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Comptroller General
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Decision

Matter of: E.L. Hamm & Associates, Inc.

File: B-280766.5

Date: December 29, 1999

Michael L. Sterling, Esq., and Howard W. Roth III, Esq., Vandeventer Black, for the protester.

Capt. Joseph L. Fuller, and Maj. Frank A. March, Department of the Army, for the agency.

Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency, in implementing recommendation in decision sustaining a protest, improperly reopened discussions with firm whose proposal had been eliminated from competitive range is denied where the firm's proposal had been recommended for elimination for award, but was not actually eliminated from the competitive range.
2. Challenge to cost realism analysis is denied where, notwithstanding limited analysis performed by agency, protester has not identified any prejudicial flaw in analysis and record does not indicate any weakness in analysis prejudiced protester.
3. Agency was not required to find awardee's proposed general and administrative rate unduly low where the rate was capped, and thus created no cost realism problem, and the rate was not so much lower than the firm's approved provisional rate as to require a finding that it created risk for the agency.

DECISION

E.L. Hamm & Associates, Inc. protests the proposed award of a cost-plus-award-fee contract to Computer Systems International, Inc. (CSI) by the Department of the Army, under request for proposals (RFP) No. DABT60-98-R-0014, for storage and warehouse services at the Army Training Support Center, Fort Eustis, Virginia. The award followed a reevaluation undertaken by the Army in response to an earlier protest, E.L. Hamm & Assocs., Inc., B-280766.3, Apr. 12, 1999, 99-1 CPD ¶ 85, against the award to Communication Technologies, Inc. (Comtek). We sustained Hamm's

earlier protest because we found that the cost realism evaluation was flawed. We concluded that it was unreasonable of the agency to accept Comtek's proposed use of employees in a particular labor category to perform certain tasks, and that the evaluation record contained no support for the agency's acceptance of Comtek's proposed overhead rate. Id. at 10. We recommended, among other things, that the Army hold discussions with all competitive range offerors, request and evaluate final revised proposals, and perform a proper cost evaluation, including a cost realism analysis. Id. at 10-11. Hamm alleges various improprieties with respect to the Army's implementation of our recommendation, and contends that the cost realism analysis was again flawed; as a result, the protester alleges, the cost/technical tradeoff was unreasonable.¹

We deny the protest.

BACKGROUND

Our prior decision, E.L. Hamm & Assocs., Inc., supra, contains much of the background for this procurement and our rationale for sustaining that protest, which will not be repeated here. However, for purposes of this decision, a brief recapitulation is necessary.

Under the RFP, the contract was to be awarded on a best value basis with technical quality more important than cost unless the technical quality of the proposals approached equality, in which case cost would be given greater importance and could control the award decision. RFP § M.3. The agency received 11 proposals and each was evaluated under the stated evaluation factors and subfactors using the [DELETED]. The contracting officer established an initial competitive range comprised of three proposals with an overall rating of [DELETED]. Hamm and CSI, whose proposals received an overall rating of [DELETED], were not included in the initial competitive range. On August 7, 1998, Hamm--the incumbent subcontractor for this requirement--filed a protest with our Office alleging that the Army improperly had excluded its initial proposal from the competitive range (our file number B-280766). After reviewing the protest, the agency decided to take corrective action by reestablishing the competitive range to include those initial proposals rated [DELETED], and Hamm withdrew its protest.

Thereafter, on August 18, the contracting officer made a second competitive range determination, increasing the number of offerors from three to six, including Hamm and CSI. Discussions were held and the six competitive range offerors were allowed to submit revised proposals. Comtek's proposal was determined to be the best value

¹ Hamm raised a number of arguments in support of its protest. We have considered them all and find none of them has merit. This decision will address only the more significant arguments.

to the government and the firm was selected for award. Preaward notification was sent to the five unsuccessful offerors and Hamm filed its second protest, which we sustained on April 12, 1999. E.L. Hamm & Assocs., Inc., supra.

In response to our decision, the agency amended the solicitation to revise the labor categories; reopened discussions with the competitive range offerors, including Hamm and CSI; and requested and received final revised proposals. RFP amends. 0003 and 0004. After individually evaluating the offerors' revised proposals under the non-cost evaluation factors and subfactors, the technical evaluation board (TEB) then met to discuss the merits of the revised proposals and reach a consensus in assigning an overall [DELETED] rating for each proposal. Proposals were ranked on the basis of the overall consensus ratings; [DELETED] in order to determine the ranking of those proposals that were assigned equal consensus ratings. Agency Report, Tab G, Executive Summary. The TEB prepared a consolidated report reflecting the individual members' narrative descriptions of each proposal's strengths, weaknesses, and risks and submitted this final technical evaluation report to the contracting officer, who served as the source selection authority (SSA) for this procurement. Id.

A cost analysis panel (CAP) evaluated the cost data submitted by each offeror with the assistance of the Defense Contract Audit Agency (DCAA) to determine the most probable cost (MPC) to the government. The record shows that the CAP evaluated each offeror's cost proposal for realism and reasonableness by analyzing the individual cost elements in the proposal. The evaluators considered the total proposed costs as one measure of cost realism; in the analysis of CSI's proposal, they concluded that the proposed costs were realistic. The CAP also reviewed the number of labor hours, and the mix of labor categories proposed. Most probable cost adjustments were made to four of the six offerors' proposed costs based on a comparison of each offeror's proposed staffing with the agency's estimate of the appropriate workforce (referred to in the record as the government's MPC) of [DELETED] employees. Agency Report, Tab I-2, Cost Realism Review, Aug. 31, 1999, at 1-2. As relevant to this protest, the CAP reduced CSI's proposed staffing [DELETED] and decreased CSI's proposed labor cost by [DELETED], because the CAP determined that CSI had overestimated its need for [DELETED]. Id.

The evaluators further reviewed overhead costs, other direct costs (such as material and supplies), general and administrative (G&A), base fee, and award fee. They considered whether escalation factors or other costs had been omitted, and concluded that none appeared to be missing. The proposed indirect rates were submitted to the Defense Contract Audit Agency (DCAA) for its review. Agency Report, Tab I, Cost Analysis--Final Revised Proposals.

In its review of CSI's cost, DCAA advised the agency that CSI's approved provisional G&A rate of [DELETED] was based on CSI year end data (September 30, 1998), a review of December 31, 1998 data, and projected events. DCAA further noted that

“[t]his rate does not include the impact from receipt of this contract or any changes since [December 31, 1998].” With regard to CSI’s overhead, DCAA noted that “[DELETED] and we have no information available.” DCAA Facsimile dated July 28, 1999.

The evaluation results for the three highly ranked offerors, after cost adjustments,² were as follows:

[DELETED]

The CAP performed a cost/technical tradeoff analysis between the proposals of Offeror A, as the highest technically ranked offeror with the highest cost, and Hamm, as the second highest technically ranked offeror. The analysis concluded that the [DELETED] non-cost benefits of the highest-ranked offeror, [DELETED], did not justify the cost premium of [DELETED]. Agency Report, Tab I-4, Cost/Technical Trade-off Analysis, at 1. The CAP then performed a cost/technical trade-off analysis comparing the proposals of Hamm and CSI. The analysis stated as follows:

The [DELETED] added benefits that were offered by [DELETED]. The cost difference between the evaluated costs of Hamm and [CSI] is [DELETED]. The cost premium for these [DELETED] benefits is not justified. [DELETED]. Based on the above, it is therefore determined that the non-cost benefits, when combined, offered by the higher priced technically superior offer from E.L. Hamm are not worth the price premium of [DELETED].

Agency Report, Tab I-4, Cost/Technical Trade-off Analysis, at 1.

On that basis, the CAP determined that CSI’s proposal represented the best overall value to the government and recommended award to that firm. Agency Report, Tab I, Cost Analysis--Final Revised Proposals, at 6-7. In the post-negotiation memorandum, which served as the source selection decision, the SSA agreed with the CAP’s assessment and selected CSI for award. Agency Report, Tab K, Post Negotiation Memorandum. After receiving notice of the proposed award and a debriefing, Hamm filed this protest, supplementing it based on information received in the agency report.

DISCUSSION

² The cost proposals submitted by Offeror A and CSI contained apparent minor errors in computation, which were resolved by the agency as clarifications. Agency Report, Tab I, Cost Analysis--Final Revised Proposals, at 1-3.

Hamm protests the agency's decision to reopen discussions with CSI in response to our decision and recommendation. Protest at 10. The protester points out that on November 20, 1998, the contract specialist recommended that CSI should be eliminated from further consideration because its revised proposal did not conform to the staffing requirements of the solicitation and was unrealistic as to cost.³ According to the protester, this recommendation was set forth in the price negotiation memorandum which was submitted to, and approved by, the acting director of the contracting activity on November 25, 1998. Protester's Comments at 15-16. On this basis, Hamm concludes that CSI was not a competitive range offeror at the time our decision was issued in April 1999 and that the Army impermissibly readmitted CSI into the competitive range, held discussions, and accepted a revised proposal from CSI in violation of Federal Acquisition Regulation (FAR) § 15.307(a). Protest at 11.

Hamm's position is without merit. Contrary to Hamm's contention, the record does not establish that CSI's proposal was eliminated from the second (post-August 1998) competitive range (whether in response to the contract specialist's recommendation or otherwise). It is true that, based on the results of the cost realism analysis of the October 26, 1998 revised proposals, the contract specialist determined that CSI's proposal was unrealistic and recommended in the November 20 document that CSI's proposal be eliminated from further consideration for award. Hamm makes much of the fact that this recommendation was specifically set forth in the price negotiation memorandum (which served as the source selection decision) and was approved by the acting director of the contracting activity. However, as the agency states, nothing in the record indicates that the contracting officer ever actually eliminated CSI's proposal from the second competitive range. Nor are we persuaded by the protester's arguments that the agency's November 25 preaward notice to CSI demonstrates that the firm's proposal had been eliminated from the competitive range. Protester's Comments at 16-17. The preaward notice certainly does not state that CSI's proposal was eliminated from the competitive range. Letter from Contracting Officer to CSI (Nov. 25, 1998). We find, therefore, that the Army reasonably considered CSI a competitive range offeror and that the agency's

³ The contract specialist also noted:

The ranking of proposals after cost analysis is set forth in the table below. [CSI's] revised [DELETED] failed the evaluation of cost realism and has been eliminated. They are no longer in line for consideration for award and will not be included in this trade-off analysis.

Protester's Response to Motion for Summary Dismissal, Tab X, Cost Analysis, Nov. 20, 1998, at 5.

decision to conduct discussions with CSI was thus consistent with our recommendation.⁴

Even if we assume, arguendo, that there was some doubt about whether CSI's proposal was in the competitive range, we would not question the agency's implementing our recommendation by including CSI in the reopened discussions. The details of implementing our protest recommendations for corrective action are generally within the sound discretion and judgment of the contracting agency. QuanTech, Inc., B-265869.2, Mar. 20, 1996, 96-1 CPD ¶ 160 at 2. We will not question the details of an agency's method of compliance, so long as it remedies the procurement impropriety that was the basis for the decision's recommendation. Id. Under the circumstances here, we would see nothing objectionable in the Army's including even an offeror whose competitive-range status was in some doubt in reopened discussions.

We note that in QuanTech, Inc., supra, we rejected a contention similar to the one asserted by Hamm concerning an agency's implementation of our recommendation. In the QuanTech, Inc. decision, the protester objected to the agency's decision to reopen the competition to all offerors because our Office, in sustaining the protest, had recommended reopening the competition to allow the original protester to submit a proposal. We concluded that the agency's decision to allow other firms to join the competition was consistent with the mandate in the Competition in Contracting Act of 1984, 10 U.S.C. § 2304 (a)(1)(A) (1994), that contracting agencies obtain full and open competition. We also found that there was no evidence that the protester or any offeror was prejudiced by the decision since all competitors would have an equal opportunity to compete. We further noted that to the extent the protest sought to limit the competition to gain the benefit of a reduced competition, our Office would not review a protest that had the explicit or implicit purpose of reducing competition so that a protester would become the beneficiary of a more restrictive procurement. We think the reasoning of that decision would apply here as well.

Hamm also challenges the cost realism analysis of the awardee's proposal, an area that was key to our sustaining the earlier protest. In this case, as in the earlier protest, Hamm's challenge focuses on the calculation of the awardee's most probable staffing and overhead costs.

⁴ Since we conclude that CSI's proposal was not eliminated from the competitive range, we do not reach the protester's argument that there was a violation of FAR §15.307(a), which provides that "if an offeror's proposal is eliminated or otherwise removed from the competitive range, no further revisions to that offeror's proposal shall be accepted or considered."

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 the offeror's estimated costs may not provide valid indications of the final actual costs that the government is required, within certain limits, to pay. See ManTech Envtl. Tech., Inc., B-271002 et al., June 3, 1996, 96-1 CPD ¶ 272 at 8. Accordingly, a cost realism analysis must be performed whenever a cost-reimbursement contract is contemplated. FAR § 15.404-1(d)(2).⁵ A cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's technical proposal. FAR § 15.404-1(d)(1). The requirement to conduct a cost realism analysis of proposals for a cost-reimbursement contract does not require the agency to conduct an in-depth cost analysis, see FAR § 15.404-1(c), or to verify each and every item in the proposals. Rather, the analysis of cost realism calls for the exercise of informed judgment by the contracting agency involved, since it is in the best position to assess the realism of proposed costs and it must bear the difficulties or additional expenses resulting from a defective cost realism analysis. Our review is limited to determining whether the agency's cost realism analysis was reasonable. The Warner/Osborn/G&T Joint Venture, B-256641.2, Aug. 23, 1994, 94-2 CPD ¶ 76 at 5.

Here, the protester first maintains that the agency arbitrarily adjusted CSI's staffing (and therefore its staffing costs) [DELETED] based on a mechanical approach of adjusting each offeror's workforce to the government's estimated staffing level of [DELETED] employees, without regard to the skill levels and labor categories proposed. Protester's Comments at 22-24.

We agree with the protester that the record does not provide much explanation of why the agency believes that [DELETED] employees represent the appropriate staffing nor of whether the agency took into account, in its decision to [DELETED] the probable staffing cost of CSI's proposal, the particular technical approach and mix of labor categories that CSI proposed. The protester has not shown, however, why the agency's decision that [DELETED] employees could perform the services was unreasonable. In fact, this is the number of employees proposed by Hamm to perform the services. Agency Report, Tab I, Cost Analysis--Final Revised Proposals, at 4. Moreover, it appears that the agency gave some consideration to the mix of labor categories, since the agency concluded that CSI had [DELETED]. More importantly, Hamm, unlike in the prior protest, has not identified any particular defect in the agency's staffing analysis that hurt its chances of award. Hamm's broad attack on the agency's evaluation of CSI's proposed staffing does not establish that

⁵ The explicit requirement for a cost realism analysis, as well as the description of such an analysis, was added to the FAR in the 1997 rewrite of Part 15.

any flaw in the agency's action prejudiced the protester. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

We next turn to Hamm's claim that, as part of the cost realism analysis, the agency should have adjusted CSI's probable costs upward because the firm provided no support for its proposed overhead rates. In this regard, the protester notes a discrepancy in CSI's cost summary sheet and the supporting schedule in CSI's proposal--attachment C--for its overhead costs [DELETED]. Protester's Comments on Agency Response, Nov. 19, 1999 at 6.

While the record indicates that the agency did perform a review of CSI's proposed overhead rate, there is some confusion in the record about the exact overhead rate proposed by CSI. Nonetheless, we agree with the agency that the net effect of the difference claimed by Hamm would be negligible. Specifically, the agency states, the net effect of using the figures claimed by the protester increases CSI's MPC from [DELETED] over 5 years. Agency's Response to Protester's Comments, Nov. 16, 1999 at 9. Even applying the highest amount [DELETED] the protester claims should be added to CSI's cost, CSI's MPC remains significantly lower than Hamm's, as the agency points out. As with the staffing issue discussed above, we conclude that any error that occurred failed to prejudice the protester.

The protester also alleges that the agency's acceptance of CSI's G&A average rate of [DELETED], which is lower than its approved DCAA rate, was unreasonable. According to the protester, although the solicitation states that G&A rates will be capped at the rates proposed, the agency should have considered the risk created by what the protester views as CSI's below-cost proposal. Protester's Comments at 24.

We see nothing unreasonable about the Army's acceptance of CSI's G&A rate. As stated above, and as Hamm acknowledges, the G&A rates were capped at the rates proposed.⁶ Accordingly, there is no cost realism concern (that is, the actual G&A rates could not be expected to exceed those proposed). Moreover, Hamm has failed to point to any reasonable basis for concern about a risk associated with CSI's proposed rate. Hamm appears to be claiming that risk exists because the proposed rate is lower than CSI's approved provisional rate, so much lower that it will cause CSI to lose money on the contract. In our view, however, the difference between the

⁶ The RFP states, in relevant part, that "G&A rates provided in the proposal shall, for each contract period, be considered as the maximum reimbursable rate that can be used for each period. No upward adjustment of the stated G&A rate (i.e., ceiling) shall be allowed" RFP at L-8.

proposed rate [DELETED] and the approved provisional rate [DELETED] was not so large as to require a finding of risk. See Agency Report, Tab I, Cost Analysis--Final Revised Proposals, at 4. Moreover, as DCAA pointed out to the Army, the [DELETED] rate was based primarily on CSI's 1998 data and did not include the impact of this contract award or any changes since December 31, 1998. DCAA Facsimile dated July 28, 1999. Accordingly, we have no basis to conclude that the Army was required, as Hamm alleges, to find that CSI's proposed G&A rate created risk.

With respect to Hamm's challenge to the cost/technical tradeoff leading to the selection of CSI for award, the protester contends that the agency did not perform a qualitative comparison of CSI's proposal to its own technically superior proposal in making its best value determination. Protester's Comments at 26-28. This argument is without merit. The source selection documents show that the SSA agreed with the CAP analysis that the benefits found in Hamm's proposal did not warrant paying the price premium. These documents specifically discuss the merits of Hamm's and CSI's proposals with respect to non-cost factors. The SSA simply decided that the added benefits in Hamm's proposal did not warrant the cost premium. Agency Report, Tab K, , Post Negotiation Memorandum. For example, as quoted above, the CAP analysis, with which the SSA agreed, found that [DELETED] was for the benefit of the contractor and that [DELETED]. We see nothing unreasonable in this analysis and, as our analysis above indicates, the protester has not shown that the alleged evaluation errors were significant enough to have affected the outcome of the cost/technical tradeoff.

Finally, Hamm contends that many of the agency's actions are the likely result either of retaliation against Hamm for bringing its earlier successful protest or of preferential treatment of CSI, which is operated by the former Commandant of the Army's Transportation School at Ft. Eustis. Without clear evidence of retaliation or bias, and the record here contains none, we will not attribute prejudicial motives to agency contracting officials on the basis of inference or supposition. See Dynamic Aviation--Helicopters, B-274122, Nov. 1, 1996, 96-2 CPD ¶ 166 at 4.

The protest is denied.

Comptroller General
of the United States