has been the "leader" in the shelter field and that TVI has "more recently" entered this field, and reports that TVI has "not fielded an entire system complete with trailer package but . . . pre-award surveys . . . determined TVI demonstrated both the capability and capacity to provide the trailer to field the total system."

However, a review of both technical proposals, as well as the pre-award surveys of TVI and its subcontractor, shows significant distinctions between the two offerors which call into question the agency's determination to rate both firms equally.

DHS' proposal states that it has "more direct experience in the design, manufacturing, testing, quality assurance procedures, training and supporting of integrated mobile tent sheltering systems as required in this solicitation than any other company in the world." The proposal asserts that, by the end of 1994, DHS and its subcontractors had manufactured and delivered 403 shelters and 28 trailers, and the proposal contains a comprehensive recitation of the firm's manufacturing and operating experience for the shelter systems. In the recent sales section of its

proposal, DHS lists three contracts for mobile soft shelter systems—the item being procured here—with values ranging between [DELETED] and [DELETED]. DHS also lists three contracts for shelters alone, ranging in value between [DELETED] and [DELETED], and one contract for a non-mobile soft shelter system.

In comparison, TVI's proposal states that it has developed [DELETED] shelters that can be used individually or [DELETED] to form a shelter complex. However, in its proposal's recent sales section, the firm lists [DELETED] for shelter systems and states that [DELETED] terminated for the convenience of the government prior to performance, thus denying the firm the experience associated with [DELETED]. The other contracts listed by TVI are either for soft shelters alone, with values [DELETED], or for cloth tank targets for training and tank decoys for use on the battlefield. The subcontractor proposed to manufacture the utilities trailers lists no experience in manufacturing such a trailer, but generally refers to contracts for [DELETED]. The pre-award survey confirms the experience cited by TVI in its proposal and states that the subcontractor is an "integrator" of commercial/tactical trailers and mobile platforms.

This information, relied upon by the agency in its evaluation, shows that DHS' level of experience with soft shelters and soft shelter systems is substantially more extensive than TVI's. The contracting officer concedes as much when she states, in her price reasonableness determination, that DHS is the "leader" in the field. Indeed, in the October 27 acquisition plan, the contracting officer stated that DHS had been "fielding these systems for many years with proven reliability," and that "some risk may be associated with TVI since their experience base is in canvas targets, they have not built large numbers of these type tents before, and they have only recently entered into a subcontract arrangement with a supplier for the trailer."

Despite the information available, the technical evaluators rated the offerors as equal, giving them both "acceptable" ratings, and provided no explanation, justification, or rationale for this conclusion. Moreover, while the language of the subfactor also permits an offeror to demonstrate its expertise with respect to quality control by providing explanations in its proposal of such things as specific inspection techniques and corrective actions, there is nothing in the record to show that the agency considered the quality control sections in either proposal, much less that it conducted a comparative evaluation of their merits. Given the distinctions between the two firms as demonstrated by the information available to the agency, and given the absence of any basis for the agency's determination that those distinctions did not warrant correspondingly distinct evaluation ratings, we

conclude that the evaluation under this factor and subfactor was unreasonable.⁵
See id.

In its comments, DHS, for the first time, argues that the agency improperly evaluated TVI as superior to DHS under the technical quality factor's expeditious setup subfactor. DHS' allegation, citing the information contained in the firms' proposals and referencing the videotapes, is untimely. The agency report in DHS' possession no later than April 18 contained the evaluation documents discussing the merits of TVI's tents and referencing the videotapes. Despite possessing this information, DHS did not raise this issue until May 3, 11 days later, when it asked the Air Force to provide TVI's videotape. Not only was this document request filed well after the 2-day period required by our Bid Protest Regulations, 4 C.F.R. § 21.3(f) (1995), but even if it could be construed as a protest, it would be untimely filed, more than 10 working days after it was put on notice of the issue. 4 C.F.R. § 21.2(a)(2).⁶

Definitive Responsibility Criterion

DHS next argues that the Air Force improperly determined that TVI satisfied the solicitation's requirement to provide evidence of recent sales of "this or similar items." DHS contends that the contracting agency erroneously concluded that TVI's sales of soft shelters alone and targets and decoys satisfied this requirement.

The solicitation required offerors to provide, as a minimum, "a list of the three most recent sales of this or similar items/services to commercial concerns or government activities and a list of the three most recent contracts for any items/services." The parties do not dispute that this solicitation requirement, which calls for the prospective contractor to have a designated number of projects in a specific area completed, is a definitive responsibility criterion, see D.H. Kim Enter., Inc., B-

⁵The price reasonableness determination's statement concerning the offerors' experience also addresses the firms' levels of experience in the context of the solicitation's "general considerations." However, the general language of the solicitation in this regard provides us no basis to question the agency's determination, as it is broad enough to encompass various kinds of experience.

⁶While DHS implies that its basis of protest was the videotape, which it received on May 10, our reading of DHS' comments shows that the videotape merely augmented the information contained in the report, which provided the actual basis of protest—the agency's conclusions and the offerors' proposals. Our Regulations provided ample opportunity for the protester to respond to the agency's position; however, as an initial matter, it was important for the protester to timely file a protest once it knew the basis for that protest. See TeleLink Research, Inc., B-247052, Apr. 28, 1992, 92-1 CPD ¶ 400.

255124, Feb. 8, 1994, 94-1 CPD ¶ 86, which is a specific and objective standard established by an agency for use in a particular procurement for the measurement of an offeror's ability to perform the contract. FAR § 9.104-2; BSC Brown Boveri, Inc., B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309.

Generally, a contracting agency has broad discretion in making responsibility determinations, including whether bidders meet definitive responsibility criteria, since the agency must bear the brunt of any difficulties experienced in obtaining the required performance. BMY, Division of Harsco Corp., B-233081; B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67. Where an allegation is made that definitive responsibility criteria have not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the definitive criteria have been met. BBC Brown Boveri, Inc., supra.

By its terms, this definitive responsibility criterion could be satisfied by an offeror providing evidence of three recent sales of "this or similar items." The evidence of compliance here is contained in TVI's proposal, which lists [DELETED] for a soft shelter system, [DELETED] terminated for convenience prior to performance; [DELETED] recent contracts for soft shelters alone; and [DELETED] recent contracts for targets and decoys. DHS argues that the requirement can only be met by providing evidence of recent sales of soft shelter systems—either the type sought here or similar types. The Air Force apparently contends that TVI's sales of quick erect shelters alone are for "this" item, and its sales of targets and decoys are for "similar" items.

This solicitation seeks offers for soft shelter systems, which the RFP defines as soft shelters packed within the utilities trailer. TVI's proposal lists [DELETED] for soft shelter systems, [DELETED] terminated for convenience prior to performance, and its subcontractor for the utilities trailer lists no specific contracts and claims no sales of soft shelter systems.⁷ The question, then, is whether the contracting officer reasonably determined that TVI's sales of soft shelters alone and/or its sales of targets and decoys are "similar" to soft shelter systems, thus satisfying this criterion.

The contemporaneous procurement documents do not address this definitive responsibility criterion. It is not mentioned in the contracting officer's responsibility determination, the evaluation record, or the price reasonableness determination. In response to this protest, the contracting officer states, without

⁷While a subcontractor's experience generally can be considered in determining whether a definitive responsibility criterion concerning experience has been satisfied, see, e.g., Harris Corp. Broadcast Div., B-255302, Feb. 10, 1994, 94-1 CPD ¶ 107, to the extent that there is any evidence of the subcontractor's recent sales in the record, it is too vague to justify the agency's decision.

elaboration, that she determined that TVI's sales of soft shelters alone and targets and decoys, which have frames and fabrics like the soft shelters, along with its subcontractor's trailer experience, constituted sufficient evidence to satisfy the criterion.

The lack of explanation in the contemporaneous record and the conclusory statement in response to the protest provide no basis for us to judge the reasonableness of the contracting officer's responsibility determination. In reaching this conclusion, we recognize that, in making a determination regarding an offeror's compliance with a definitive responsibility criterion, a general statement by the agency of its rationale is all that is required. When, however, a protester presents a reasonable argument that the offeror does not comply with the criterion, the agency must articulate the basis for its determination with greater specificity than was done here. It may well be that TVI's soft shelters alone and targets and decoys are sufficiently similar to soft shelter systems for the purposes of this criterion. However, because the record in effect is silent as to whether the agency considered the matter in accordance with language of the requirement, we are unable to determine whether the agency reasonably concluded that TVI satisfied this criterion.⁸ See Townscro Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313.

Financial Capability

DHS argues that the Air Force improperly evaluated TVI's financial capability as one of the general considerations in the technical evaluation because, it asserts, TVI misrepresented its financial capability during the pre-award survey. DHS implies that the Air Force improperly relied upon DCMAO's pre-award survey for its conclusions, without undertaking further investigation of its own.

While an offeror's financial capability to perform a contract is a traditional responsibility factor, see FAR § 9.104-1, in appropriate circumstances, and where the solicitation so appraises offerors, financial capability may be used to assess the relative merits of individual proposals. E.H. White & Co., B-227122.3; B-227122.4,

⁸Under the contract at issues, soft shelters must be integrated with trailers—the shelters are stored and transported on the trailers, and their interior and exterior linings must include ports to allow for entry and passage of the trailers' electrical and communications wiring and HVAC ducts. There is no evidence that the agency considered whether, given the integration requirements, soft shelters alone can be considered similar to soft shelter systems. There is also no evidence that the agency made any comparison for the purposes of similarity between, on the one hand, soft shelters equipped with electricity, heating and cooling for purposes of human habitation and, on the other hand, structures that are not intended for human habitation, but for destruction as targets and decoys.

July 13, 1988, 88-2 CPD ¶ 41. Here, the solicitation clearly apprised offerors of the Air Force's intention to consider financial capability in the technical evaluation as one of the less important "general considerations," and the price reasonableness determination confirms that intention. The contracting officer's consideration of TVI's financial capability relied upon DCMAO's pre-award survey of the firm. For that survey, DCMAO requested copies of TVI's latest financial information, which was submitted over the signature of TVI's president, Mr. Brent Molovinsky. DCMAO stated that this data included "indications of a strong recovery" from its 1991 bankruptcy, and that its files indicated that all claims had been settled with no disputes. DCMAO further noted that TVI's current financial condition demonstrated a strong ability to meet cashflow needs, and that its financial ratios represented an outstanding financial condition. Finally, DCMAO stated that TVI had sufficient working capital available to perform the contract. In her price reasonableness determination, the contracting officer states that a pre-award survey addressing "capacity, capability and financial soundness was requested on TVI," and "it was determined that [it] had the ability to complete the intended effort."

In support of its argument that TVI misrepresented its financial capability to the government, DHS cites a document filed by TVI's equity shareholders committee in a United States Bankruptcy Court wherein the committee objects that the firm had filed false or misleading information with respect to, among other things, the firm's profitability, and that the evidence suggested that most company funds have been depleted and that TVI may be on the verge of collapse. DHS also cites post-award newspaper articles quoting TVI's new president as stating that its previous president, Mr. Molovinsky, had made incorrect statements concerning the firm's profitability and bankruptcy status.

There is no requirement that the contracting officer conduct an independent inquiry to substantiate the accuracy of a pre-award survey report, Standard Tank Cleaning Corp., B-245364, Jan. 2, 1992, 92-1 CPD ¶ 3; Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235, and the pre-award survey report here supports the contracting officer's decision regarding TVI's financial capability. Moreover, there is no evidence that the information concerning TVI's alleged misrepresentations would have been available to the government prior to its selection decision. The bankruptcy court document cited above was filed on March 2, several weeks after the price reasonableness determination was written, and the newspaper accounts cited by DHS did not appear until May, during the pendency of this protest. Finally, though the information cited by DHS raises questions concerning TVI's financial capability, its speculative nature affords us no basis to find the agency's evaluation unreasonable.⁹

⁹As for DHS' assertion that TVI has submitted a below-cost offer, there is no prohibition against an offeror's submitting, or a procuring agency's accepting, an
(continued...)

CONCLUSION AND RECOMMENDATION

Implicit in the requirement that the agency's judgment in conducting a technical evaluation be reasonable is the requirement that these judgments be documented in sufficient detail to show that they are not arbitrary. Wadell Eng'g Corp., 60 Comp. Gen. 11 (1980), 80-2 CPD ¶ 269; KMS Fusion, Inc., *supra*. Here, because the information relied upon by the technical evaluators in rating TVI and DHS equally under the quality control factor and subfactor is contrary to those ratings and is not documented in sufficient detail to show that it is not arbitrary, we conclude that the evaluation in this regard is unreasonable.

Since the quality control factor is one of two equally important evaluation factors, and has only one subfactor, there is no question but that it is of greater value than the expeditious setup subfactor, the least important of the four technical quality subfactors, which was the technical discriminator between the two firms.¹⁰ As a result, the possibility that DHS was prejudiced by the agency's failure to document its technical evaluation in this best value procurement, which rendered it unreasonable, compels us to sustain the protest on this ground. *See Arco Management of Washington, D.C., Inc.*, B-248653, Sept. 11, 1992, 92-2 CPD ¶ 173.

Similarly, TVI's evidence of compliance with the definitive responsibility criterion raised questions as to its sufficiency, and the agency failed to address, much less answer, those questions because it did not document its determination that the firm satisfied the criterion. As a result, we are unable to conclude that the determination was reasonable, and sustain the protest on this ground as well. *See Townsco Contracting Co., Inc.*, *supra*.

We recommend that the Air Force reevaluate the proposals, adequately documenting that evaluation and its determination regarding the definitive responsibility criterion. Following the reevaluation, the agency should determine which offer is most advantageous to the government as provided in the solicitation. In the event the protester's proposal is determined to be most advantageous to the government, the agency should terminate the contract with TVI and award the contract to the protester. We also find that the protester is entitled to the cost of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f), DHS' certified claim for such costs, including the

⁹(...continued)

unreasonably low or below-cost offer on a fixed-price contract. Intown Properties, Inc., B-256742, July 11, 1994, 94-2 CPD ¶ 18.

¹⁰While the record shows that TVI also offered [DELETED], the record affords us no basis upon which to assess the value of this advantage.

time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States