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## Decision

**Matter of:** Carothers Construction, Inc.

**File:** B-405241.4

**Date:** July 26, 2012

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Robert J. Symon, Esq., and Aron C. Beezley, Esq., Bradley Arant Boult Cummings LLP, for the protester.

James E. Moye, Esq., and Mark O. Masterson, Esq., Moye, O'Brien, O'Rourke, Pickert & Dillon, LLP, for Sauer, Inc., an interested party.

Connie L. Baran, Esq., Department of the Army, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Source selection official reasonably selected higher-rated, higher-priced proposal for award where he identified technical distinctions between proposals and determined that value of advantages associated with higher-rated proposal exceeded the difference in price.

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### DECISION

Carothers Construction, Inc., of Water Valley, Mississippi, protests the issuance of a task order for design/build of an elementary school at Fort Stewart, Georgia, to Sauer, Inc., of Jacksonville, Florida, pursuant to request for task order proposal (RFTOP) No. URSF-11-0004, issued by the U.S. Army Corps of Engineers, Savannah District. The protester argues that the agency unreasonably selected Sauer's higher-priced proposal for award.

We deny the protest.

### BACKGROUND

The RFTOP, which was issued on February 25, 2011, to firms holding multiple-award, task-order contracts, provided for award of the order to the contractor whose proposal represented the best value to the government. Proposals were to be evaluated based on price and four technical evaluation factors (quality of building systems and materials, building function and aesthetics, proposed contract duration

and summary schedule, and site design). The technical factors, when combined, were of greater importance than price.<sup>1</sup> The solicitation also advised that a construction cost limitation of \$20,500,000 applied to the project, and that proposals exceeding the cost limitation would be considered ineligible for award.

The RFTOP provided that the building was to be designed to achieve an energy consumption at least 30 percent below the consumption of a baseline building meeting the minimum requirements of American Society of Heating Refrigeration and Air Conditioning (ASHRAE) Standard 90.1-2007, in compliance with the Energy Policy Act (EPAAct) of 2005. RFTOP, App. B and Section 01 10 00 at 108.<sup>2</sup> The solicitation further advised that proposals committing to achieve energy savings of 40 percent or better might be rated more favorably. In connection with the foregoing, offerors were instructed to describe their overall approach for design of the facility in relation to energy conservation features, provide the anticipated energy usage for the school as proposed, and describe the most important factors in achieving that performance. With regard to energy conservation, the RFTOP also included a requirement that “[n]ot less than 30 percent of hot water demand for this facility shall be met through the installation and use of solar hot water heaters . . . unless demonstrated to not be life cycle cost-effective.” Section 01 10 00 at 86.

The protester, Sauer, and a third offeror submitted proposals.<sup>3</sup> On June 3, 2011, the agency notified the protester that Sauer had been selected to receive the task order, and Carothers protested the selection decision to our Office. After the agency notified us that it intended to reevaluate the proposals and make a new source selection decision, we dismissed the protest as academic. Carothers Constr., Inc., B-405241, B-405241.2, July 26, 2011.

The agency reevaluated the proposals and assigned the following ratings:

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<sup>1</sup> Technical factors 1 and 2 were equal in weight and of greater importance than factors 3 and 4; factor 3, in turn, was more important than factor 4.

<sup>2</sup> In connection with the foregoing goal, the solicitation explained that the Department of Defense Education Activity had emphasized the importance of saving energy in their facilities and was examining the feasibility of designing and constructing future schools to be Zero-Net-Energy-Buildings or Zero-Net-Energy Ready. RFTOP, App. B.

<sup>3</sup> The third offeror’s proposal was subsequently eliminated from consideration because it exceeded the cost limitation.

	Factor 1	Factor 2	Factor 3	Factor 4	Overall	Evaluated Price
Sauer	O	AA	S	AA	AA	\$20,265,000
Carothers	AA	S	S	AA	S	\$18,147,100

(O = Outstanding, AA = Average, and S = Satisfactory).

The contracting officer again selected Sauer to receive the task order, finding that the technical advantages of Sauer’s proposal outweighed the protester’s price advantage, and Carothers again protested to our Office. After reviewing the record, the cognizant GAO attorney conducted an outcome prediction alternative dispute resolution telephone conference, during which she advised the parties that, in her view, the protest was likely to be sustained on the grounds that the agency had treated the offerors unequally by engaging in discussions with Sauer only. The GAO attorney recommended that the agency take corrective action. In response, the agency notified our Office that it would hold discussions, allow the offerors to revise their proposals, evaluate the revised proposals, and make a new source selection decision. We subsequently dismissed the protest as academic. Carothers Constr., Inc., B-405241.3, Feb. 2, 2012.

The agency opened discussions with the two offerors, advising both that they would be permitted to revise their proposals only to the extent necessary to respond to the items discussed. Discussion items raised with Sauer (and Sauer’s responses thereto) included the following:

- Confirm the information provided in response to this clarification, “In relationship to EPACT (which does not include Plug Loads), what energy reduction would your proposal have?”

Response: “55% Energy Reduction. We hereby revise our proposal by increasing the Solar PV [photo-voltaic] system capacity and Solar Hot Water System capacity.”

- Confirm the information provided in response to this clarification, “In relationship to ASHRAE (which includes Plug Loads), what energy reduction would your proposal have?”

Response: “45% Energy Reduction. We hereby revise our proposal by increasing the Solar PV system capacity and Solar Hot Water system capacity.”

Contracting Officer (CO) Letter to Sauer, Feb. 10, 2012, and Sauer Letter to CO, Feb. 16, 2012.

Likewise, discussion items raised with the protester (and the protester's responses) included the following:

- Confirm the information provided in response to this clarification, "In relationship to EPACT (which does not include Plug Loads), what energy reduction would your proposal have?"

Response: "Per the Energy Policy Act (EPACT) of 2005, a new federal facility must meet a required energy reduction of 30% against ASHRAE Standard 90.1. For the subject project, we propose and confirm an EPACT energy reduction of 44.6%."

- Offeror did not provide the percentage of the hot water demand and did not demonstrate that meeting the requirements of Chapter 10 para 10.4 [which provides that 'not less than 30 percent of hot water demand for the facility shall be met through the installation and use of solar hot water heaters . . . unless demonstrated to not be lifecycle cost-effective'] was not life cycle cost effective.

Response: "As per Section 523 of the Energy Independence and Security Act of 2007, an analysis was performed to determine if a solar domestic hot water system would be life cycle cost effective. The area chosen for the analysis was the kitchen, which comprises approximately 60% of the total hot water demand for the facility. As stated in the Mechanical Systems paragraph of the original proposal dated April 5, 2011, Page 4, the domestic water heating system would use evacuated tube collectors to heat water in a storage tank. The system was calculated to have a payback of approximately 36 years, which does not show the system being life cycle cost effective. Therefore, it is proposed that a high efficiency, condensing gas fired domestic water heater be utilized to serve all areas of the facility. Additionally, a life cycle cost analysis for solar hot water heating in comparison to electric water heating was performed and is included as *Attachment 1*."

CO Letter to Carothers, Feb. 10, 2012, and Carothers Letter to CO, Feb. 16, 2012.

The technical board reevaluated the proposals. The evaluators raised the rating of the protester's proposal under the building function and aesthetics factor from satisfactory to above average based on Carother's response to a discussion item

regarding the material for wall stripes.<sup>4</sup> At the same time, however, the evaluators lowered the rating assigned the protester's proposal under the quality of building systems and materials factor from above average to satisfactory, finding that the protester had not met the solicitation requirement that not less than 30 percent of the facility demand for hot water be met through the installation and use of solar hot water heaters unless demonstrated not to be life cycle cost effective. In the foregoing connection, the evaluators noted that the protester had not furnished a life cycle analysis demonstrating that the solar hot water heaters would not be cost effective; rather, the protester had furnished a payback analysis. The evaluators further noted that the protester's payback analysis addressed only the hot water demand for the kitchen (as opposed to the demand for the entire facility). Because the two changes in rating essentially cancelled each other out, the overall rating (of satisfactory) assigned the protester's proposal remained unchanged. No changes were made to the ratings assigned Sauer's proposal.

In comparing the two proposals, the contracting officer noted that energy conservation was an extremely important element of the project, and that Carothers had neither proposed to furnish at least 30 percent of the facility's hot water demand with solar hot water heaters, nor demonstrated that meeting the requirement would not be lifecycle cost effective, as required by the solicitation, whereas Sauer had proposed to furnish 40 percent of the facility's hot water through solar heating. The contracting officer further noted that Carothers had proposed a 44.6 percent reduction in energy consumption in relationship to the EPACT, whereas Sauer had proposed a reduction of 55 percent, and that while Carothers had not explained in its proposal whether and how its design could be expanded to make the facility Net Zero Energy Ready, Sauer had provided for a photovoltaic system with the capability for future expansion. The contracting officer also noted that while Carothers had proposed energy efficiency strategies for conservation and savings exceeding the minimum requirements of the RFTOP, Sauer had both proposed such strategies and "provided an extensive narrative of the design approach to incorporate these features and illustrate where the savings would be realized." CO's Decision Document, Apr. 13, 2012, at 5. The contracting officer concluded that the technical advantages of Sauer's proposal outweighed its higher price, and that Sauer's proposal represented the best value to the government.

By letter of April 19, 2012, the contracting officer notified Carothers that Sauer had again been selected to receive the task order. After requesting and receiving a debriefing, Carothers filed a timely protest with our Office on May 1.

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<sup>4</sup> The agency had asked Carothers to clarify the material used for glazed strips along the walls. In response, Carothers indicated that it would use "pre-faced architectural concrete masonry block that has the glazing compound permanently molded to the face of the [masonry block]." Id.

## DISCUSSION

Carothers argues that the evaluators relied upon an unstated evaluation factor in finding that its proposal had failed to meet the requirement to furnish at least 30 percent of the facility's hot water using solar hot water heaters and had not otherwise demonstrated that it was not life cycle cost effective. The protester contends that the solicitation did not require offerors to furnish an analysis demonstrating that the use of solar hot water heaters would not be cost effective, with their proposals. Rather, the protester maintains, the solicitation provided for energy calculations of that sort to be furnished post award as part of the final design. In the alternative, Carothers argues that it provided the requisite analysis.

The protester is in essence arguing that the agency has unreasonably interpreted the solicitation as requiring offerors not committing to furnish 30 percent or more of the facility's hot water with solar heaters to demonstrate the non-cost-effectiveness of compliance in their proposals.

Where a dispute exists as to the meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, an interpretation must be consistent with such a reading. ArmorWorks Enters. LLC, B-405450, Oct. 28, 2011, 2011 CPD ¶ 242 at 3.

In our view, the only reasonable reading of the solicitation requirement that "[n]ot less than 30 percent of the hot water demand for this facility shall be met through the installation and use of solar hot water heaters (IESA 2007) unless demonstrated to not be life cycle cost-effective," RFTOP, § 01 10 00 at 108, is that offerors were required either to propose to meet the requirement or to demonstrate in their proposals that they should be exempted from the requirement because compliance was not cost effective. Moreover, even assuming for the sake of argument that it was unclear from the solicitation whether the analysis demonstrating that the solar heaters were not cost effective had to be submitted as part of an offeror's proposal or could be furnished post award, the agency clearly placed the protester on notice during discussions that it expected that information to be included in its proposal. See Intermagnetics General Corp., B-286596, Jan. 19, 2001, 2001 CPD ¶ 10 at 6. Accordingly, to the extent the protester believed that the agency's request for the information at this stage in the process was inconsistent with the terms of the solicitation, it should have protested the matter then. See Engineered Elec. Co. d/b/a DRS Fermont, B-295126.5, B-295126.6, Dec. 7, 2007, 2008 CPD ¶ 4 at 8-9; Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2012) (protests must be filed not later than 10 days after the basis of protest is known).

With regard to the protester's alternative argument that it did in fact provide an analysis demonstrating the non-cost-effectiveness of solar hot water heaters in its proposal, the protester's analysis addresses only the hot water demand for the

facility's kitchen. Setting aside the issue of whether the "payback" analysis provided by the protester was an adequate substitute for the required life cycle cost analysis in the given circumstances, see Protester's Comments at 14, all that the protester's analysis purports to show is that it would not be cost effective to furnish the hot water for the facility's kitchen with solar heaters. Given that, according to the protester, hot water demand for the kitchen comprises only 60 percent of the overall facility demand, establishing that the kitchen's hot water cannot be provided cost effectively with solar heaters does not establish that 30 percent of the overall facility demand cannot be furnished cost effectively. Accordingly, the evaluators had a reasonable basis to find the protester's cost effectiveness analysis inadequate.

Carothers further argues that the agency treated the two offerors unequally by giving Sauer, but not the protester, the opportunity to revise its proposed energy reduction during discussions. The protester also argues that the agency improperly prompted Sauer during discussions to increase its energy savings "in order to distinguish its proposal from Carother's proposal." Protester's Comments, May 1, 2012, at 9.

The protester's first argument lacks merit. The agency treated the two offerors identically, asking both to confirm information that they had earlier provided in response to requests for clarification regarding their energy reductions in relationship to EPACT. The two offerors responded differently--that is, in response to the discussion item, Sauer increased its percentage of proposed reduction from 45 percent to 55 percent, whereas the protester confirmed its previously furnished rate of 44.6 percent. The fact that the two offerors responded differently does not demonstrate that the agency treated them unequally.

The protester's second argument also lacks merit. According to the protester, the agency "telegraphed" to Sauer that it should increase its energy reduction by asking Sauer to confirm its response to an earlier clarification regarding energy reduction. Id. A significant flaw in Carother's argument is that, as noted above, the agency also asked the protester to confirm its response to an earlier clarification regarding energy reduction. In other words, to the extent that the agency's request for confirmation of previously provided information "telegraphed" to Sauer that it needed to increase its energy savings, the agency "telegraphed" the same message to Carothers.

Carothers also argues that it was unequal for the contracting officer to require it to furnish a life cycle cost analysis in support of its decision not to propose solar hot water heaters, but not to require an equivalent analysis from Sauer in support of its proposed water heating system. Again, we find the protester's argument to be without merit. The solicitation required offerors either to commit to furnishing at least 30 percent of the facility's hot water with solar heaters or to demonstrate that doing so would not be life cycle cost effective. Sauer committed to furnishing more

than 30 percent of the facility's hot water with solar heaters; thus, it was not required to provide a life cycle cost analysis.

In commenting on the agency report, Carothers raised the additional argument that the agency had unreasonably failed to require Sauer to substantiate the increased energy reduction rate that it proposed in response to the final round of discussions. In this connection, Carothers maintains that Sauer did not provide any support for its revised energy saving rates. We disagree. Sauer indicated in its discussion question response that it would increase its energy reduction by increasing the capacities of its solar photovoltaic and solar hot water systems. With regard to the protester's assertion that "it is highly unlikely that Sauer could achieve an EPACT energy savings rate of 55% through the use of an expanded PV system, given that the project has already been designed and does not account for an expanded PV system," Protester's Comments, at 9 n.5, the record shows that Sauer did in fact account for expansion of the PV System in its proposal. For example, Sauer's proposal stated that "[t]he [PV] system will be set up with spare conduits and components in order to make it Zero-Net-Energy Ready and capability for future expansion to provide 100% of the electrical building load or Zero-Net electrical load." Sauer Proposal, Vol. II, at 1. Moreover, with regard to the protester's argument that the school's roof does not have enough useable space to support the number of panels that would be required to achieve an energy reduction of the given magnitude, Sauer addressed this issue in its proposal, noting that additional panels could be mounted on canopy-style structures over the parking areas. Id. at 2.

Finally, Carothers argues that the contracting officer lacked a reasonable basis for determining that the technical advantages of Sauer's proposal outweighed the price advantage of its own.

This argument also lacks merit. Where, as here, a solicitation provides for a price/technical tradeoff, the agency retains discretion to make award to a firm with a higher technical rating, despite a higher price, so long as the tradeoff decision is properly justified and otherwise consistent with the stated evaluation and source selection scheme. TtEC-Tesoro, JV, B-405313, B-405313.3, Oct. 7, 2011, 2012 CPD ¶ 2 at 10. The contracting officer identified a number of advantages to Sauer's proposal, including that Sauer had proposed an energy reduction of 55 percent (versus the protester's 44.6 percent); Sauer had proposed to furnish 40 percent of the facility's hot water with solar heaters, whereas Carothers had neither proposed to furnish the required 30 percent of hot water demand with solar heaters nor demonstrated that doing so would not be cost effective; Sauer had proposed a Zero-Net-Energy Ready design, whereas the protester had not; and Sauer had done a better job of explaining its overall approach to energy conservation.

The protester maintains that the contracting officer's tradeoff determination is irrational because the value of the advantages associated with Sauer's proposal is



less than the \$2 million difference between the two offeror's prices. In so arguing, however, the protester is in essence asking us to substitute our judgment as to the value of the advantages associated with Sauer's proposal for the contracting officer's judgment, which we will not do. It is not our function to second guess the agency's judgment as to the value of the advantages associated with a higher-rated proposal--that is, in considering the rationality of an agency's tradeoff determination, we look at whether the reasons given for preferring one proposal over another are consistent with the stated evaluation scheme, and not whether we agree with the source selection authority as to the relative value of the advantages. See MCR Federal, LLC, B-401954.2, Aug. 17, 2010, 2010 CPD ¶ 196 at 11. In our view, the agency has adequately justified its selection of Sauer's higher-rated, higher-priced proposal here.

The protest is denied.

Lynn H. Gibson  
General Counsel