Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: Kay and Associates, Inc.

File: B-258243.7

Date: September 7, 1995

Laura K. Kennedy, Esq., Kevin P. Connelly, Esq., and G. Matthew Koehl, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.
Thomas J. Madden, Esq., James F. Worrall, Esq., and Jerome S. Gabig, Jr., Esq., Venable, Baetjer, Howard & Civiletti, for Beech Aerospace Services, Inc., an interested party.
William P. McGinnies, Esq., Department of the Treasury, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency did not conduct a meaningful cost/technical tradeoff before making award to higher-rated, higher-cost offeror for aircraft maintenance services, is denied where (1) cost was less important than the technical factors and (2) the source selection authority identified specific technical discriminators in the awardee's proposal which were likely to assure a highly motivated, productive and stable work force, and increase the operational readiness and mission capability of the aircraft; contrary to protester's argument, there is no requirement that selection of a higher cost proposal be justified through an exact quantification of the dollar value to the agency of the proposal's technical superiority.

DECISION

Kay and Associates, Inc. protests the determination of the Department of the Treasury, U.S. Customs Service, to affirm its previous award of a contract to Beech Aerospace Services, Inc., under request for proposals (RFP) No. CS-94-004, for aircraft maintenance and related services. Customs again selected Beech's proposal as most advantageous to the government after having reopened negotiations and requested revised best and final offers (BAFO) pursuant to the corrective action recommended in our decision Serv-Air, Inc.; Kay and Assocs., Inc., B-258243 et al., Dec. 28, 1994, 96-1 CPD ¶ ___. Kay challenges the evaluation of cost proposals and the overall cost/technical tradeoff.

We deny the protest.

The RFP contemplated the award of a cost-plus-award-fee contract for a base year with 4 option years to maintain aircraft used by Customs to detect, interdict, track and apprehend aircraft, ships and land vehicles attempting to smuggle contraband into the United States. The RFP provided that the contractor "shall provide program management, aircraft maintenance, logistics, supply and Electronic Data Processing (EDP) support requirements necessary to ensure that Customs has the numbers, types and properly configured aircraft available where and when required to meet all Customs aviation operational commitments."

The solicitation generally provided for award to be made to the offeror "whose proposal offers the best value to the Government in terms of technical and cost rather than to the proposal offering the lowest estimated cost." The RFP listed three specific technical evaluation factors: (1) technical approach--including staffing, methodology and past performance--and (2) quality management, which were of equal importance and "four times greater than" (3) phase-in and phase-out. The solicitation stated that cost was less important than--"not as critical as"--the technical factors. Cost proposals were to be evaluated for allowability, allocability, realism and risk. The RFP cautioned that the agency "is concerned with the quality and stability of the work force to be employed on this contract. . . . The cost proposal will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with the technical proposal."

Six proposals were received by the closing time. Four--including Kay's, Beech's and Serv-Air's--were included in the competitive range. Following discussions with the offerors, the agency requested best and final offers (BAFO). Based upon its evaluation of BAFOs, Customs determined that Beech's proposal, which received a technical rating of outstanding (blue), was technically superior to the other proposals, which received ratings of good (green), and that it offered the overall best value to the government. Upon learning of the award to Beech, Kay and Serv-Air protested to our Office.

We sustained Kay's protest on the basis that Customs had failed to conduct meaningful discussions concerning its cost proposal. Although Kay's initial cost proposal indicated that its historic general and administrative (G&A) rates for 1991, 1992, and 1993 were approximately [DELETED] percent, it offered G&A rates of [DELETED] percent for labor and [DELETED] percent for materials for the years 1994-1999 based upon assumptions concerning future business volume, including the impact of the contemplated contract. The proposal also stated that "[Kay] will accept a G&A ceiling rate arrangement in any contract awarded as a result of this proposal." While noting that the proposed rates were significantly lower than "recent actuals," the Defense Contract Audit Agency (DCAA) found the rates to be "reasonable and acceptable, so long as they are to be ceilings." Customs, however, did not discuss with Kay either DCAA's concerns or Kay's willingness to accept capped rates. Instead, when Kay in its BAFO reduced its proposed G&A rates for labor and materials to [DELETED] and [DELETED] percent, respectively, again indicating that it "will accept a G&A ceiling rate," Customs adjusted Kay's G&A rate upward to [DELETED] percent in its most probable cost evaluation. Although we agreed in our prior decision with Customs's position that Kay's proposal could reasonably be read as not including a contractually binding cap, we found that the agency improperly had failed to conduct discussions concerning Kay's apparent willingness to cap its G&A costs. (We denied Kay's remaining arguments and Serv-Air's protest.) We recommended that the agency reopen discussions with Kay in order to ascertain the appropriate G&A rates to be used in determining the G&A costs which would be incurred if the agency accepted Kay's proposal; conduct discussions with all other competitive range offerors; and request new BAFOs.

In response to our recommendation, Customs reopened discussions with offerors. Customs then requested BAFOs limited to changes in cost proposals. After further discussions, Customs requested an additional round of cost BAFOs. Customs determined that Beech's revised BAFO offered the overall best value to the government. Although Beech's proposal offered the highest proposed ($144,343,065) and evaluated ($148,660,391) costs, approximately 9 percent higher than Kay's ($132,493,716 proposed; $136,445,875 evaluated), the technical advantages of Beech's proposal, which was rated outstanding, were found to warrant its higher cost. Kay thereupon filed this protest with our Office.

COST RISK

Customs characterized Kay's proposal as offering a high cost risk--i.e., a risk that the total actual cost would vary significantly from the proposed cost. Customs based its assessment of a high cost risk in part on its determination that: (1) Kay's failure to propose any labor rate escalation (other than that required by Department of Labor wage rate determinations) over the 5 years of the contract would lead to a high turnover rate and low employee morale; (2) Kay's proposal of low pay rates for management and supervisory personnel could lead to the departure of supervisors familiar with the aircraft and site operations; and (3) Kay's failure to offer a shift differential--for working other than standard daytime shifts--to any shift employees (other than employees covered by a union agreement at one site), when all shift employees were currently being paid shift differential premiums, could lead to the departure of shift employees. Customs concluded that higher compensation than proposed by Kay (and evaluated) may be necessary in order to motivate and retain a productive work force. In addition, Customs questioned Kay's offer in its revised BAFO to cap its G&A rate at [DELETED] percent; the agency expressed concern that Kay could seek to recover the estimated $[DELETED] million cost of the cap as part of overhead and/or that the cap would result in a disincentive to quality performance since the cost of the cap greatly exceeded Kay's share of the fee and Kay "would be working for little or no profit."

Kay challenges Customs's assessment. According to Kay, it has neither the intention nor the opportunity under the contemplated contract to circumvent the cost cap. Further, Kay points out that it stated in its BAFO that it was offering lower G&A rates based on an anticipated increase in business volume that would lower actual G&A. Kay claims that if Customs had raised its concerns in this regard during discussions, it could have furnished additional information demonstrating its ability to absorb any excess G&A costs and still earn a reasonable profit performing the contract. Kay argues that Customs's failure to raise this matter during the reopened discussions constituted a failure to conduct meaningful discussions.

Competitive prejudice is an essential element of a viable protest, and where no competitive prejudice is shown or is otherwise evident, our Office will not sustain a protest even if a deficiency in the procurement is evident. See Latins Am., Inc., 71 Comp. Gen. 436 (1992), 92-1 CPD ¶ 519; Anamet Labs., Inc., B-241002, Jan. 14, 1991, 91-1 CPD ¶ 31.

It is clear from the record that neither Customs's failure to discuss its concerns with respect to Kay's proposed G&A cap nor its underlying evaluation in this regard resulted in competitive prejudice to Kay. In justifying the selection of Beech's proposal, the source selection official (SSA) explained in the source selection statement that:

> "[Beech's] proposal will best fulfill the stated goals of attracting and retaining a qualified workforce to perform the maintenance services upon the Customs aircraft fleet. More specifically, I determine as follows:
>
> > [Beech's] outstanding technical features are worth an additional cost of $2.4 million per year (9 percent overall) to the Customs Service as compared to [Kay's] proposal.
> >
> > . . . . .
>
> "In light of the foregoing findings and determinations I have made, I find that [Beech] offers the best value to the Customs Service. This finding is further buttressed by the fact that I find that [Beech] presents the lowest cost risk to the Customs Service over the course of the contract."

We think it is clear from the record that, as maintained by Customs, the SSA determined that Beech's proposal offered the best value to the government even before consideration of the evaluated cost risk of Kay's proposal. In this regard, as indicated above, the SSA first determined that the technical strengths of Beech's proposal warranted the approximately $12 million additional cost relative to the evaluated cost of Kay's proposal, that is, the cost of Kay's proposal when the G&A cost cap is given full effect. Only then did the SSA consider the effect of the evaluated cost risk of Kay's proposal, finding that it "further buttressed" the results of the above cost/technical tradeoff. (Further, as discussed below, we find reasonable Customs's position that the technical strengths of Beech's proposal justified award to Beech even without consideration of the cost risk of Kay's proposal.) In any case, Customs's characterization of Kay's proposal as offering a high cost risk was based on a number of factors beyond the proposed G&A cost cap: inadequate labor rate escalation; low pay rates for management and supervisory personnel; and failure to offer a shift differential to most shift employees. Given Customs's determination that Kay's compensation package was insufficient to assure retention of a knowledgeable, motivated and productive work force, the agency could reasonably assign significant cost risk to Kay's proposal irrespective of any consideration of the proposed G&A cost cap.

Kay challenges Customs's failure to assign any cost risk to Beech's proposal to account for the fact that Beech did not propose to charge G&A on its estimated $55.1 million in reimbursable materials to be acquired under the contemplated contract. [DELETED] Again, however, it is clear that the evaluation of Beech's proposal in this regard did not result in competitive prejudice to Kay since, even if Beech's cost in this area was understated, there is no basis for concluding that adjusting them up to the level of Kay's would have materially affected the assessment of cost risk. Certainly, there is no reason to believe that the outcome of the cost/technical tradeoff would have been different even if the agency had added as much as [DELETED] percent, or $[DELETED] to the evaluated cost ($148,660,391) of Beech's proposal. Customs denies that Kay was prejudiced by the evaluation of cost risk, and we find its position to be reasonable. <u>See</u> <u>MR&S/AME, An MSC Joint Venture</u>, B-250313.2, Mar. 19, 1993, 93-1 CPD ¶ 245.

COST/TECHNICAL TRADEOFF

Kay argues that Customs did not conduct a meaningful cost/technical tradeoff. According to Kay, the agency did not adequately take into account the fact that the evaluated cost of Kay's proposal at the conclusion of the reopened negotiations was approximately $12.2 million lower than Beech's; the protester argues that the agency should have quantified the additional value offered by Beech's technical advantages. Kay maintains that its proposal, not Beech's, would have been rated the best value had Customs done so since, notwithstanding the fact that Beech's was rated outstanding and Kay's was rated good, Kay believes the proposals were close technically. (Kay expressly states that it does not challenge the results of the technical evaluation.)

In a negotiated procurement, there is no requirement that award be made on the basis of lowest cost unless the RFP so specifies. Henry H. Hackett & Sons, B-237181, Feb. 1, 1990, 90-1 CPD ¶ 136. Cost/technical tradeoffs may be made in deciding between competing proposals; the propriety of such a tradeoff turns not on the difference in technical scores or ratings per se, but on whether the agency's judgment concerning the significance of that difference was reasonable and adequately justified in light of the RFP evaluation scheme. Brunswick Defense, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225. Federal Acquisition Regulation § 15.612(d)(2) requires that documentation supporting the selection decision show the relative differences among proposals as well as their strengths, weaknesses and risks along with the basis and reasons for the decision. There is no requirement, however, that selection of a higher-cost proposal be justified through an exact quantification of the dollar value to the agency of the proposal's technical superiority. Picker Int'l, Inc., B-249699.3, Mar. 30, 1993, 93-1 CPD ¶ 275. Further, even where a selection official does not specifically discuss the cost/technical tradeoff in the selection decision document, we will not object to the tradeoff if it is clearly supported by the record. Maytag Aircraft Corp., B-237068.3, Apr. 26, 1990, 90-1 CPD ¶ 430.

The record supports the agency's cost/technical tradeoff. While Kay contends that the technical evaluation results were "very close," it is clear from the record that the overall rating of Beech's technical proposal as outstanding represented a considered determination that it offered significant technical advantages relative to the proposals (including Kay's) rated only good. In this regard, the SSA identified specific technical discriminators warranting Beech's higher cost. For example, noting that the incumbent had experienced an employee turnover rate of 17 percent in recent years, the SSA concluded that Beech's proposal of annual [DELETED]-percent pay raises and higher than required benefits would act as an incentive to assure a highly motivated, productive and stable work force. In contrast, Customs determined that Kay's overall compensation package--with inadequate labor rate escalation, low pay rates for management and supervisory personnel, and no shift differential for most shift employees--was insufficient to assure retention of a knowledgeable, motivated and productive work force. As another example, the SSA found that Beech's proposal to [DELETED] would shorten turnaround times by at least 3 days and thereby directly increase operational readiness and mission capability. Further, the SSA found that Beech's proposal of a [DELETED] would increase aircraft life expectancy and thereby reduce Customs's acquisition costs. The SSA also considered it a strength that Beech had proposed [DELETED] which would enable the agency to use [DELETED] lower stock levels and reduce aircraft downtime/increase operational readiness. Given the fact that cost was less important than the technical factors, we think that the agency's determination that the technical advantages offered by Beech's proposal warranted its approximately 9-percent higher evaluated cost relative to the cost of Kay's proposal, was reasonable.

The protest is denied.

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