



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Earle Palmer Brown Companies, Inc.

File: B-243544; B-243544.2

Date: August 7, 1991

Harvey G. Sherzer, Esq., William A. Roberts III, Esq., Scott Arnold, Esq., and Mary A. Denise, Esq., Howrey & Simon, and Jeffrey K. Kominers, Esq., for the protester. Scott T. Kragie, Esq., and John C. Reilly, Esq., Squire, Sanders & Dempsey, for J. Walter Thompson U.S.A., Inc., an interested party.

George N. Brezna, Esq., United States Marine Corps, for the agency.

C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In determining whether to grant access to documents under protective order, the General Accounting Office considers whether the applicant primarily advises on litigation matters or whether he also advises on pricing and production decisions, including the review of proposals, as well as the degree of physical and organizational separation from employees of the firm who participate in competitive decision-making and the degree and level of supervision to which the applicant is subject.

2. Where agency determined, based on a survey of similar staff positions under other contracts and the salaries contained in other technically acceptable proposals, that in order to supply district representatives under recruiting contract, protester would have to pay higher salaries than estimated in its proposal or to hire personnel with less qualifications than indicated in the protester's proposal, it was proper for agency to adjust estimated cost, since solicitation did provide for cost realism adjustments and since technical evaluation was based on assumption that protester would hire personnel with the qualifications proposed.

3. Agency adjustment of protester's estimated cost to reflect cost experience of incumbent in identifying salary required to recruit qualified district representatives was reasonable, where the limited data available indicated that the incumbent's salaries were generally in the middle range of those paid for similar staff positions.

4. Award to higher-cost offeror was proper under solicitation that gave greater weight to technical merit compared to cost, where source selection authority determined that superiority of awardee's technical proposal was worth the extra cost, and the awardee received the highest greatest value score, as adjusted.

5. Where protester offered more highly qualified personnel in its best and final offer (BAFO) but lowered its estimated salaries for district representative positions, agency was not obligated to discuss concerns over cost realism that first arose after protester submitted its BAFO.

DECISION

Earle Palmer Brown Companies, Inc. protests the award of a contract under request for proposals (RFP) No. M00027-90-R-0010, issued by the United States Marine Corps for recruit advertising services. The protester contends that the agency unreasonably adjusted its estimated cost, resulting in an increase in the awardee's combined cost/technical score that wrongly deprived the protester of award in accordance with the solicitation's award criteria.

We deny the protest.

I. BACKGROUND

On June 25, 1990, the agency issued the solicitation for a cost-plus-fixed-fee contract for the creation and production of advertising to encourage recruitment in the Marine Corps, for placement in the media, such as television, radio, magazines and periodicals, direct mail and billboards for 9 months of fiscal year (FY) 1991, with evaluated options for additional periods. The successful contractor would also develop an advertising plan to assist the agency in achieving its recruitment goals, purchase advertising space and time on behalf of the agency, and provide support of the agency's district recruiting program, as well as producing reports and performing collateral projects.

The solicitation advised offerors that the agency would evaluate offers on the basis of written and oral proposals as well as cost proposals. The agency would evaluate written proposals for the way in which they addressed the technical requirements of creative (the highest valued factor); system; facilities and staffing; offeror dimensions (equal in importance to system, facilities and staffing); media; district support; and research. The solicitation provided for each offeror which remained in the competitive range after evaluation of initial proposals to make an oral presentation, which would be of less importance than the written proposal; technical proposals (technical and oral) would be of more importance than cost proposals.

The agency would evaluate cost on the basis of cost realism, defined as "the offeror's ability to project realistic costs and to show an understanding of the nature and scope of the work to be performed," reserving the right to the contracting officer to adjust prices to a level that he considered realistic. The solicitation requested each offeror to provide an estimated cost and fixed-fee for the base period and each option year. For computing estimated costs, the solicitation contained a form (Exhibit B) upon which each offeror would indicate the salaries and positions proposed and estimated hours in eight areas: account group; research; creative (art); media (television, radio, print); print production; client advertising; district support; and miscellaneous service. The agency would also score each offeror's Small Business and Small Disadvantaged Business (SDB) Subcontracting Plan, which would be of less importance than the other parts of its proposal.

As the basis for award, the solicitation provided for the method referred to as Greatest Value Scoring (GVS) for making its cost/technical tradeoff. The agency retained the discretion to examine the points assigned to the highest-rated technical proposals to determine whether the point differential was so insignificant as to indicate that proposals were substantially equal in technical merit; in such instances, the agency reserved the right to make award on the basis of the lower-priced proposal. Where the agency did not consider the technical rating substantially equal, the solicitation provided that GVS ranking would be the primary means of rating and ranking offers and determining which offer was the most advantageous to the government but that the extent to which cost advantages might be sacrificed for technical ones would be "governed only by the tests of rationality and consistency with the established evaluation factors."

Four offerors submitted proposals by the closing date of August 24. As a result of review by the agency's technical evaluation panel, the agency eliminated one offeror from the competitive range; on November 1, it requested the remaining three offerors to schedule their oral presentations. The agency also provided a list of discussion questions to the offerors; in several areas, including staffing for the creative functions, the media departments and district representatives (related to the evaluation criterion of district support), the agency advised the protester that its staff lacked experience. The agency suggested that the protester place more stress on advertising experience for district representatives.

The offerors made their presentations during the first week of December, and the evaluation panel provided the results of its evaluation to the contracting officer on January 4, 1991. On January 7, the contracting officer requested responses to its list of discussion questions and instructed each offeror to submit its best and final offer (BAFO) by January 22. On the same date, the agency amended the solicitation to adjust the method of estimating cost; instead of having each offeror provide its own estimated number of hours, as was done with initial proposals, the agency modified Exhibit B to provide a set number of hours for cost estimation purposes, leaving the offerors only to determine the precise categories and labor mix within that number of hours. The agency advised offerors that it would use the fixed estimates of labor hours in assigning point values in the area of cost.

The three offerors submitted BAFOs, and the technical panel completed its evaluation of the revised technical proposals on February 5. Based on a list of enhanced qualifications proposed by the protester in its BAFO for recruiting district representatives, the panel adjusted the protester's technical score slightly upward. Not considering the cost proposals, the panel recommended award to Thompson, whose proposal the panel rated superior with a total technical score of 724.49 points out of 800 available. The protester, with the lowest total of 691.22 points, nevertheless received an excellent rating. In addition, the evaluation of cost proposals resulted in a higher GVS score for the protester as follows:

	<u>Protester</u>	<u>Thompson</u>
Written (550)	470.84	495.61
Oral (250)	220.38	228.88
Subcon- tracting Plan (50)	<u>44</u> 1/	<u>50</u>
Total (850)	735.22	774.49
Cost (200)	<u>200</u>	<u>155.17</u>
Total (1050)	935.22	929.66

The agency had noted errors in the protester's cost proposal, and the secretary of the technical panel then prepared a cost realism analysis of the protester's proposal, which he provided to the contracting officer.^{2/} The secretary found several concerns; specifically, under the evaluation criterion of district support, where none of the offerors other than the incumbent, J. Walter Thompson U.S.A., Inc., had personnel performing as district representatives, the protester proposed extremely low salaries. In its initial proposal, the protester had stated that it intended to recruit Thompson personnel, providing a proposed list of qualifications for recruiting new personnel if the Thompson personnel declined. That proposal offered relatively low salaries for the district representatives; although the protester had proposed enhanced qualifications in its BAFO, which were reflected in its increased technical score, it had further reduced the salaries that it proposed to offer.

1/ The protester has filed a supplemental protest against the scoring of its SDB plan. The agency found that the protester had computed its SDB participation percentages on the basis of total contract price, rather than on the basis of total subcontracting. The protester argues that it was unreasonable for the agency to deduct points, since its proposal obviously met subcontracting goals. The agency, however, while finding the plan acceptable, noted that it reflected a lack of understanding of the protester's obligations in this regard and indicated that the agency would have to expend resources to monitor the protester's performance and bring the protester's percentages in line with reporting requirements. We find the evaluation reasonable and consistent with the evaluation factors in the solicitation.

2/ The protester had neglected to price 3 months of contract performance. The agency also prepared a cost realism analysis of the other proposals, but one which provided the contracting officer with no basis to question the cost estimates submitted with the proposals.

Although the contracting officer found it inappropriate to consider most of the concerns raised in the analysis, he agreed with the panel secretary's finding that the protester had underestimated the salaries that it would have to pay district representatives. After adjusting the protester's proposal for cost realism, which resulted in a 12-point increase in Thompson's cost score,^{3/} the contracting officer found that apart from Thompson's advantage in the scoring of the SDB plans, the two proposals had received essentially equal GVS scores. Unable to find any significant technical advantage in the Thompson proposal, the contracting officer and the contracts division review board recommended award to the protester, based on its lower cost.

The source selection authority (SSA) received briefings from the technical panel as well as the contracting staff, each of which recommended a different awardee. On March 27, after a review of the technical proposals and the narrative comments of the technical panel, the SSA selected Thompson for award, based on his belief that the awardee's proposal offered considerable technical advantages justifying the additional expense, as evidenced, among other things, by its receipt of the highest GVS score, after adjustment of the protester's proposal for cost realism. This protest followed.

Pursuant to our Bid Protest Regulations, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(d)), our Office issued a protective order covering material related to the offerors' proposals and the agency's process for evaluating proposals and selecting an awardee. None of the parties objected to granting attorneys retained by the awardee and by the protester access to these materials. We also reviewed an application from Thompson's General Counsel, an Executive Vice President of the corporation and a member of the board of directors. The application showed that he provides legal counsel to senior management of the firm and reports to Thompson's Chief Executive Officer (CEO). He also reviews advertising materials produced for use under the contract and assists in drafting and reviewing contracts with suppliers.

In determining whether to grant access to protected material, we consider such factors as whether counsel primarily advises on litigation matters or whether he also advises on pricing and production decisions, including the review of bids and proposals, the degree of physical separation and security with respect to those who participate in competitive decision-making and the degree and level of supervision to which in-

^{3/} Protester's cost, \$12,859,221/ Thompson's cost, \$15,390,330 X 200 = 167.11. This resulted in Thompson having the highest GVS score by a small margin.

house counsel is subject. Based on the General Counsel's direct relationship to Thompson's CEO and his membership on its board, we were unable to conclude that the risk of disclosure, particularly inadvertent disclosure, of protected material was sufficiently small to warrant granting Thompson's General Counsel access to protected material.^{4/} See U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984).

II. COST REALISM ADJUSTMENT

The protester argues that the cost realism adjustment was unreasonable, inconsistent with its proposal and failed to take into account the differences between its proposal and that of the awardee, which was also the incumbent contractor. The protester contends that the agency failed to take into account legitimate differences in the salary structures of the two offerors. The protester asserts that, without this improper cost adjustment, it achieved the highest GVS score and was therefore entitled to award.

At a hearing held at our Office in connection with this protest, we explored the issue of whether the cost realism adjustment was inconsistent with the content of the protester's proposal. We find that it was not.

Under the category of district support, the agency weighed three criteria, the second of which related to "The technical expertise/experience of its field force representatives. Anticipated representative qualifications if no representatives exist." At the hearing, the panel secretary, who recorded and compiled the panel's scores, testified that the panel only rated the incumbent by the first factor--expertise/experience of their current representatives. To avoid penalizing non-incumbents, which would have no representatives, the panel rated the other offerors according to the second factor--anticipated qualifications.

Some panel members felt that the protester's proposal to offer the district representative positions to Thompson's current personnel reflected an understanding of the quality of personnel needed to serve in these positions. The initial evaluation, nevertheless, raised a concern that if the current incumbent's personnel were unavailable, the protester proposed to hire entry-level personnel lacking field experience to fill the district representative positions. Raising this issue

^{4/} At the hearing held regarding this protest, our Office refused admission to corporate officials of the protester, to whom we had not granted access under the protective order, since it was impracticable to separate the discussion of protected material from the discussion of unprotected material.

during discussions, the agency suggested that the protester place greater stress on advertising experience in recruiting district representatives. Accordingly, the protester's BAFO added 3-5 years of advertising experience as a qualification for the representatives, resulting in an increase in the protester's technical score. Although the protester proposed to reduce the district representatives' salaries in its BAFO, the protester also added several other employment criteria such as a thorough knowledge of mass media vehicles, experience in multimedia account management, an understanding of the requirements of working on a U.S. Government account and more extensive background in other areas. The panel secretary testified that the panel was aware that the plan to hire incumbent personnel was only one alternative, that the cost adjustment was to reflect the wages that the agency believed necessary for the protester to attract personnel with the experience proposed in the BAFO. We find the proposal clear in this regard, and there is no evidence that in calculating the cost realism adjustment, the agency wrongly presumed that the protester's proposal depended upon hiring incumbent personnel.

When an agency contemplates award of a cost reimbursement contract, the offeror's estimated costs of contract performance are not dispositive since they may not provide valid indications of what the government will be required to pay. Mandex, Inc., B-242841, Mar. 6, 1991, 91-1 CPD ¶ 253. Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. General Research Corp., B-241659, Feb. 19, 1991, 70 Comp. Gen. _____, 91-1 CPD ¶ 183. The government evaluation is to be aimed at determining the extent to which the estimates represent what the contract should cost and since this process involves the exercise of informed judgment by the agency, our review of it is limited to ensuring that it was done reasonably. JSA Healthcare Corp., B-242313 et al., Apr. 19, 1991, 91-1 CPD ¶ 388. Where labor constitutes a substantial portion of the cost of performance, an agency's cost realism analysis may involve comparative evaluation of the labor mix and cost proposed in two acceptable proposals. Electronic Warfare Integration Network, B-235814, Oct. 16, 1989, 89-2 CPD ¶ 356.

Once the agency determined that an adjustment was necessary, that the protester would have difficulty hiring personnel of the quality promised at the rather low salaries that it proposed to pay, the agency had to determine what rate the protester would realistically have to offer to attract such people. In trying to determine a realistic rate, the agency found that the district representative positions were fairly unique; except for Thompson, which was the incumbent, the

agency did not find that any of the offerors employed personnel in a similar position with similar responsibilities. Campbell-Mithun-Esty, the third offeror, proposed salaries for district representatives somewhat higher than those proposed by Thompson; Young & Rubicam, the Army's advertising agency, also paid higher salaries for what appeared to be comparable positions. Compared with the protester's low salaries and the higher salaries of other advertising agencies, the agency found that the incumbent's salaries were in the middle range and constituted an appropriate base of comparison for cost realism purposes.

We find the use of the incumbent's salaries reasonable. For the seven district representative positions, the protester's proposed salary, an average of \$16.08 per hour for the contract period, was \$7 per hour less than the lowest proposed by Thompson, \$9 less than that proposed in two districts and nearly \$20 less for the three other positions.^{5/} The protester's assertions to the contrary, we find no appreciable difference in the fringe benefits and bonus packages of the two offerors; there is nothing in the record before our Office to show that the amount of the adjustment was unreasonable.

III. EVALUATION AND AWARD

The protester argues that even after the cost realism adjustment, the agency retained discretion to award a contract to the lowest-priced offeror regardless of GVS totals where it found that the proposals were substantially equal in merit. The protester notes that the contracts division review board could find no technical distinction between the offerors and argues that there was in fact no technical advantage to the awardee's proposal meriting the payment of the cost premium here involved. The protester contends that the agency closely circumscribed its own discretion in the award decision, interpreting the award clause as requiring the agency to make award to the offeror with the highest GVS except for the sole situation where the agency found a lower-technical, lower-cost proposal with a lower GVS score to be substantially equal in technical merit.

^{5/} These figures are based on the awardee's BAFO. In recommending the \$900,000 cost realism adjustment, the panel secretary used smaller figures, derived from the salaries proposed in Thompson's initial proposal, disregarding Thompson's BAFO rates because they included overhead expenses, and he was unfamiliar with the calculations necessary to compute straight salaries from such data. Application of the BAFO rates to the protester's proposal would result in an adjustment nearly twice as great--nearly \$1.7 million.

Consistent with the prior decisions of our Office, the agency expressly stated that ultimately its cost/technical tradeoff would be governed only by the tests of rationality and consistency with the established evaluation criteria. See Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Furthermore, while the review board could find no technical distinction between the two proposals, the SSA did, based not just upon the scoring but upon his review of the technical panel's narrative comments and scoring justifications.

Our own review, of the evaluation documents, confirms the testimony of the SSA that where the panel consistently found the protester's plans adequate and its proposed personnel qualified, the panel's narratives described the awardee's plans and personnel in terms of superiority and excellence. While the protester argues that a 33-point (4.1 percent) difference in technical scores was insignificant, the significance of a given point spread depends upon all the facts and circumstances surrounding a procurement; the point scores themselves are not controlling, reflecting as they do the disparate subjective judgments of evaluation, but are useful only as guides to intelligent decisionmaking. Midwest Research Inst., B-240268, Nov. 5, 1990, 90-2 CPD ¶ 364.

The SSA noted that the awardee received a superior rating on 6 of 10 technical categories, including the critical and most important categories of creative and systems, facilities and staffing; the SSA found that the awardee had superior technical capabilities, particularly in its staffing, employee quality, depth, and experience. Evaluators also expressed concern over certain themes suggested by the protester, such as the suggestion that where the Marine Corps trained soldiers to live (not die) for their country, other services did not; evaluators felt that such an approach could provoke an internecine and unnecessary recruiting war between the services, which would eventually be counterproductive. There was also a perception that some of the slogans were geared to current events (Operation Desert Shield) and could become quickly obsolete, while some of the visuals lacked brand identification (undifferentiated personnel in uniform).

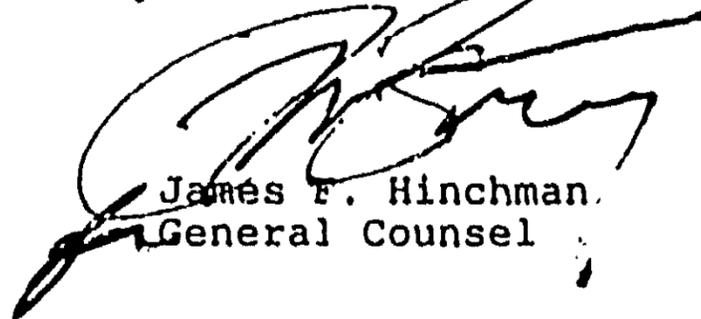
The awardee had the highest total GVS score; while the protester disputes the amount of the difference in cost attributable to the awardee's higher quality personnel, as the protester nevertheless concedes, a substantial portion of the cost difference was attributable to the greater experience and expertise of the awardee's personnel. The protester ranked third in technical quality. The SSA therefore concluded that there was not technical equivalency between the proposals. Based on our review of the record and the SSA's

testimony at the hearing, we find that the technical panel and SSA reasonably concluded that the two proposals were not in fact substantially equal in technical merit.

IV. DISCUSSIONS

The protester also argues that the agency should not have presumed that its district representatives' salaries were too low without addressing the issue in discussions. Agencies generally must conduct such discussions with all offerors, advising them of deficiencies in their proposals and providing them with the opportunity to satisfy the government's requirements. tg Bauer Assocs., Inc., B-229831.6, Dec. 2, 1988, 88-2 CPD ¶ 549. In this case, the protester's initial proposal contained total costs in line with those of other offerors; while its salaries were low, its proposal compensated by proposing a greater number of labor hours. The January 7 amendment of Exhibit B substantially reduced the number of hours for performance of the work from the protester's original proposal. Although the agency had identified district representative qualifications as a weakness in the initial proposal, the protester promised enhanced experience with its BAFO while lowering proposed salaries, without any explanation for the change. An agency is not required to reopen discussions or to allow an offeror further opportunity to revise its proposal when a deficiency first becomes apparent in a BAFO. See Addesco Indus., Inc., B-233693, Mar. 28, 1989, 89-1 CPD ¶ 317.

The protest is denied.



James F. Hinchman
General Counsel