The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: G. Marine Diesel; Phillyship

File: B-232619; B-232619.2

Date: January 27, 1989

DIGEST

1. Where technical evaluation scheme in a request for proposals sets forth prior experience and performance under prior contracts as an evaluation factor and awardee referenced in its proposal its performance under a major, ongoing contract with the contracting agency, the technical evaluation was unreasonable where the agency ignored the problems encountered by the awardee in performing the contract.

2. Agency calculation of evaluation points for probable cost to the government is inconsistent with the evaluation scheme where the solicitation provided for higher-cost proposals to receive proportionately fewer points, but the second low cost proposal in fact received the same number of points as the low cost proposal.

3. While General Accounting Office (GAO) finds that offerors' proprietary information should not be released to other offerors, GAO finds that release to the protesters of the evaluations of their own proposals, the relative standing of proposals, and those portions of the source selection plan explaining the evaluation scheme was necessary to provide the protesters a meaningful opportunity to develop their protests, and thus was proper.

DECISION

G. Marine Diesel (GMD) and Phillyship protest the award of a contract to Pennsylvania Shipbuilding Company (PSC) under request for proposals (RFP) No. N00024-88-R-8502, issued by the Naval Sea Systems Command (NAVSEA), Department of the Navy, for the overhaul and repair of three ammunition supply ships. The protesters contend that the evaluation of cost

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and technical proposals lacked a reasonable basis and failed to take into consideration PSC's deficient performance under a prior contract with NAVSEA. We sustain GMD's protest; we deny Phillyship's protest in part and dismiss it in part.

The solicitation listed the primary criteria for the evaluation of proposals, in descending order of importance, as (1) management capability, (2) technical approach, (3) cost, including probable cost to the government, cost realism and supporting cost data, and (4) resource availability. Prior experience and past performance were subcriteria under all but the cost criterion. Cost was listed as only the third most important criterion, but the actual importance of cost in the evaluation scheme was increased by the listing of cost control and avoidance as a subcriterion under each of the other three primary criteria. Under NAVSEA's undisclosed evaluation plan, offerors could receive up to 1,650 points for cost considerations, approximately 33 percent of the 5,000 total available award points.

Four proposals were received in response to the solicitation; all were included in the competitive range. After conducting written discussions with offerors and surveying their proposed facilities, NAVSEA requested the submission of best and final offers (BAFO).

Although NAVSEA found no significant weaknesses in PSC's approach set forth in the firm's BAFO, it questioned several aspects of PCS's cost proposal. The agency gave PSC the lowest cost realism score (120 of 300 available points) of any offeror, significantly less than GMD's (240 points) and Phillyship's (180 points) scores; PSC also received a lower score for supporting cost data (60 of 150 available points) than either GMD (90 points) or Phillyship (90 points). In particular, the agency concluded that PSC had not complied with the solicitation requirement for a cost breakdown that clearly traced the cost of each work item through the appropriate subtotals to the total of proposed costs. Furthermore, while PSC proposed the lowest cost ($69,044,298) of any offeror, NAVSEA found the probable cost of award to PSC ($71,912,464) to be the second lowest, lower than GMD ($74,876,867), but higher than Phillyship ($66,963,416).

Notwithstanding its concerns with respect to PSC's cost proposal, however, NAVSEA determined that PSC's overall proposal was most advantageous to the government. The agency found that the proposal offered significant strengths in the areas of organizational approach, advance planning, planning and engineering manpower, prior technical and

management experience, experience in providing necessary resources, and available facilities. As a result, PSC received a higher score (3,709 points) than either GMD (3,421 points) or Phillyship (3,407 points). Based upon this evaluation, NAVSEA made award to PSC; GMD and Phillyship thereupon filed these protests.

GMD PROTEST

Prior Experience/Past Performance

GMD contends that NAVSEA failed fully to consider PSC's prior experience and past performance as required by the solicitation. As indicated above, the RFP listed prior experience and past performance as subcriteria under the primary evaluation categories for management capability, technical approach and resource availability; it required offerors to summarize any prior experience and performance relevant to their ability to manage, control and perform the required overhaul and repair work. In addition, offerors were required to provide in a separate section of their proposals (volume 4) detailed information concerning manning, change orders, deficiency reports and delays "for each Navy contract completed during the last year and the last (5) Navy contracts over $3 million." PSC received 532 of the 625 evaluation points available under the experience and performance subcriteria; GMD received 423 points and Phillyship received 352 points.

GMD, although not provided access to the narrative evaluation of PSC's proposal, maintains that PSC's higher score could only have resulted from a failure to evaluate PSC's performance under a fixed-price incentive contract with NAVSEA for the construction of four (two base and two option) fleet oilers. In this regard, in late 1987, PSC informed NAVSEA that it was experiencing financial difficulty in performing the fleet oiler contract due to significant cost increases; as a result, the cost of completion was expected to exceed both the target and ceiling prices. Concerned that PSC would be unable to continue operation and might file for protection under the bankruptcy statutes, the agency suggested, and PSC agreed to, the transfer of the two option ships to another builder. See American Shipbuilding Co., B-231845, Nov. 8, 1988, 68 Comp. Gen. ___, 88-2 CPD ¶ 454; Bethlehem Steel Corp., Baltimore Marine Division, et al., B-231923 et al., Nov. 3, 1988, 88-2 CPD ¶ 438. The assignment was effected on June 16, after the May 31 closing date for submission of initial proposals under this solicitation, but prior to the July 20 receipt of BAFOs.

We have reviewed the record and find no evidence that NAVSEA considered PSC's performance under the fleet oiler contract with NAVSEA. When asked by our Office whether it had considered PSC's performance, the agency responded that: "NAVSEA evaluated only information contained in each offeror's proposal and Best and Final Offer; NAVSEA did not consider outside information in its evaluation. PSC's past performance was evaluated only with respect to the information contained in its proposals in accordance with the solicitation requirements." In this regard, however, while PSC cited the fleet oiler contract as relevant to a consideration of its management and technical experience and the experience of its key personnel and noted in the separate, volume 4 experience section that the contract was ongoing, the firm did not describe its performance under the prior contract and, specifically, did not discuss the serious financial performance problems it had encountered. Although the agency took into account for purposes of the pre-award survey the impact of the fleet oiler contract on PSC's financial capability, it does not appear from the agency evaluation records that NAVSEA considered under the several evaluation categories that concerned prior performance the financial problems PSC encountered under that contract. On the contrary, agency evaluators concluded without apparent reservation that PSC's management and technical experience represented a strength.

We have previously recognized that a contracting agency in evaluating proposals may consider evidence obtained from sources outside the proposals so long as the use of extrinsic evidence is consistent with established procurement practice. Thus, where the solicitation provides for references to be used in the evaluation, the agency may consider the unsatisfactory past performance of an offeror under a recent contract with the agency, in effect furnishing its own reference. Western Medical Personnel, Inc., 66 Comp. Gen. 699 (1987), 87-2 CPD ¶ 310. Indeed, we have stated that in appropriate circumstances, the contracting officer should consider extrinsic evidence when evaluating proposals. See Univox California, Inc., B-210941, Sept. 30, 1983, 83-2 CPD ¶ 395. For example, we have held that an agency acted improperly in ignoring an offeror's prior performance, listed in the proposal, as the incumbent contractor providing the same services for the procuring agency. Inlingua Schools of Languages, B-229784, Apr. 5, 1988, 88-1 CPD ¶ 340; see also New Hampshire-Vermont Health Service, 57 Comp. Gen. 347 (1978), 78-1 CPD ¶ 202.

In our view, given (1) the solicitation's emphasis on management capability, cost control and avoidance, and prior experience, (2) the relevance to these considerations of recent performance under a substantial, cost-type contract for related services, and (3) PSC's reference to, and the agency's familiarity with, the contract, we believe that NAVSEA was required to consider in its technical evaluation PSC's performance under the fleet oiler contract. The record before us lacks any indication that PSC's financial performance problems under the fleet oiler contract were taken into account in the technical evaluation. See Universal Shipping Co., Inc., B-223905.2, Apr. 20 1987, 87-1 CPD ¶ 424, aff'd B-223905.3 et al., Aug, 4, 1987, 87-2 CPD ¶ 125; New Hampshire-Vermont Health Service, 57 Comp. Gen. 347, supra.

Most Probable Cost

Although GMD lacked access to the most probable cost analysis of PSC's proposal and did not raise this matter in its protest, we find that NAVSEA did not properly account for the results of the most probable cost evaluation when calculating evaluation points. The solicitation stated that the probable cost to the government of accepting each offeror's proposal would be "compared to the lowest projected cost to the government and considered less favorable by an amount proportionate to the ratio derived from that comparison." We think this solicitation statement clearly indicates that the resulting cost ratio would be multiplied by the total evaluation points available for the probable cost analysis, with the low cost proposal receiving all of the 625 available points and the higher cost proposals receiving proportionately less. In fact, however, under the scoring scheme actually adopted by the agency, both the low cost offeror (Phillyship) and PSC, the second low cost offeror, received the maximum number of evaluation points for this category.1/

The agency's failure to adhere to the evaluation scheme was improper; procuring agencies do not have the discretion to announce in a solicitation that one evaluation plan will be used and then follow another in the actual evaluation,

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1/ Under the approach adopted by the agency, the low cost offeror and any other offeror whose probable cost was no more than 9.9 percent higher than the low cost would receive 100 percent of the available points for the probable cost category; any offeror whose cost was more than 10.1 percent higher but no more than 22 percent higher would receive 80 percent of the available points.

unless all offerors are notified of the change. SIMCO, Inc., B-229964, Apr. 19, 1988, 88-1 CPD ¶ 383. Accordingly, the agency's departure from the solicitation's cost evaluation criteria, which by our calculations resulted in an overstatement of PSC's cost score by 102 points, was improper.2/

We find these evaluation deficiencies to be significant. The prior experience subcriterion accounted for 625 points, or 12.5 percent of the total evaluation points. In addition, the fleet oiler experience could have additional relevance to an evaluation of the likely effectiveness of PSC's proposed approach to planning, management and cost control and avoidance, and to an evaluation of the credentials of some key employees. The agency's failure to score probable cost in accordance with the solicitation accounted for 102 of PSC's 288-point scoring advantage, leaving PSC with only a 186 point (or approximately 3.7 percent of the total possible points) advantage over GMD. In view of this remaining narrow margin and our inability to predict the scoring impact of the agency's failure to consider PSC's prior contract difficulties, we cannot conclude that the source selection decision was a reasoned one. Therefore, GMD's protest is sustained on this basis.

Other Allegations

GMD complains that the evaluation of PSC's facilities was unreasonable because PSC was given credit for possessing additional facilities and equipment beyond what GMD believes was the minimum necessary to perform the contract. NAVSEA, on the other hand, maintains that it acted properly in considering all of PSC's proposed facilities when evaluating its proposal. We find nothing improper in NAVSEA's taking into consideration PSC's offer of sufficient capacity such that an accident or an unforeseen change in schedule would not delay the overhaul and repair of the ammunition ships. We note that NAVSEA, although concerned that many of GMD's (and Phillyship's) proposed facilities had not yet been acquired, nevertheless gave GMD (and Phillyship) an

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2/ PSC received 625 points for the probable cost analysis; had its score been calculated pursuant to the stated evaluation scheme, with PSC receiving proportionately fewer points than the low cost offeror, we calculate PSC would have received 582 points. GMD received 500 points for the probable cost analysis; it should have received 559 points. Thus, the departure from the evaluation scheme resulted in an overstatement of PSC's score relative to GMD's score by 102 points.

acceptable rating under the facilities subcriterion; the agency simply found that PSC had proposed superior, more efficient and comprehensive facilities.

GMD, which proposed to perform the required work in the New York area, finally alleges that NAVSEA failed to take into consideration in its evaluation of PSC's cost proposal the additional costs the agency will incur from assigning government personnel ordinarily based in New York to PSC's shipyard in the Philadelphia area. The solicitation, however, did not provide for the evaluation of these costs. Since contract administration costs are a significant cost factor, an agency may only evaluate them if offerors were advised such costs would be evaluated. Any protest that the costs should be considered should have been filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1988); see CDI Marine Co., B-219934.2, Mar. 12, 1986, 86-1 CPD ¶ 242; see generally, Tichenor & Eiche, B-228325, Dec. 28, 1987, 87-2 CPD ¶ 631.

PHILLYSHIP PROTEST

Phillyship contends that NAVSEA withheld material information concerning this procurement when it failed to advise offerors of the modification of PSC's fleet oiler contract. According to the protester, the knowledge that the agency would "bailout" PSC by agreeing to the assignment of two fleet oilers and thereby avert PSC's impending bankruptcy would have materially affected its decision to respond to the solicitation. As an initial matter, however, we note that NAVSEA did not finally approve and recognize the assignment until after the closing date for receipt of initial proposals. In any case, to the extent that Phillyship argues that it would not have competed or would have submitted a different proposal had it known that PSC would be a competitor, it is our view that an offeror submitting a proposal, in what on its face is a competitive procurement, based on the assumption that there would be no or only limited competition, does so at its own risk when the assumption proves to be wrong. See Concord Electric Co., B-230675, May 25, 1988, 88-1 CPD ¶ 501.

Phillyship argues that an examination of the point scores given by one of the evaluators demonstrates that the evaluator was biased in favor of PSC. As we have previously recognized, however, relatively low scoring by one member of an evaluation panel does not establish that the member was biased; it is not unusual for individual evaluators to reach disparate conclusions when judging competing proposals since both objective and subjective judgments are involved. Digital Radio Corp., B-216441, May 10, 1985, 85-1 CPD ¶ 526.

There is no evidence in the record which establishes that the scoring by the technical evaluation panel reflects anything other than the members' reasonable judgment as to the merits of Phillyship's proposal.

Phillyship also reiterates the arguments made by GMD with respect to the evaluation of PSC's past performance under the fleet oiler contract. Although we have sustained GMD's protest in this regard, Phillyship is not an interested party to raise this issue; Phillyship is not in line for award based on our consideration of this issue, since GMD was ranked second after PSC, and reevaluation and rescoring (see our recommendation below) can affect the relative standing of only these two firms. See Computer Science Innovations, Inc., B-231880, Sept. 27, 1988, 88-2 CPD ¶ 289.

RELEASE OF DOCUMENTS

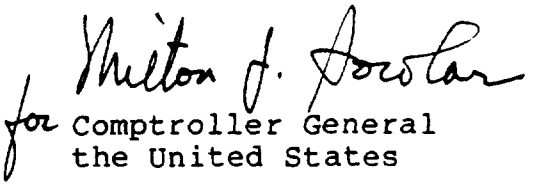
NAVSEA objects to our decision to release certain documents relevant to the evaluation of proposals. The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(b)(2) (Supp. IV 1986), requires the contracting agency to submit to the Comptroller General a complete report, including all relevant documents, on a protested procurement, and also requires that parties be provided relevant documents, including the administrative report, that would not give that party a competitive advantage and that the party is otherwise authorized by law to receive. Although the report submitted to our Office by NAVSEA included offerors' proposals and the agency's contemporaneous evaluation of proposals, these documents were not included in the copies of the report furnished to the awardee and the interested parties; the agency withheld these documents on the basis that they contained either information proprietary to one of the parties or procurement-sensitive, source selection information the release of which would confer a competitive advantage on the recipient and impair future procurements.

We agreed with NAVSEA that since the offerors' proposals and the evaluations were proprietary, their disclosure would be inappropriate because that information could confer a competitive advantage on the protesters. See Varian Assoc., Inc.--Request for Reconsideration, B-229921.6, Sept. 27, 1988, 88-2 CPD ¶ 291. On the other hand, we released to each protester its own evaluation, the relative standing of proposals, and the source selection scoring plan because these were relevant and necessary to give the protesters a meaningful opportunity to develop their protests challenging the award selection. In the context of this procurement, we saw no reason why disclosure of this information would offer a competitive advantage to the protesters.

RECOMMENDATION

By letter to the Secretary of the Navy, we are recommending that the source selection decision be reconsidered in light of the views expressed herein. In particular, the agency should recalculate the evaluation points for the probable cost factor so that higher cost proposals receive proportionately fewer points than the low cost proposal, and should reconsider whether the firm's financial problems under the fleet oiler contract warrant overturning the award. We also find GMD to be entitled to recover the costs of filing and pursing its protest. 4 C.F.R. § 21.6(d)(1); See Sanford & Sons Co., B-231607, Sept. 20, 1988, 88-2 CPD ¶ 266. Since Phillyship is not an interested party to raise the grounds on which we sustain GMD's protest, Phillyship is not entitled to recover its costs.

GMD's protest is sustained; Phillyship's protest is denied in part and dismissed in part.



for Comptroller General
the United States