

The number of hours required to perform each audit are ESTIMATED only for evaluation purposes. Each offeror must propose their [sic] plan to successfully complete the requirements.

Second, Section M.2 was amended to replace the three criteria previously listed with the statement that "TECHNICAL SUPERIORITY IS THE PRIMARY CONSIDERATION." However, Attachment VI to the solicitation retained the original three evaluation criteria, and assigned weights to them as follows: technical approach - 40%; organization, staffing and services - 25%; and personnel qualifications - 35%. Third, Attachment V, Section 3, which dealt with general instructions for the preparation of cost proposals, was amended to note that "any discount offered must include a description/illustration of the formula used to arrive at the proposed discounted fully loaded rates." Fourth, the tradeoff between technical and cost factors was clarified as follows:

Q.33 How is cost evaluated against the other evaluation factors listed?

A.33 Contract award will be based on Best Value Analysis. The technical findings are compared against cost in determining which offer (firm) affords the best overall value to the Postal Service. Technical proposals will be a greater consideration factor [sic] than cost, and award is [sic] made on a technical and cost tradeoff. The offerors' technical quality is compared against the offerors' cost to determine if the differences justify paying the cost for the relative quality required.

Finally, the amendment clarified that proposals should be made on a time and materials basis by deleting language which mistakenly referred to "fixed-price" portions of the solicitation.

After a pre-proposal conference held May 18, Amendment A02 was issued on May 30. In response to questions concerning the basis for the estimated labor hours and how they would be used in the evaluation of proposals, the amendment stated:

The hours for FY 1990 were based on our projection of the necessary requirements to perform the audit. ... The hours in the "Work Volume Assumption" were developed as a guideline to assist bidders in preparing their plan, "Labor Hours Only Proposal" and cost/price proposal. The guidelines will be used as a general, but not specific, benchmark for bidder's [sic] proposals.

Proposals were received on June 22 from several offerors, including Ernst and Coopers.^{1/} After technical and price analysis, the contracting officer transmitted a letter to the offerors which requested responses to technical and pricing questions, allowed the offerors to make improvements to their proposals, and set September 25 as

^{3/} Ernst's proposal was originally submitted by Arthur Young & Co. During the period of contract formation, Ernst & Whinney was finalizing a merger with Arthur Young. Therefore, while the proposal was submitted by Arthur Young, the contract was entered into with the merged firm of Ernst & Young.

the due date for the receipt of best and final offerors. One requirement addressed to all offerors was as follows:

Any discount formula must be presented in a clear and detailed manner showing how the discount formula calculation was arrived at. Any discount or reduced hourly rate must be reflected in the proposal and clearly identify the method used to apply the same discount formula to all work performed under the contract.

Best and final offers were received and evaluated. Ernst's proposal received the highest technical score, 84; Coopers was second highest at 82. As to pricing, Ernst offered the lowest fully loaded labor rates and Coopers offered the highest fully loaded labor rates. Both offerors offered discounts. Coopers offered to provide 3,500 hours of effort during the first year to the Postal Service at no cost and to reduce the rates for six labor categories by between 14.82% and 16.15% during the contract term. Ernst proposed to discount its rates by approximately 24% and to establish a ceiling on the number of hours charged; if its actual hours exceeded its estimate for the number of hours worked, it would not charge any amount above the its estimate, while the Postal Service would have to pay only for the actual hours worked if those hours came in under the estimated amount.

The contracting officer compared the two proposals and found that Ernst's represented the better value to the Postal Service. Ernst had the higher technical score and the lower fully loaded hourly rates, and the price ceiling was of considerable importance in lessening the risk of increased costs to the Postal Service. While Coopers' average fully loaded direct labor rate was slightly below that of Ernst, that was not deemed to be of sufficient importance to override Ernst's advantages in other areas.

On November 7, the contracting officer notified Coopers of her intent to make contract award to Ernst. Award was made to Ernst on November 28. After receipt of the contracting officer's letter of November 7, Coopers tried to schedule a debriefing with the contracting officer,^{4/} and a debriefing was eventually held on December 18. Coopers' protest followed on December 19.

Coopers first claims that the evaluation factors were not followed because price, and not technical considerations, was given controlling weight in the evaluation of proposals and that there was no technical ranking of offerors. Coopers contends that the Postal Service's failure to award a contract in accordance with the solicitation requirements was a violation of Procurement Manual (PM) 4.1.4 a.^{5/} and requires termination of Ernst's contract. Additionally, Coopers claims that, because its proposal was technically equivalent to Ernst's, it should have received award because its

^{4/} It appears that Coopers did not first request a debriefing until November 22, and then, in that letter, only requested a debriefing at the contracting officer's "earliest possible convenience, preferably before December 8, 1989."

^{5/} This section requires proposals to be evaluated in accordance with the evaluation criteria set forth in the solicitation.

average fully loaded hourly rate was much less than Ernst's, and its proposal was, therefore, much lower in cost.¹⁷

Second, Coopers states that the Postal Service has erroneously estimated Ernst's proposal because the ceiling price which Ernst placed in its proposal would make Ernst the lowest cost proposal only if the Postal Service knew that its estimated labor hours had been grossly understated. Based on its proposal and its guess at what Ernst proposed, Coopers concludes that Ernst's proposal is more expensive than Coopers for an equal amount of work and is less expensive only if the hours to be worked total about 13% above the Postal Service's estimate. Coopers states that the miscalculation of Ernst's proposal violated the solicitation's requirements,¹⁸ and that Coopers proposal was lower in cost and should have been selected for award. Coopers requests termination of Ernst's contract and award to it, or, in the alternative, resolicitation of the requirement.¹⁹

The contracting officer states the facts concerning the evaluation and award of the contracts as set forth above and maintains that the proposals were evaluated in accordance with the PM and the solicitation. She notes that both the solicitation and the PM provided that award need not be made to the lowest cost proposal.²⁰ Ernst proposed and was awarded a time and materials contract on an equal basis with other offerors. Ernst offered the lowest hourly labor rate. Average hourly labor rates were computed as an element of price analysis only, and not as a part of the evaluation process, since the offeror would be reimbursed on the basis of their proposed rates, rather than any average rates. Therefore, Coopers' analysis which shows that it offered the lowest cost proposal is incorrect because it is based on average rates.

She claims that Coopers is also mistaken about the discount offered by Ernst. This ceiling does not convert the contract into a fixed-price contract, but, in effect, offers to provide all time and materials above a certain amount at no cost to the Post Service. When viewed from this perspective, it is no different than Cooper's offer to provide 3,500 hours at no cost in the first year, except that the hours are unspecified. The contracting officer recommends that the protest be denied.

¹⁷ Cooper disputes the contracting officer's calculation of its average rate and set forth its own calculation which results in a somewhat lower rate for the first year of performance. We need not determine which calculation is correct.

¹⁸ In addition, Coopers claims that PM 4.1.5 b., which requires awards to be made consistent with the requirements of the solicitation, has also been transgressed.

¹⁹ Coopers also requests protest costs, attorney fees and proposal preparation costs. We are without statutory or regulatory authority to award these costs. See DHL Airways, Inc., P.S. Protest No. 89-36, July 7, 1989.

²⁰ PM 4.1.5 d. provides that, in awarding cost-reimbursable contracts, "the cost proposal is not controlling, since advance estimates of cost may not be valid indicators of final actual costs," and, further, that there is no requirement that such contracts be awarded on the basis of cost.

In two extensive supplemental submissions, Coopers further expounds its protest position. While many comments were somewhat repetitive, some additional points were made. Coopers claims that Ernst's cost ceiling will be of no value to the Postal Service because it is highly unlikely that the Postal Service will require enough hours to be worked for the ceiling to become applicable. Coopers notes that the contracting officer failed to allow for certain discounts it offered on some of its labor rate positions. It also explains that cost should be the determining factor because the chairman of the evaluation committee told it at its debriefing that the two offers were technically equal.

Coopers assumes without support that the use of the average rates to compare costs is justified, and maintains at length that, given this basis of calculation, its offer was substantially lower in cost than Ernst's. It claims that the fully loaded rates are irrelevant because this contract is not an indefinite quantity/indefinite delivery contract, and that the proposed labor mix must be evaluated to determine which proposal offers the best value. Coopers asserts that the labor mix proposed by the offerors could not be changed during contract performance, and, therefore, any analysis of cost had to take into account the average labor rates based on the proposed labor mix.^{10/}

Ernst has submitted two sets of comments which essentially track the arguments made by the contracting officer. It opines that the contracting officer clearly stated at the pre-proposal conference that costs would be evaluated by review of the offerors' fully loaded labor rates,^{11/} and that its proposal provided the lowest labor rates. Ernst also notes that its ceiling on yearly costs was of real benefit to the Postal Service as limiting the annual expenditures under this contract regardless of the amount of work performed. It further states that assuming a constant mix of labor hours over the term of contract performance is highly unlikely due to changes in various factors during such performance.

^{10/} Coopers requested the technical scores of itself and Ernst and the technical evaluation of its proposal. The contracting officer opposed this request, alleging that release of this data would violate the deliberative process privilege and conflict with our prior practice of reviewing scoring and technical evaluations in camera. See Documail Systems Division, Bell & Howell Corporation P.S. Protest No. 85-26, June 20, 1985. We released to Coopers the technical scores and ranking as consistent with the Procurement Manual, and withheld any additional information concerning the technical evaluation of its proposal. See Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989. Coopers has submitted redacted versions of its comments to the interested parties in order to protect its own confidential and proprietary information.

^{11/} The transcript of the conference reads, in pertinent part, as follows:

Question: I was just wondering if we could have you walk through how the pricing would be evaluated and specifically, what factors.

Answer: The pricing, we are going to look at your proposed fully loaded labor rates and how you arrive at those rates. And basically, we are going to do a trade off. In other words, we are going to look at the technical scores of offerors that are considered technically acceptable. It is then compared against your rates and whichever company we feel offers the best value to the Postal Service is the company that we will award the contract to.

KPMG Peat Marwick has also submitted comments. It complains about the scope and extent of the debriefing it was given and asserts its belief that its proposal was technically equivalent to that of Ernst. It further opines that award could only be made on the basis of technical scores, rather than on cost proposals, and that the solicitation's terminology was vague.

At the outset, there is the question of whether Coopers' protest has been timely filed.¹² We lack authority to decide any protest which has been untimely filed. See, e.g., International Jet Aviation Services, P.S. Protest No. 87-36, September 1, 1987; Southern California Copico, Inc., P.S. Protest No. 83-2, August 31, 1983 (collecting cases). Even where actions of the contracting officer have contributed to the untimeliness of a protest, our past decisions have been to the effect that the timeliness standard cannot be ignored. See Amerijet International, Inc., P.S. Protest No. 87-45, September 2, 1987 (delayed receipt of notice of award does not waive timeliness period when the protester knew of exclusion of its proposal from the competitive range prior to the issuance of the notice); CACI Systems Integration, Inc., P.S. Protest No. 87-79, August 29, 1987 (failure by contracting officer to disclose information pursuant to a Freedom of Information Act request does not waive the running of the timeliness period); Cincom Systems, Inc., P.S. Protest No. 76-80, April 25, 1977 (delay of several months in debriefing and disclosure of information does not waive the timeliness period); Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985 (delay in seeking or obtaining information relevant to a protest does not extend the time in which a protest may be filed); Computer Systems & Resources P.S. Protest No. 87-38, June 24, 1987 (bid protest regulations may not be waived by the actions or representations of the contracting officer); but see American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988 (violation of regulatory requirement to notify bidders of award which made filing a timely protest impossible tolls running of the timeliness period).

On its face, Coopers' protest was untimely. It knew in early November that award would be made to Ernst and that its proposal was to be rejected. Coopers waited approximately ten days after receipt of this knowledge before even requesting a debriefing, and then requested a debriefing with language which, at best, failed to suggest exigent need.¹³

In response to this analysis, Coopers has set forth several arguments. First, it states that it diligently attempted to schedule a debriefing, requesting one only three days after the contract was awarded to Ernst. It asserts that the contracting officer was

¹² Although no party to this proceeding has raised the issue of timeliness, we may do sua sponte because it affects the jurisdiction of our office to adjudicate Coopers' assertions. See Pitney Bowes, Inc., On Reconsideration, P.S. Protest No. 89-86, January 30, 1990; Evergreen International Airlines, Inc., On Reconsideration, P.S. Protest No. 86-07, June 9, 1986. This issue was raised during Coopers' protest conference and Coopers was offered an opportunity to address it prior to this decision.

¹³ Coopers acknowledges that it did not go above the contracting officer's immediate supervisor in attempting to schedule a debriefing.

responsible for the delays which resulted in the debriefing being held on December 18 and the protest being filed on December 19 and that Coopers should not be held responsible for Postal Service caused delays. Coopers alleges that its protest was timely filed within 10 working days of its knowledge of the ground for the protest, of which it became aware only at the debriefing. Coopers distinguishes Cincom Systems, Inc., P.S. Protest No. 76-80, April 25, 1977, as a case in which the protest was untimely because it was filed later than the allowable period after contract award, and cites Huntington Laboratories, Inc., P.S. Protest No. 89-46, November 15, 1989, as a case in which the protester could not have known of the ground for the protest from the notice of award, only learned of the grounds at a later debriefing, and was found to be timely as to the issues raised in the debriefing.

Coopers' arguments are unavailing given our precedent. Its basic premise is faulty; "a protester 'is charged with knowledge of a basis for protest' when the contracting officer conveys to the protester a position adverse to the protester's interest." Computer Systems & Resources supra.¹⁷ The "grounds for protest arise when the protester has learned of an agency's action or intended action which is inconsistent with what the protester believes to be correct." ARA Services, Inc., P.S. Protest No. 81-48, November 17, 1981. Review of past cases illustrates the application of these principles.

In ARA Services, Inc, supra, the information on which the protest was to be based was the contracting officer's notification to the protester that another offeror's proposal had been found to be more favorable to the Postal Service, and the latest possible event giving the necessary information was the actual award to the competitor. In South-West Utilities, P.S. Protest No. 83-29, October 21, 1983, the primary basis of the protest, the protester's lower price, was constructively known to the protester at the time of award. See also USA 800, Inc., P.S. Protest No. 89-90, February 15, 1990 (all elements of protest known at time of award notification).

The debriefing in this case does not help Coopers' position. In GTE Business Communications Systems, Inc., P.S. Protest No. 83-79, February 8, 1984, the timeliness period ran from the protester's notification that its proposal had been found to be technically unacceptable, not from information gathered at a subsequent debriefing. Similarly, in RISI Industries, et al., P.S. Protest Nos. 84-38, 84-44, 84-46, 84-51, July 31, 1984, a protest was deemed to be untimely when received more than 10 working days after telephonic notification of the offeror's unacceptable offer, even when a debriefing had not yet been held on the rejection of the offer.¹⁴

^{14/} In this regard, we note that oral notification of the basis for the protest is sufficient to start the timeliness period running; receipt of written notification is not required. Evans Suppliers Co., Inc., P.S. Protest No. 84-42, June 21, 1984.

^{15/} We have reviewed the case cited by Coopers for the proposition that its protest is timely. In Huntington Laboratories, Inc, supra, the primary concern of the protest was the technical evaluation of its offer, which was not apparent from a review of the contract awarded to the successful offeror. Here, the major point made by Coopers, that it was much lower priced than Ernst, would have been apparent from a review of the contract award. Therefore, Huntington Laboratories is not applicable to this case.

Coopers knew of the Postal Service's intent to award a contract to Ernst in early November. It knew of the award to Ernst by December 1. Coopers' protest, received December 19, was received more than 10 working days after the information on which the protest was based was known or should have been known. Given that Coopers' major issue is that its proposal was lower priced than Ernst's, the date of award (November 28) was the latest date in which the necessary information was available to Coopers for its protest. We cannot waive or modify the requirements of timeliness set forth in our bid protest regulations. It is for the protester to gather the information it needs to protest in a timely manner, and its failure to do so, while unfortunate, does not mean that its otherwise untimely protest is rendered timely. Cf. Tulsa Diamond Manufacturing Corp., et al., P.S. Protest Nos. 85-18, 85-20, 85-23, June 17, 1985. We must dismiss its protest. However, we will briefly comment on some of the issues raised by Coopers for purposes of clarification and future consideration. See, e.g., Juanita Protz, P.S. Protest No. 80-73, April 14, 1981; Parrino Enterprises, P.S. Protest No. 80-34, August 5, 1980.

The solicitation stated that technical factors would be the major criteria upon which award would be based. While the numerical scores were close, there is no dispute that Ernst's proposal was given a higher technical score, reflecting preferable technical characteristics. There is no evidence that this evaluation was arbitrary or capricious. In her contemporaneous negotiation memorandum, the contracting officer gave this difference significant weight in determining which offeror's proposal presented the best value to the Postal Service.

That Coopers was told by the chairman of the evaluation committee something that differed from the contracting officer's view of the technical merits of the offers is immaterial. The decision to be made as to the weight to be given to the technical scores is for the contracting officer, and we do not ascertain any evidence here that she acted in an arbitrary manner in her evaluation. See Chamberlain Manufacturing Corporation, P.S. Protest No. 85-83, February 14, 1986. Second, insofar as Coopers may have been misled by what was told to them by the committee chairman, that does not affect the validity of a procurement that was otherwise not objectionable.

Coopers also mistakenly assumes that cost evaluation had to be performed based on average fully loaded costs. We can find for this assumption no support in the protest file. What little evidence exists supports the contracting officer's use of fully loaded costs as the correct measure to evaluate the offeror's cost proposals. These are the costs the Postal Service will have to pay during contract performance and were specifically referred to in response to a pre-proposal question regarding proposal evaluation. The average cost figures were used by the contracting officer only for price analysis purposes. Again, there is no dispute that Ernst offered the lowest fully loaded labor rates.

Finally, Ernst's offer to cap the costs of contract performance did have a value to the Postal Service. The assumption by Ernst of some of the risk which would normally fall on the Postal Service in a time and materials contract was a proper discount and could well be taken into account by the contracting officer in her evaluation of which proposal offered the greatest value.

The protest is dismissed.

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[checked against original JLS 5/26/93]