



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: FC Business Systems, Inc.

File: B-278730

Date: March 6, 1998

Daniel B. Abrahams, Esq., and Raymond Fioravanti, Esq., Epstein Becker & Green, P.C., for the protester.

William M. Rosen, Esq., and Karen Lau, Esq., Dickstein Shapiro Morin & Oshinsky, LLP, an intervenor.

Joshua A. Kranzberg, Esq., and Maj. Scott L. Kilgore, U.S. Army Materiel Command, for the agency.

Scott Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's source selection decision is sustained where record shows that, contrary to the express terms of the RFP, the agency failed to consider the results of a sample delivery order cost evaluation in the source selection decision.

DECISION

FC Business Systems, Inc. protests the award of a contract to Logistics Engineering & Environmental Support Services, Inc. (LESCO) under request for proposals (RFP) No. DAAB07-97-R-6006, issued by the Department of the Army for program management support, and research and analysis services for the Army's Logistics Integration Agency. FC argues that the agency's cost and technical evaluations were flawed and that, as a consequence, the agency's source selection decision was unreasonable.

We sustain the protest.

BACKGROUND

The RFP, issued for a base year and four 1-year options, contemplated the award of an indefinite-delivery, indefinite-quantity (IDIQ) type contract with fixed, fully burdened hourly rates for various types of employees, and travel and material costs reimbursed based on actual costs incurred. Firms were required to submit proposal information that described their technical and management approach, and also were

required to include detailed past performance information relating to the firm and its subcontractors; offerors also were required to prepare responses for two sample delivery orders.

For cost evaluation purposes, firms were required to complete a matrix for what the RFP called total contract life cost (TCLC). Offerors were required to state the number of hours for each staff-year of contract performance, and to submit loaded hourly rates for various types of employees; these hourly rates were multiplied by the number of hours to arrive at an extended staff-year price for each category of employee, which was then multiplied by the number of staff-years estimated in the RFP for each contract year. In addition to the TCLC matrixes, firms were required to prepare cost proposals for each of the two sample delivery orders.

The solicitation provided that the agency would make award to the firm whose proposal represented the best overall value to the government considering price and several non-price factors. The criteria, listed in descending order of importance, were Technical, Past Performance, Price, and Management. The technical evaluation criterion included three subfactors, Logistics Business Process Analysis, Technology Application, and Program Management Support; the first two subfactors were of equal importance and the third subfactor was relatively less important. For cost evaluation purposes, the RFP provided that the agency would consider the TCLC information, as well as the offerors' responses to the sample delivery orders. The solicitation further provided that, in evaluating the sample delivery order cost proposals, the agency would perform a cost realism evaluation.

The Army obtained and evaluated best and final offers and arrived at the following adjectival and cost evaluation results for the protester's and awardee's proposals:

CRITERION	FC Business Systems	LESCO
TECHNICAL	BLUE (Outstanding)	BLUE (Outstanding)
Logistics Business Process Analysis	BLUE (Outstanding)	BLUE (Outstanding)
Technology Application	GREEN (Good)	BLUE (Outstanding)
Program Management Support	BLUE (Outstanding)	GREEN (Good)
PAST PERFORMANCE	BLUE (Outstanding)	BLUE (Outstanding)
TCLC	\$16,493,852.80	\$16,579,863.00
MANAGEMENT	YELLOW (Acceptable)	GREEN (Good)

The Army made award to LESCO, finding that its proposal--despite its slightly higher TCLC--offered the best overall value to the government. The agency's source selection decision found that LESCO's proposal was superior to FC's under the first two technical subfactors (logistics business process analysis and technology application), while FC's proposal was superior under the third technical subfactor (program management support). The source selection decision primarily concludes that, because LESCO's proposal was superior to FC's under the first two technical subfactors, the agency preferred to make award to LESCO, notwithstanding the fact that its TCLC was approximately \$86,000 higher than FC's.

USE OF THE SAMPLE DELIVERY ORDER COST EVALUATION RESULTS

FC maintains that, contrary to the express terms of the RFP's evaluation provisions, the agency failed to utilize the results of the sample delivery order cost evaluation in making its source selection. FC argues that the source selection decision document relies solely on a comparison of the two firms' cost under the TCLC evaluation in its tradeoff decision. The protester notes that its cost advantage was significantly larger under the sample delivery order cost evaluation than under the TCLC evaluation, and contends that the tradeoff and award decision may have been different, had the source selection authority (SSA) taken cognizance of this fact.

The agency seems to concede that it did not use the results of the sample delivery order cost evaluation results as a discriminator for source selection purposes; it maintains that it would have been "inappropriate" to do so because the tasks represented work of a short duration (4 and 6 months respectively), and thus did not reflect the potential cost of the contract overall. In apparent contradiction to this position, however, the Army also asserts that the reports prepared by the source selection advisory council (SSAC) and source selection evaluation board (SSEB)--which were reviewed by the SSA--discuss the results of the sample delivery order cost evaluations. The agency concludes from this that the SSA did in fact consider the results of that cost evaluation in making his award decision, even though he did not reference those costs in his source selection memorandum.

We find both of the agency's arguments without merit for several reasons. First, it was improper for the Army not to consider the results of the sample delivery order cost evaluation results in reaching its award decision. The Competition in Contracting Act requires that a solicitation for competitive proposals state all significant factors that will be considered in the evaluation of proposals and ultimate award decision, 10 U.S.C. § 2305(a)(2)(A) (1994), and that agencies evaluate proposals based solely on the factors included in the solicitation. 10 U.S.C. § 2305(b)(1). By virtue of this statutory requirement, an agency may not represent that it will evaluate proposals on one basis, and then use another. Thus, given the RFP's specific representation that sample delivery order costs would be considered

in the cost evaluation, the Army could not ignore that information in making its source selection. Group Techs. Corp., B-240736, Dec. 19, 1990, 90-2 CPD ¶ 502 at 9-10 (agency is required to use cost evaluation tools provided in the evaluation scheme).

More significantly, the agency's failure to consider the sample delivery order cost evaluation resulted in a failure to evaluate the realism of the competing proposals' costs; in other words, the agency failed to compare the relative efficiency of the two offerors in light of their technical approaches. Under an IDIQ contract, which has elements of both fixed-price and cost reimbursement-type contracts, the cost of performance will vary depending not only on the labor rates proposed (as measured here by the TCLC evaluation), but also on the contractor's efficiency in performing the actual task orders issued, that is, the hours that will be required to perform. The sample delivery order cost evaluation was the means provided for under the solicitation for evaluating this latter aspect of cost to the government. Without using the results of the sample delivery order cost evaluation, the agency had no measure of how many hours each offeror would require to perform the same task. Thus, while the agency could determine which offerors' rates were low under the TCLC evaluation, it could not evaluate the offerors' relative cost efficiency. Id. at 9.

There is a reasonable possibility that this evaluation deficiency had a significant effect on the source selection. See Geo-Centers, Inc., B-276033, May 5, 1997, 97-1 CPD ¶ 182 at 11-12. The offerors' sample delivery order responses were central to the Army's technical evaluation findings. As discussed in the SSEB report, LESCO's proposal was deemed somewhat superior under the first two technical subfactors, primarily on the basis of that firm's response to sample delivery order No. 2. Thus, had the agency weighed the sample delivery order cost evaluation in making its award decision, it may well have made a different choice. The record shows that LESCO's proposal for sample delivery order No. 2 involved a cost premium of approximately 28 percent more than FC's proposal. This cost premium is far larger than the 0.6-percent TCLC cost premium on which the award decision is actually based. And while the Army found, for example, that LESCO proposed a superior approach to addressing its requirements as reflected in the first two technical evaluation subfactors, it also found that FC's proposal merited an outstanding rating under the first subfactor and a good rating under the second subfactor. The record leaves unanswered the question of whether LESCO's limited technical superiority is worth the 28-percent cost premium associated with its sample delivery order No. 2 cost proposal.

The Army's assertion that a sample delivery order cost evaluation would have been inappropriate is incorrect. While the sample delivery orders may not represent all of the possible requirements that may arise during contract performance, evaluation of sample delivery order costs for an indefinite quantity contract can provide a useful method for evaluating the relative costs of contracting where disparate technical approaches are offered. Geo-Centers, Inc., supra, at 11-12. As discussed,

the actual cost of the contract will be driven by the delivery orders issued and the contractor's efficiency in performing them. The use of sample tasks or delivery orders provides a means to review the technical approaches and efficiencies under simulated contract conditions. Geo-Centers, Inc., supra; Group Techs. Corp., supra, at 7-10. The agency's failure to consider the sample delivery order cost evaluation results here is particularly significant in light of the fact that its technical evaluation findings were based in substantial part on the offerors' responses to the sample tasks.

Moreover, there is no support for the agency's alternative position that the SSA weighed--albeit without mentioning in his source selection document--the sample delivery order cost evaluation by virtue of his review of the SSEB and SSAC reports. While the SSEB and SSAC reports contain a discussion of the sample delivery order cost proposals (comparing, for example, the gross dollar value difference between the firms and noting that the offerors proposed different quantities of labor hours), that discussion does not attempt to trade off those cost differences against the differences in the proposals' perceived technical merit. The SSAC report (which made an award recommendation to the SSA) states, generically, that the cost differences between the two offerors' sample task responses are attributable to the offerors' respective technical approaches, but does not analyze the relative value of one approach versus another in terms of the potential cost to the government. Since neither the SSEB or SSAC reports included a tradeoff analysis, the SSA nowhere referred to the sample task cost evaluation, and the SSA's award decision on its face specifically refers only to the TCLC cost difference, there is no basis to conclude that he considered the sample delivery order cost results in his award decision. We therefore sustain FC's protest on this basis.

DISPARITY IN HOURS PER STAFF-YEAR

FC also maintains that the Army improperly failed to use a uniform number of hours in a staff-year, and that this resulted in a defective TCLC cost evaluation. In this regard, the record shows that the independent government cost estimates were calculated using a staff-year of 2,080 hours, the protester's prices were calculated using a staff-year of 1,920 hours, and LESCO's prices were calculated using a staff-year of 1,880 hours. According to the protester, this discrepancy provided LESCO with an improper advantage because it was not required to multiply its labor rates by as many hours in arriving at its pricing. The Army contends that this argument is untimely. We agree with the agency because FC did not raise this specific contention until more than 10 days after it received the information (the evaluation documents and LESCO's proposal) upon which it is based. However, since we have found the cost evaluation defective for the reason discussed above, we discuss this contention below in order to provide the agency with guidance in implementing the appropriate corrective action.

In its substantive response to this contention, the agency asserts that the different number of hours in the firms' staff-years is immaterial because, regardless of the number of productive hours used by each offeror to calculate the cost of a staff-year, they have included the balance of each employee's cost (for example, the cost of sick leave and vacation time) in the form of indirect costs added to the direct labor costs. (The Army infers that the offerors arrived at their loaded hourly rates by dividing their employees' annual salaries by the number of staff-hours in a staff-year.) The Army therefore contends that it "leveled the playing field" for purposes of the evaluation because, to the extent that one offeror may have used a smaller number of staff-hours in its calculations, any advantage it might have gained from this was offset by higher hourly rates.

Within the context of an IDIQ-type contract, a properly constructed solicitation should express the agency's requirements in terms of its best estimate of the number of staff-hours, as opposed to the number of employees, thereby ensuring that the government can reliably determine the true cost of making award to one firm versus another. See Temps & Co., B-221846, June 9, 1986, 86-1 CPD ¶ 535 at 4. Here, the RFP permitted offerors to base their proposed costs on staff-years comprised of different quantities of hours, but the agency's cost evaluation focused on staff-years and ignored the difference in hours between the offerors' staff-years. The agency, however, will pay for services under the contract on an hourly (as opposed to a staff-year) basis. We conclude that the TCLC evaluation failed to reveal the true relative costs of the proposals to the government.¹ Id. The record shows that LESCO prepared its proposal using approximately 2.08 percent fewer staff-hours than used by FC (that is, 40 hours per staff-year fewer than FC). Adding the cost of those additional hours to LESCO's proposal could increase the cost difference between the firms from the \$86,010 identified by the agency (and relied on in the source selection decision) to approximately \$430,000. This greater cost difference could have affected the source selection.

RECOMMENDATION

¹The record shows that the offerors also prepared their sample delivery order cost proposals using a different number of hours in a staff-year. While it would be permissible for the agency to accept proposals based on a different number of hours in a staff-year where it concluded that this difference reflected the firms' differing technical approaches resulting in greater or lesser efficiency, there was no such finding here. The record shows only that the agency noted the difference in the number of labor hours per staff-year, but did not attribute it to anything relating to the firms' respective technical approaches. Thus, the offerors' use of a different number of hours in a staff-year also skewed the sample delivery order preparation and evaluation.

As discussed, we sustain FC's protest based on the agency's failure to consider the sample delivery order cost evaluation results in its source selection decision. Under such circumstances, we ordinarily would recommend only that the agency reevaluate proposals. However, given the lack of a common definition of a staff-year in the RFP, the agency should first amend the solicitation to explain how it will take into consideration the differences in the number of hours per staff-year proposed by the offerors, or otherwise establish a uniform basis for preparing and evaluating offers (for example, by defining a staff-year in terms of a uniform number of hours). The agency should then provide the offerors an opportunity to revise their proposals. If, after evaluating the revised offers, the agency concludes that a firm other than LESCO is in line for award, the agency should terminate LESCO's contract for the convenience of the government and make award to the other firm if otherwise proper. We also recommend that FC be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for those costs, detailing the time spent and expenses incurred, within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).²

The protest is sustained.

Comptroller General
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²FC also raises several additional allegations relating to the agency's technical evaluation and cost realism adjustments. We need not consider these arguments at this time since we are recommending that the agency amend the RFP and solicit and evaluate revised proposals. Since the nature of the agency's cost evaluation errors in this case--and the remedy therefor--necessarily will require offerors to revise their proposals from a level-of-effort standpoint, those revisions could well have an effect on the firms' technical standing, and could also affect the agency's cost realism evaluation and ultimate source selection.