

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-213369

DATE: May 1, 1984

MATTER OF: Everhart Appraisal Service, Inc.

DIGEST:

1. Absent a finding of nonresponsibility, the government cannot withhold contract award merely because the low offer is considered unreasonably low where contract award is not on a cost reimbursement basis.
2. An agency may not depart in any material way from the evaluation plan set forth in a solicitation without informing offerors and giving them a chance to structure their proposals with the new evaluation plan in mind.
3. Proposal preparation costs are awarded where the agency improperly evaluated the protester's proposal and the protester had a substantial chance of receiving the award except for the agency's improper action.

Everhart Appraisal Service, Inc. protests the award of a contract to Iowa Appraisal & Research Corporation by the Forest Service under request for proposals (RFP) No. R5-83-60. The purpose of the procurement was to establish land values to be used in setting fees for linear rights-of-way across National Forest System lands. We sustain the protest.

The RFP provided for award on a firm fixed-price basis and stated that the award would not necessarily be made to the offeror receiving the highest technical point score, the offeror with the lowest price or the offeror receiving the highest total technical and price score. Rather, award would be made to that offeror whose proposal was technically acceptable and most advantageous to the government in terms of price, technical and other factors.

028726

Everhart submitted the low price of \$44,600, for which it received the full 80 points available. Its technical score was 1498 out of a possible total of 1600 points, which gave it an overall score of 1578 points. Iowa's price proposal of \$115,000 was second low and received a score of 31 points. Iowa received the high technical score of 1505, giving it a total score of 1536 points. The contracting officer determined that award should be made to Iowa, even though its technical score was only seven points more than Everhart's and even though Everhart submitted the low price proposal and received the highest total score. The rationale for this decision was that Everhart's price proposal was unrealistically low for the project.

The contracting officer states that Everhart's proposal did not identify any innovative or unique approaches that would support its low price. She also notes that the government estimate for the project was \$100,000, which is more than two times greater than the protester's proposed price.

Everhart contends that since its proposal was found technically acceptable and there was no evidence of mistake, its low price was not a proper basis for rejecting the proposal. We agree.

As previously indicated, the contract at issue was awarded on a firm fixed-price basis. Such a contract is not subject to adjustment based on the contractor's cost experience during performance and thus places no obligation on the contracting agency to pay more than the price at which contract award is made. See Los Angeles Community College District, B-207096.2, August 8, 1983, 83-2 CPD 175. Moreover, there are various valid motivations which may influence a firm to offer a below-cost price. 50 Comp. Gen. 788 (1971). Accordingly, in the absence of a nonresponsibility determination, the government cannot withhold contract award merely because the low offer is perceived to be unreasonably low, or even below-cost, where the contract is not on a cost reimbursement basis. See Blue Cross-Blue Shield of Tennessee, B-210227, May 23, 1983, 83-1 CPD 555; Ted L. Bidy and Associates, Inc., B-209297; B-209297.2, April 22, 1983, 83-1 CPD 441.

Of course, the risks to the government inherent in accepting an unusually low-priced offer should be considered by responsible procurement officials in the evaluation and selection process. KET, Inc., B-190983, December 21, 1979, 79-2 CPD 429; EPSCO, Incorporated, B-183816, November 21, 1975, 75-2 CPD 338. In this context, consideration of price realism can serve as an aid in determining whether the offeror understands the scope of the work required, uncovering mistake or alerting the government to the possibility of a "buy-in" so that precautions may be taken against its possible adverse effects. See 50 Comp. Gen. 788, supra.

Here, the record contains no evidence that any attempt was made to analyze the risks that might be associated with the protester's proposal, and there was no finding of mistake or nonresponsibility. Nor was Everhart's proposal found technically unacceptable. In fact, the technical proposal was scored only seven points less than that of the awardee, and Everhart received the highest over-all point score. While the RFP stated that award would not necessarily be made to the offeror with the lowest price or to the proposal receiving the highest total point score, the award decision was not based on a determination that the awardee's technical superiority outweighed the protester's price advantage. Rather, the sole justification for selecting Iowa over Everhart was that Everhart's price was considered unrealistic for the project. As we have stated, this alone is not a valid basis for rejection of a fixed-price proposal.

The record reveals another serious evaluation impropriety which Everhart has not protested but which we cannot overlook. As previously noted, the evaluation scheme utilized here allowed for a possible total of 1600 points for technical factors. The RFP, however, provided that technical factors were worth only a possible total of 160 points. Thus, technical proposals were not point-scored in accordance with the evaluation scheme set forth in the RFP. (There was no similar inconsistency in the scoring of price since both the RFP and the actual evaluation provided for a total of 80 possible points for price.)

It is improper for an agency to depart in any material way from the evaluation plan described in the solicitation without informing the offerors and giving them an opportunity to structure their proposals with the new evaluation scheme in mind. Umpqua Research Company, B-199014, April 3, 1981, 81-1 CPD 254. Here, the agency assigned a value to technical factors that was 10 times greater than that set forth in the RFP, but made no corresponding change in the weight assigned to price. This had the effect of reducing price from approximately 1/3 of the total possible score to approximately 1/20 of the total possible score. Neither the protester nor any of the other offerors was given an opportunity to structure its proposal according to the revised scoring system.

Everhart clearly was prejudiced by the agency's actions since its price proposal was significantly lower than that of the awardee. The evaluation scheme actually used greatly reduced the impact of that difference by according price a weight which was substantially less than the RFP indicated it would receive.

For the foregoing reasons, we conclude that Everhart's proposal was not properly evaluated. Nevertheless, we are unable to recommend corrective action. Due to the relatively short duration of the contract (6 months), performance is now almost complete. Consequently, contract termination is no longer feasible. See R&H General Contractors, Inc.; Reynolds Aluminum Building Products Company, B-208776; B-208776.2, June 8, 1983, 83-1 CPD 625.

We believe, however, that Everhart is entitled to recover the costs of preparing its proposal. These costs are recoverable where the government acted arbitrarily and capriciously with respect to a proposal, and the offeror had a substantial chance of receiving the award except for the agency's improper action. Metric Systems Corporation; Command, Control and Communications Corporation, B-210218; 210218.1, September 30, 1983, 83-2 CPD 394. While we recognize the possibility that the Forest Service, had it properly conducted the evaluation, might have been able to justify a finding of nonresponsibility based on Everhart's low price, the record indicates that Everhart has a reasonable explanation for its low price. Everhart has

stated, for example, that it did not charge to the contract professional time or per diem for weekends, while the government estimate included those sums. It also states that it proposed two appraisers, one of whom is less experienced than the other and accordingly is compensated at a considerably lower rate of pay. The government estimate also utilized two appraisers, but at the same rate of pay (a rate which closely corresponds to the higher rate charged by Everhart for the more experienced appraiser). In addition, we would expect any concerns the agency had about what Everhart's proposed price might indicate with regard to its performance approach to be reflected in its technical score, which was based on factors such as "Soundness of Approach," "Record of Past Performance," "Capacity to Perform Work," "Utilization of Appropriate Personnel," and "Adequacy of Planning and Scheduling." Everhart received a high technical score, however, that was only 7 points below that of the awardee, so that it does not appear that Everhart's approach was of significant concern to the agency.

Under these circumstances, we believe it is fair to say that Everhart had a substantial chance for award. We therefore believe that the protester is entitled to receive its proposal preparation costs. Everhart should submit documentation to support its costs to the agency.

The protest is sustained.

for *Harry R. Van Cleave*
Comptroller General
of the United States