

Protest of) Date: October 2, 1992
)
 AMR DISTRIBUTION SYSTEMS)
)
 Solicitation No. 104230-91-A-0176) P.S. Protest No. 92-36

DECISION

AMR Distribution Systems ("AMR") protests the award of a contract for warehousing services to New Breed Leasing Corporation ("New Breed"). AMR argues that the Postal Service did not award the contract to the offeror who would provide it the best value, pointing out that its proposal was technically similar to the awardee's proposal, yet was much lower in price.

Solicitation No. 104230-91-A-0176 was issued by the Office of Procurement, Headquarters, in Washington, D.C. on November 25, 1991. The solicitation sought a full service equipment processing center ("EPC") near Greensboro, NC, that would provide mail transport equipment ("MTE") processing, repair, warehousing, and distribution/transportation. The solicitation stated that the contract type was a cost-plus-award-fee,^{1/} and listed the contract duration as one year plus startup (not to exceed 90 days) with three one-year option periods.

Section A.1 of the solicitation listed the seven items for which offerors were to provide estimated total costs: 1) equipment processing, storage and retrieval (listed as being an estimated 50% of the work); 2) mailbag repair (10%); 3) container repair (15%); 4) warehousing (10%); 5) distribution and transportation services (15%); 6) miscellaneous services not included in items 1-5; and 7) startup. Offerors were required to propose all items for all years.

Section M.1 stated that award would be made to "the responsible offeror whose

^{1/} Section A.1 of the solicitation describes a cost-plus-award-fee contract as one where the "Postal Service will reimburse cost to the contractor and provide a fee that consists of: (1) a fixed amount agreed to at time of award; and (2) an award amount based on the contractor's performance, as evaluated quarterly by the Postal Service."

proposal conforming to the solicitation will be most advantageous to the Postal Service, cost or price and other factors specified elsewhere in this solicitation considered."

Section M.2 more specifically stated that the "primary area to be used in determining which proposal is most advantageous to the Postal Service is technical acceptability, which may include oral presentations, functional demonstrations, or both. . . . Cost proposed by those offerors whose proposals are determined to be technically acceptable will be carefully evaluated, although award may not necessarily be made to the offeror submitting the lowest estimated cost. Award will be made to the responsible offeror that, in the judgment of the Postal Service, presents the best value to the Postal Service, both technical and cost considered." Section c. of M.2 stated that "[c]ost or pricing data submitted in accordance with J.10.c will be used to evaluate offerors' cost."

The following technical evaluation criteria and subcriteria were listed in Section M.2. in descending order of importance:

- I. Understanding the Requirement
 - A. Approach to all Major Functions of the Statement of Work (SOW)
 - B. Qualifications and Availability of All Resources
- II. Organization and Management
 - A. Structure for and Management of This Procurement
 - B. Management and Reporting Systems and Practices
- III. Corporate Experience
 - A. Record of Past Performance
 - B. Prior Experience in Related Areas
- IV. Quality of Proposal
 - A. Response to All Requirements of the Solicitation
 - B. Proposed format and content as specified in Section J

The solicitation advised that the first two criteria, "Understanding the Requirement" and "Organization and Management" were worth significantly more than the other two factors. Sub-criteria for "Understanding the Requirement" and for "Corporate Experience" were of equal importance. The subcriteria for the other two criteria were in descending order of importance. Section M.3 of the solicitation warned offerors that "[t]he Postal Service will evaluate offers for award purposes by including only the price for the basic requirement; i.e., options will not be included in the evaluation for award purposes."

Eleven proposals were received. A technical committee reviewed and scored the

technical proposals. After making a competitive range determination, the contracting officer held discussions with and requested best and final offers from four offerors, including AMR. AMR's best and final offer was the second highest rated with a score of 88.9. AMR's proposed cost was \$1,686,941. New Breed's proposal received a technical score of 80.4, the lowest of the four technical scores. Its proposed cost was \$3,138,891. One of the other offerors was scored highest technically, but offered a significantly higher price; the remaining offeror was third highest technically and offered the lowest price.

As discussed further infra, the cost proposals were adjusted for cost realism. The technical committee's memorandum states that after cost realism adjustment, AMR's cost was \$1,849,478, while New Breed's cost was \$1,790,538. The lowest adjusted cost was that of the offeror ranked third technically.

The technical committee recommended award to New Breed because it found that New Breed's proposal offered the greatest opportunity for success with the lowest fixed cost to the Postal Service. In addition, the committee found that New Breed's proposal offered the best value. New Breed was awarded a contract in the estimated amount of \$2,990,580 on May 14. AMR received a debriefing on May 28; its protest was timely received on June 4.

In its protest, AMR contends that the award of the contract to New Breed failed to meet the Postal Service's guidelines to pursue contracts that are "in the best interests of the Postal Service." More specifically, AMR wishes to have its proposal reconsidered because its proposal was determined to be technically acceptable and its cost was significantly lower than the winning proposal. The protester asserts that it has the resources and experience to perform the activities demanded by the solicitation. Finally, AMR argues that it met or exceeded all the requirements of the subject solicitation. AMR asks that all actions involving this contract be suspended until the protest is resolved.^{1/}

The contracting officer reports that all offerors in the competitive range had proposals that were technically acceptable. However, he adds that when measured against the technical criteria set forth in Section M.2 of the solicitation, New Breed's proposal was superior to the others in the areas of "Understanding the Requirement" and "Organization and Management."

The contracting officer states that while AMR and New Breed's proposals were

^{2/} This office does not have the authority to suspend contract performance while a protest is pending. That authority rests with the contracting officer. See Procurement Manual ("PM") 4.5.5 b. which states that "[w]hen a protest [is] filed after award . . . , [t]he contracting officer, with the advice of assigned counsel, must determine whether it would be in the interest of the Postal Service to . . . suspend [contract] performance on a no-cost basis"

approximately equal in the third category, "Corporate Experience," AMR's proposal was downgraded because of deficiencies in its stated related experience. For instance, he notes that although AMR supported this area with the experience of one of its corporate divisions in baggage repair and engine maintenance, it proposed a stand-alone cost center and he could find no connection between the corporation's and the division's experience.

He adds that New Breed possesses an excellent performance history and that its proposal responded to all requirements in a readable, businesslike fashion. The contracting officer concludes that although both firms presented straightforward proposals and both were technically acceptable, New Breed's proposal was clearly technically superior to that of AMR's.

He further points out that Section M.3 of the solicitation stated that only the estimated cost proposed for the basic period - one year plus startup time - was evaluated for award purposes. He states that, in accordance with Section M.2. c. of the solicitation, the cost proposals were evaluated for realism, which consisted of adjusting the proposed cost of each element of the offeror's proposal, with the assistance of a cost audit, to establish a "recommended cost line." Each proposal's recommended cost line was further adjusted for major cost differences such as 1) technical elements specific to one or more, but not all the offerors' solutions and 2) technical elements included in all offerors' solutions but calculated differently.^{4/} Lastly, a fee was added and a bottom-line comparison made.

The contracting officer explains that once these adjustments had been made, AMR's cost was determined to be \$1,842,764, while New Breed's cost was determined to be \$2,161,382.^{1/} He reports that the major cost difference stemmed from New Breed's higher repair material costs. He adds that AMR's labor rates were adjusted up by \$219,526 because it failed to use the required Department of Labor rates in its proposed labor costs. He states that AMR's estimates for its other direct costs were higher than New Breed's but its estimates of indirect costs and its award fee were lower.

The contracting officer reports that he determined that the technically superior solution offered by New Breed for this requirement more than outweighed the difference between its estimated cost and that of the other offerors. Responding to the protester's concern about its significantly lower cost, the contracting officer refers to

^{3/} For instance, the contracting officer reports that the only significant technical element that was a part of all proposals but which was the subject of differing costs in the individual proposals was repair materials. During cost analysis both New Breed and AMR's estimates for this item were decreased slightly. According to the contracting officer, New Breed supported its estimate for repair materials better than AMR did.

^{4/} The contracting officer does not explain the variance between his figures and those reached by the technical committee.

the stated award criteria in Section M for support that award was not to be based solely on a lower cost.

The contracting officer asserts that proposals were evaluated in accordance with the factors specified in the solicitation and that the evaluation clearly resulted in a best value decision award to New Breed. He adds that the trade-off between technical factors and cost is reasonable and within his discretion as a contracting officer. He repeats that although AMR's proposal was evaluated as being technically acceptable, New Breed's proposal was superior. He recommends that AMR's protest be denied.^{4/}

AMR initially laments the general lack of information it has received concerning the award decision, adding that the lack of information seriously disadvantaged it in rebutting the contracting officer's statement.^{4/} That notwithstanding, AMR believes that the contracting officer's statement evidences either a lack of understanding of its proposal or serious errors in its proposal's evaluation.

AMR disagrees with the contracting officer's statement that it supported its corporate experience section of its proposal with examples of its baggage repair and engine maintenance programs. AMR alleges that it gave two instances of its direct corporate experience, one in baggage repair and the other in parts reclamation, not engine maintenance. The protester adds that although "Corporate Experience" was only the third most important category for evaluation, it believes that its experience should have been reflected positively by the Postal Service and it saw no indication of this in the contracting officer's statement.

In addition, AMR argues that a stand-alone cost center was proposed to assist it in giving this Postal Service project high priority and to ensure its ability to comply with Postal Service cost allocation requirements. It adds that it emphasized this point in its discussions with the Postal Service auditors.

AMR disagrees with the contracting officer's remark that it failed to substantiate the cost of its repair materials. It explains that it used the mailbag repair estimates supplied by the Postal Service to develop its labor estimates. It states that while it could not supply the same level of information for the container repair parts because the information supplied by the Postal Service was indecipherable, it did supply a rationale for its estimate.

AMR points out that it was much more accurate in its estimate than New Breed, whose

^{5/} New Breed briefly commented that it concurred with the contracting officer's response.

^{6/} The record reflects that AMR received a debriefing. While AMR should have received information concerning "the significant weak or deficient factors in [its own] proposal, . . . point-by-point comparisons with other offerors' proposals must not be made." PM 4.1.5 j.3.

costs AMR alleges were four times that of AMR and the Postal Service's estimate. It believes this should have been given some weight. As a last point, AMR states that these alleged deficiencies were not mentioned in its telephone debriefing, making it appear that these criticisms were determined after the fact. The protester requests that the award to New Breed be overturned and the requirement be resolicited.

The contracting officer emphasizes in his rebuttal comments that there was no "price differential" between AMR and New Breed's proposals since the award was cost-based.¹⁷ He stresses that his report merely explained how AMR's proposed costs were greater than New Breed's, except in the area of repair materials. He adds that in order to give repair material cost estimates, offerors had to make some assumptions. However, he was unaware, from AMR's proposal, of any assumption it made regarding this cost. He states that it is unlikely that AMR even calculated costs for certain materials, while New Breed provided a cost for each type of container.

Concerning AMR's proposed corporate experience, the contracting officer explains that AMR did not state in its proposal that it had experience in certain areas. He expressed how confusing AMR's proposal was in determining whether the offeror was the parent company or a subsidiary division. Finally, the contracting officer states that during its debriefing, AMR refused to listen to information concerning its proposal and instead concentrated on asking questions concerning why New Breed's proposal was better.

Discussion

AMR's basic argument is that because its proposal was technically equal to the awardee's proposal and its proposal was lower priced, its offer was the best value to the Postal Service and it should have received award. The solicitation stated in Section M that award would be made "to the responsible offeror that, in the judgment of the Postal Service, presents the best value to the Postal Service, both technical and cost considered." The solicitation also stated that the technical proposals would be evaluated based upon four technical evaluation criteria, with corresponding subcriteria, and that the first two criteria were worth significantly more than the other two factors.

Where, as here, the solicitation provides for the consideration of factors other than [cost], it is not inappropriate for award to be made to other than the lowest-[cost] offeror. When [cost] is not the sole award factor, the contracting officer is responsible for trade-off judgments involving cost and other evaluation factors.

Marathon, Inc., P.S. Protest No. 91-14, March 28, 1991; see also PM 4.1.5 b.2.

¹⁷ This is merely a difference in semantics. According to PM 5.3.2 c., price "means cost plus any fee or profit applicable to the contract type." Using this definition, the protester is correct that "price" was evaluated and not just cost. Although this was a cost-reimbursement contract type, offerors were allowed to propose an award fee which was evaluated along with their proposed cost.

Further,

[W]here the agency must bear the additional expense for the proposal it views as superior, the relevant consideration is not whether we believe that the more expensive, higher rated proposal is worth the extra cost, but whether we can discern from the record a reasonable factual basis for the agency's choice.

Marathon, supra, (quoting Litton Systems, Inc., Comp. Gen. Dec. B-239123, 90-2 CPD & 114, August 7, 1990). The contracting officer states that New Breed's proposal was technically superior to AMR's proposal in the areas of "Understanding the Requirement" and "Organization and Management", the two technical evaluation criteria that were worth significantly more than the other two factors. The contracting officer also states that New Breed's cost was higher than AMR's, after adjustment for cost realism, although as evaluated the difference was not as great as the difference in cost as proposed.^{1/} Finally, the contracting officer states that award was made to New Breed because he determined that New Breed's technically superior proposal offered the better value to the Postal Service.

We cannot discern from the record a reasonable, factual basis for the contracting officer's conclusions. The statement that New Breed's proposal was technically superior to AMR's proposal lacks support in the record. The technical review committee gave New Breed the lowest score of the offerors within the competitive range - a raw score of 80.4, of which 31.2 points were for "Understanding the Requirement" and 26.8 points were for "Organization and Management." That raw score

^{B/} Even though the solicitation did not warn offerors that a cost adjustment would be made, such an adjustment was not improper.

When an agency evaluates proposals for the award of a cost reimbursement contract, an offeror's proposed estimated costs of contract performance and proposed fees are not considered controlling since an offeror's estimated costs may not provide valid indications of final actual costs that the government is required, within certain limits, to pay. 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. Because the contracting agency is in the best position to make this cost realism determination, our review is limited to determining whether the agency's cost realism analysis is reasonably based and not arbitrary.

General Research Corporation Comp. Gen. Dec. B-241569, 91-1 CPD & 183, February 19, 1991 (emphasis added)(citations omitted); see also PM 4.1.5 d. "[O]nce the [the contracting officer] sought proposals for a cost reimbursement contract, [he] was obliged [by the regulations] to make a cost realism assessment, rather than simply accept proposed costs at face value." Varian Associates, Inc., Comp. Gen. Dec. B-209658, 83-1 CPD & 658, June 15, 1983. However, "it would have been preferable for the [contracting officer] to have . . . state[d] specifically [in the solicitation] that he would evaluate the reasonableness and realism of proposed costs and might adjust them accordingly." Id.

was translated into a percentage of 53.7. AMR received a raw score of 88.9, with 36 points for "Understanding the Requirement" and 28.4 points for "Organization and Management." The committee translated that score into a percentage of 59.3, the second highest technical score. The contracting officer has failed to explain why he believes that the scores given by the technical committee were incorrect.^{1/}

"[S]election officials are not bound by the recommendations made by evaluation and advisory groups. This is so even though it is the . . . evaluation panel members who may normally be expected to have the technical expertise relevant to the technical evaluation of proposals." Grey Advertising, Inc., Comp. Gen. Dec. B-184825, 76-1 CPD & 325, May 14, 1976 (citations omitted). However, although a contracting officer does not have to agree with the technical evaluation committee, when he doesn't, he must explain why. "Implicit in the requirement that the agency's judgment be reasonable is the requirement that these judgments be documented in sufficient detail to show they are not arbitrary." S-Cubed, A Division of Maxwell Laboratories, Inc., Comp. Gen. Dec. B-242871, 91-1 CPD & 571, June 17, 1991.

Similarly, we cannot discern the basis on which the contracting officer further revised the evaluated costs of the two offerors, since the contracting officer has offered no explanation for those adjustments. Again, in order for an agency's judgment in a matter to be deemed reasonable, the basis for that judgment must be documented to a degree that one reviewing it can determine that it is not arbitrary. S-Cubed, A Division of Maxwell Laboratories, Inc., *supra*. Such documentation was lacking in this case, eroding the confidence we can place in the cost adjustments made here.

The protest is sustained. We now turn to the relief available to the protester.

Since award has been made and performance begun, we are limited in the relief we can grant. When contract performance is underway, whether to require termination of the contract 'depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission.'

Cummins-Allison Corporation, P.S. Protest No. 91-18, June 4, 1991 (quoting Inforex Corporation, P.S. Protest No. 78-12, June 26, 1978).

^{9/} The technical committee's recommendation is not free from flaws, since it recommended award to New Breed on the basis of cost while it appeared to overlook a lower-cost offer with a higher technical score. When the contracting officer reviewed the technical committee's recommendation, however, he did not reform it in that regard. Instead, he re-evaluated New Breed's technical and price scores, but failed to document the bases for the adjustments which he made.

The procurement deficiencies in this case are serious and call into question the integrity of the competitive procurement system. However, we cannot establish that AMR has necessarily been prejudiced by the selection of New Breed since there was another offerer rated higher technically than New Breed but with a lower adjusted cost than both AMR and New Breed.

Moreover, there are, as of the date of this decision, only eight months remaining for performance under the initial term of the contract. A termination for convenience of New Breed's contract at this point would mean significant termination costs to the Postal Service, as well as a disruption in the mail equipment processing and repair currently being handled by New Breed. Based upon this analysis, we decline to order termination of the New Breed contract.

However, since the contract contains three one-year options which have not yet been exercised, the contracting officer is hereby directed not to exercise those options, but to resolicit for any requirement for any required services for the option year. AMR and all other offerors may respond to that solicitation. Cummins-Allison Corporation, supra.

The protest is sustained.

For the General Counsel:

William J. Jones