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Decision

Matter of: Cascade General, Inc.

File: B-283872

Date: January 18, 2000

John T. Jozwick, Esq., for the protester.

William W. Goodrich, Esq., Arent Fox Kintner Plotkin & Kahn, for Ship Dismantling and Recycling Joint Venture, and Katherine S. Nucci, Esq., Adduci, Mastriani & Schaumberg, for International Shipbreaking Limited, intervenors.

John B. Dale, Esq., Susan S. Grooms, Esq., and Keith M. Dunn, Esq., Naval Sea Systems Command, for the agency.

Andrew T. Pogany, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency properly did not downgrade or reject proposal based on awardee's proposed exclusive use of a subcontractor's facility for performance of contract, where solicitation did not restrict use of subcontractors in performing the contract, and record demonstrates that subcontractor's facility was fully available by lease with the government during entire duration of the contract.
2. Contracting agency reasonably determined that awardee's price was not unrealistically low where the cost difference between protester's and awardee's proposals was driven by differences in proposed labor hours and rates, with awardee proposing rudimentary, but satisfactory, technical approach requiring significantly fewer hours, and lower labor rates as confirmed by Defense Contract Audit Agency audit.

DECISION

Cascade General, Inc. protests contract awards to Ship Dismantling and Recycling Joint Venture (SDR) and International Shipbreaking Limited (ISL), under request for proposals (RFP) No. N00024-98-R-2219, issued by the Department of the Navy to dismantle and dispose of ex-Naval vessels. Cascade contends that the Navy did not reasonably or consistently evaluate proposals.

We deny the protest.

BACKGROUND

The Ship Disposal Project (SDP)

This procurement, known as SDP, for the first time would pay a contractor to dismantle ex-Naval vessels, thereby allowing the agency to administer and oversee performance. Agency Report (AR) at 3-4. Previously, the Navy had sold scrapping rights for its ex-Naval vessels to the highest bidder. This method was deemed ineffective because the Navy was unable to ensure that only the most technically qualified scrapping contractors would obtain the scrapping rights. The Navy then tried the approach of awarding the rights on a best value, rather than a highest bid, basis. However, even with this and other changes, the selling of ships for scrapping had proven problematic in two respects. First, it was not reducing the growing backlog of ships awaiting scrapping; scrappers were unwilling to bid on the ships because the price of scrap metal on the open market had fallen precipitously, while environmental and safety regulations had increased. Second, ship scrapping, which is an inherently dangerous and dirty process, had been criticized in the media for its environmental, health and safety problems. AR at 3-4. The SDP--under which contractors would be paid for scrapping ex-Naval vessels and the Navy would oversee performance--was intended to resolve these issues. AR at 4.

The RFP

On January 28, 1999, the Navy issued the RFP here, which contemplated the award of up to two indefinite-delivery/indefinite-quantity contracts for each of two lots (east and west coasts). Contract line items (CLINs) 0001 through 0008 of the west coast lot designated dismantlement of particular classes of vessels, such as destroyers, frigates and cruisers. A task order for CLIN 0001, which required dismantlement of a frigate-class ship, would be placed on a cost-plus-incentive-fee (CPIF) basis at the time of contract award.¹ Task orders under the other CLINs, if issued, would be placed on either a CPIF basis, a fixed-price-incentive (successive targets) basis, or a fixed-price basis, depending on a risk assessment at the time of issuance of the task orders. AR, encl. 1, at 7.

The RFP stated that the proposals offering the best value to the government would be selected for award, considering cost and technical factors. AR, encl. 1, at 127.

¹ The RFP was structured to provide for a pilot phase--the initial task order under CLIN 0001 contemplated scrapping one ship on a cost-reimbursement basis and gathering data. The RFP then contemplated a second phase under which subsequent task orders would be issued for the remaining CLINs using the data and lessons learned from the pilot phase.

The RFP contained the following technical evaluation factors (and subfactors):² (1) program and engineering management (operational plan, ship dismantling capability and approach, approach to cost control, and schedule); (2) environmental and hazardous waste and worker safety management and capability (environmental management plan and safety and health management plan); and (3) past performance. The technical factors, when combined, were significantly more important than the cost/price factor. Id. at 126-27.

The cost/price factor would be evaluated on the basis of whether the costs in an offeror's proposal were realistic for the work to be performed, reflected a clear understanding of the requirements, and were consistent with the various elements of the offeror's technical proposal; the RFP stated that the government may reject unrealistically low proposals regardless of technical merit. AR, encl. 1, at 127. In order to arrive at a total evaluated cost, the agency would evaluate offerors' proposed cost for CLIN 0001 and then, using offerors' estimated mix of hours for dismantling each ship and projected labor rates, overhead/burden rates and other costs, adjusted for realism, also would calculate a total projected cost for all CLINs based on the expected number of ships (tonnage) to be scrapped during the period of performance. Id. at 127-28.

Proposal Evaluation

On March 30, six proposals were received for the west coast lot. The technical evaluation review panel (TERP) conducted its initial evaluation from April 5 until May 7. The TERP, with all members concurring, assigned the following adjectival ratings to the proposals:

| | Factor 1: Program & Engineering Management | Factor 2: Environmental & Hazardous Waste & Worker Safety Management and Capability | Factor 3: Past Performance |
|-----------|---|--|-----------------------------------|
| SDR | Good (Low) | Satisfactory (Middle) | Satisfactory (High) |
| Cascade | Satisfactory (Middle) | Satisfactory (Middle) | Satisfactory (Middle) |
| ISL | Satisfactory (Low) | Satisfactory (Middle) | Satisfactory (Low) |
| Offeror A | Satisfactory (Low) | Satisfactory (Low) | Satisfactory (Middle) |
| Offeror B | Unsatisfactory | Unsatisfactory | Neutral (No rating) |
| Offeror C | Unsatisfactory | Unsatisfactory | Unsatisfactory |

² The technical factors were to be rated at the factor level only; technical subfactors were approximately equivalent in value and would not be individually rated. The technical factors were to receive adjectival ratings of outstanding, good, satisfactory or unsatisfactory, and a further designation of high, middle or low would be assigned to each adjectival rating. AR, encl. 1, at 127.

The cost analysis panel (CAP) began its evaluation of the offerors' cost/price proposals on April 6. AR, encl. 4, at 4. In evaluating each offeror's estimated cost for CLIN 0001, the CAP obtained input from the TERP chairman regarding the reasonableness of the labor hours proposed. The CAP also obtained current labor rates and indirect rates from the Defense Contract Audit Agency (DCAA) for each offeror. The initial cost/price evaluation results were as follows:

| | CLIN 0001 | Total projected cost |
|-----------|------------------|-----------------------------|
| ISL | \$1.9 million | \$28.8 million |
| [deleted] | [deleted] | [deleted] |
| [deleted] | [deleted] | [deleted] |
| SDR | 3.7 million | 60.3 million |
| Cascade | [deleted] | [deleted] |
| [deleted] | [deleted] | [deleted] |

The Contract Award Review Panel (CARP) reviewed the TERP and CAP reports and was briefed by the TERP and CAP chairmen. In its report dated July 2, the CARP concurred with the findings of the TERP and CAP. AR, encl. 5. The CARP recommended to the source selection authority (SSA) that four proposals be included in the competitive range, those of SDR, ISL, Cascade and Offeror A. The SSA concurred, and discussion questions and requests for final proposal revisions (FPR) were sent to each of the four offerors. After receipt of the offerors' responses, the TERP and CAP reconvened. The TERP issued a TERP Report Addendum. AR, encl. 13. The TERP did not change its technical proposal ratings for ISL, Offeror A or Cascade as a result of discussions and FPRs. However, it raised SDR's ratings under factor 1 from Good (Low) to Good (High), and under factor 2 from Satisfactory (Middle) to Good (Low), based on the resolution of most weaknesses and the resulting reduction of SDR's performance risk.

During the course of the CARP's review of the TERP Report Addendum, the CARP became aware that the Maritime Administration (MARAD) had issued a termination notice to ISL on August 20, 1999, partially terminating for default ISL's scrapping rights contract for eight MARAD vessels. AR, encl. 15, at 1-2. (The matter was unresolved, and litigation was pending.) Since the CARP considered this default as potentially affecting the past performance rating assigned ISL by the TERP, the contracting officer exchanged letters with ISL. According to ISL, MARAD and ISL were in a dispute concerning the presence of barite on certain of the MARAD vessels. According to ISL, MARAD was aware of the presence of the barite but failed to advise ISL of this fact. ISL sought to be reimbursed for removing the barite from one vessel, but MARAD believed that under a scrapping rights sales contract such reimbursement was not appropriate or legal. AR, encl. 16, at 1-2, and encl. 17, at 1-2.

In the meantime, the CARP continued its review of the findings of the TERP and CAP, and issued a CARP Report on September 8. The CARP agreed with all ratings except ISL's. The CARP noted that the TERP had concluded that ISL's backlog of

MARAD and other ships would have a negative impact on ISL's ability to handle the SDP contract; this was a significant concern that contributed to the Satisfactory (Low) rating the TERP assigned ISL's proposal under factor 1. The CARP found that the elimination of the remaining MARAD ships from ISL's current backlog, albeit resulting from the MARAD default, alleviated many of the factor 1 concerns the TERP had noted, and "substantially reduced the risk of non-performance under the SDP contract due to fewer resource demands and less interference from other contracted work." AR, encl. 18, at 17. As a result of this assessment, the CARP increased ISL's proposal rating under factor 1 to Satisfactory (Middle). In the area of Past Performance, the CARP also noted that, while ISL had experienced fatal accidents at its facility, and while fatal accidents are always a serious concern, the fatal accidents at ISL's facility had occurred in 1995 and 1996, and none had taken place since then due to specific steps and corrective action taken by ISL. *Id.* The CARP concluded that ISL's past performance rating should be increased to Satisfactory (Middle). *Id.* at 18.

Following these adjustments, SDR was the technically superior offeror, and ISL and Cascade were tied at Satisfactory (Middle) for all three factors. The final evaluated cost/price for these three offerors were as follows: ISL, \$2.5 million (\$35.5 million total); SDR, \$3.7 million (\$64.7 million); and Cascade [deleted]. AR, encl. 18, at 10. The CARP conducted a best value determination and ranked SDR's proposal first, ISL's second, and Cascade's third. With respect to the latter two proposals, the CARP determined that "either [Cascade] or ISL West could meet the Government's technical requirements, but [Cascade's] significantly higher total projected cost [deleted] did not represent best value." *Id.* at 21. On September 15, the SSA concurred with the CARP's recommendation to award two contracts for the west coast lot, one to SDR and one to ISL. AR, encl. 19, at 4. The awards were made; these protests followed.

Cascade challenges the awards on several grounds. We have reviewed all of Cascade's arguments and, based on our assessment of the record, find that they are without merit. We address Cascade's principal arguments below.

SDR'S PROPOSAL TO USE SUBCONTRACTOR

Cascade contends that the agency lacked a reasonable basis for evaluating SDR'S proposal under factor 1, program and engineering management, as Good (low). Specifically, Cascade challenges SDR's proposed use of a subcontractor, Astoria Metals Corporation (AMC), to provide the necessary shipbreaking facility, and also questions the availability of the shipyard and dry dock facilities identified in SDR's technical proposal, in view of unspecified "other business activities" which it implies will interfere with AMC's ability to support this contract. Protest at 2.

The evaluation of proposals is a matter within the discretion of the contracting activity, since it is responsible for defining its needs and for deciding on the best

methods of accommodating them. See Abt Assocs. Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 3-4. In reviewing an agency's evaluation, we will not reevaluate the technical proposals; rather, our review is limited to examining the evaluation to ensure that it was reasonable and in accordance with the RFP criteria as well as applicable statutes and regulations. Id. at 4.

The evaluation in this area was reasonable. First, the RFP contains no restrictions on subcontracting for facilities. Rather, the RFP states only as follows:

Section 1.1--Operational Plan

The Operational Plan shall provide a description of the technical approach planned which shows capability to accomplish towing, demilitarization, ship dismantling, scrapping, scrap metal handling . . .

.
Describe how the offeror proposes to monitor the work of all subcontractors to include subcontractors performing hazardous material removal, disposal, and shipbreaking.

AR, encl. 1, at 111 (emphasis added). Since the RFP does not prohibit subcontracting for facilities, and contemplates using subcontractors for the various aspects of shipbreaking, there was no basis for downgrading SDR's offer for proposing to use a subcontractor's facility.

In its proposal, SDR stated that its subcontractor, AMC, would provide its facility at the ex-Hunter Point Naval Shipyard, California, for the dismantling operation. SDR included a commitment letter from the subcontractor and stated that in July 1999, AMC would exercise the first option under its lease with the Navy for an additional 5-year lease of the Hunter's Point facility. AR at 16-17. During discussions, the agency notified SDR that it had provided insufficient documentary evidence that facilities would be available for the duration of the contract, due to the uncertainty as to whether AMC would exercise the option. AR, encl. 13, at 5. In response, SDR stated that the option exercise no longer was an issue because AMC exercised the renewal option early, on April 14. SDR's answer provided copies of the actual option exercise document and a new commitment letter from AMC's president indicating that the entire facility would be dedicated to supporting SDP. AR, encl. 10, at W-32; AR, at 17-18. Moreover, the record shows that there is no substance to Cascade's allegation about AMC's "other business activities." In its FPR, SDR stated that AMC has minimal production work currently under contract with no sizeable work in the foreseeable future. AR, encl. 12, at 1.1-35C. SDR also advised the agency that, due to AMC's recent award of the Ship Repair Facility contract at the former Long Beach Naval Shipyard, AMC would be performing all new ship repair activities at its new Long Beach facility. AR, encl. 12, at 1.2-22A. This development made feasible the

exclusive dedication of the Hunters Point facility to the ship dismantling effort. The agency was satisfied that this information eliminated its concern. The TERP Report Addendum stated that “[SDR’s] response satisfactorily resolved the weakness. The offeror provided proof of [AMC’s] renewal of the lease option for the [facility until October 11, 2004].” AR, encl. 13.

The protester does not attempt to refute the agency’s findings, determinations, or conclusions as set forth in the agency report concerning SDR’s use of AMC’s facility or the availability of the shipyard and dry dock facilities, and we find nothing unreasonable in the agency’s conclusion; the information submitted by SDR addressed the agency’s expressed concerns by showing that the facility in fact would be available for the entire duration of the contract. We conclude that nothing in the RFP precluded SDR from subcontracting for shipyard facilities, and that the evaluation of SDR’s proposal in this area was reasonable.³

REALISM OF ISL’S PROPOSED COST

Cascade alleges that the agency did not properly evaluate ISL’s cost proposal; specifically, Cascade asserts that ISL’s proposed cost for CLIN 0001 was unrealistically low when compared to SDR’s and Cascade’s proposed costs for this line item. Protest at 3.

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

³ Cascade also asserts that SDR’s subcontractor, AMC, and ISL failed to provide information to the Navy about Occupational Safety and Health Administration (OSHA) violations, including the employee fatalities previously experienced by ISL, and that the agency therefore could not have evaluated these violations. This allegation is factually erroneous. The record shows that AMC and ISL in fact furnished the agency all relevant information concerning OSHA and other violations. For example, concerning ISL, the CARP stated as follows:

As a result of discussions with ISL, the TERP determined that ISL had identified specific positive steps it had taken following fatal accidents in 1995 and 1996 and that it had not had a shipcutter accident or fatality since the changes were implemented. . . . [W]hile any history of serious accidents is a concern, ISL had resolved the weakness by the subsequent actions it had taken and because there was no evidence of a continuing trend of accidents.

AR at 25. Cascade does not dispute in its comments the agency’s explanation that the OSHA violations were in fact evaluated.

not provide valid indications of the final actual costs that the government is required, within certain limits, to pay. See ManTech Env'tl. 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. Federal Acquisition Regulation (FAR) § 15.404-1(d)(2). 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.

The realism analysis of ISL's proposal was reasonable. The record shows that the cost difference among the proposals was driven by proposed labor hours and labor rates. ISL proposed [deleted] labor hours to accomplish CLIN 0001, while Cascade proposed [deleted] hours (SDR proposed [deleted] hours). These labor hour differences reflected what the agency found to be very different technical approaches to performing the ship dismantling. According to the agency, Cascade is a full service ship repair company with a fully outfitted facility, while ISL is only in the business of scrapping ships and has minimal facilities, management, or overhead. AR at 38-39. This fundamental difference in the two companies was reflected in how each proposed to dismantle the vessels--notably, Cascade proposed [deleted], while ISL would use an [deleted].⁴ The agency determined that ISL's performance approach was satisfactory, and Cascade does not challenge this determination.

As for labor rates, ISL's proposed rates were lower than Cascade's for every labor category. However, the ISL rates as evaluated still were higher than those recommended by DCAA based on other ISL contracts; ISL insisted during discussions that its proposed labor rates, even though higher than the DCAA recommended rates, were correct, so the agency used ISL's proposed rates in the evaluation. The record shows that the CAP and the CARP reviewed every element of ISL's costs and found them to be reasonable. Moreover, ISL was the offeror most knowledgeable about the type of effort needed to scrap a vessel, and was the only

⁴ [deleted].

offeror that had successfully scrapped a ship.⁵ Given ISL's more rudimentary--but satisfactory--technical approach and lower labor rates, we find that the Navy reasonably determined that ISL's proposed CLIN 0001 cost was realistic for the scope of work to be performed. The protester does not dispute the agency's conclusion in this regard.

EVALUATION OF SAFETY AND ENVIRONMENTAL VIOLATIONS

Cascade contends that the agency improperly considered information--regarding federal, state or local regulatory agency violations and evidence of corrective actions taken--under an evaluation factor for which it was not furnished. Specifically, Cascade notes that, although the information was requested in RFP section L-3, section 2.1 under the heading "Environmental Management Plan," which was specified in section M as a subfactor only under factor 2 (environmental and hazardous waste and worker safety management and capability), the Navy used the information in the factor 3 (past performance) evaluation.

This argument is without merit. While the protester is correct that the agency considered the information under the past performance factor, the agency explains its reason for doing so as follows:

Although information pertaining to violations and citations was requested under Section L.2.1., it was actually considered under Factor 3, Past Performance, rather than Factor 2, . . . in order to evaluate this aspect of an offeror's proposal only once. Factor 2 was meant to assess from a prospective basis how an offeror's safety and environmental management [plans] met the [RFP requirements]. An offeror's safety and environmental record seemed more relevant to Factor 3, which uses prior conduct and performance to assess how well an offeror would be expected to perform under the instant contract.

AR at 22 (emphasis added.).

⁵ As the TERP noted in its deliberations:

ISL has extensive ship dismantling experience, having scrapped the most tonnage of any shipbreaking company in the U.S. since 1996. Six former [Navy] and MARAD ships and one commercial barge have been completely scrapped within the past three years.

AR, encl. 3, at 32.

Information requirements provided for in section L of an RFP are not the same as evaluation criteria established in section M; rather than establishing minimum evaluation standards, the instructions of section L generally provide guidance intended to assist offerors in preparing and organizing proposals. See generally JW Assocs. Inc., B-275209.3, July 22, 1997, 97-2 CPD ¶ 27 at 3. The information required by section L does not necessarily have to correspond to the evaluation criteria in section M. Id. at 3. Thus, the mere fact that information was requested under a certain heading in section L did not preclude the agency from using that information under an evaluation factor that does not correspond to the section L heading. So long as the information reasonably related to the factor under which it was evaluated, and the agency evaluated all proposals in the same manner--the agency's explanation persuades us that both conditions were met here, and the protester does not assert otherwise--there is no basis for us to object to the agency's approach. We conclude that the evaluation was reasonable.

ISL'S TERMINATION FOR DEFAULT

Cascade argues that the agency unreasonably increased ISL's factor 1 adjectival rating (from Satisfactory (Low) to Satisfactory (Middle)) as a result of the MARAD default,⁶ and, more specifically, that the agency unreasonably failed to evaluate the "potential negative impact" on ISL's financial position resulting from the default, such as the potential assessment of liquidated damages [deleted], and excess costs. Protester's Comments at 7-8.

This argument is without merit. As discussed previously, the CARP noted that the TERP had concluded that ISL's backlog of MARAD and other ships would have a negative impact on ISL's ability to handle the SDP contract. The CARP further found that the elimination of the remaining MARAD ships from ISL's current backlog, albeit resulting from the MARAD default, alleviated many of the factor 1 concerns the TERP had noted and reduced the risk of non-performance due to fewer resource demands and less interference from other contracted work. As a result of this assessment, the CARP increased ISL's proposal rating under factor 1. The CARP further determined that the performance risk resulting from the default was minimized by the fact that the Navy's objective under the SDP Pilot Phase is significantly different from that under MARAD's scrap sales contracts. While the SDP contract is a cost-reimbursement contract, the MARAD contract was a scrap sales contract under which the contractor actually purchased the scrapping rights,

⁶ Cascade also asserts that ISL's factor 3 rating was unreasonably increased as a result of the default. The CARP did, in fact, increase ISL's factor 3 rating from Satisfactory (Low) to Satisfactory (Middle), but not for any reason related to the default. Rather, the rating was raised "due to resolution of the weakness involving a prior pattern of safety violations, [and] the corrective action taken by ISL." See AR at 12-13, and encl. 18, at 18.

and under which the contractor's ability to make a profit thus depended substantially on its ability to sell scrap and the strength of the scrap metal market. That linkage between the scrap metal market and a contractor's financial risk will not be present under the SDP contracts. In addition, if an SDP contractor encounters barite or other substances of which it was unaware, the contractor will be reimbursed for its actual cost for the removal. As for the potential financial impact, we simply are not persuaded that the agency was required to find that a contractor just awarded a \$35.5 million contract would be significantly affected from an overall financial standpoint by [deleted], associated litigation costs or excess costs. We conclude that the agency reasonably raised ISL's factor 1 rating.

The protest is denied.

Comptroller General
of the United States