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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: ProTech Corporation

File: B-294818

Date: December 30, 2004

Patrick S. Hendrickson, Esq., for the protester.

Derek D. Crick, Esq., Preston Gates Ellis, for Atherton Construction, Inc., the intervenor.

Roger Christopher Paden, Esq., Department of the Army, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Charles W. Morrow, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Selection of higher-rated, higher-priced proposal over lower-rated, lower-priced one was unreasonable, where the weight applied to the evaluation factors in the source selection decision differed from that announced in the solicitation.

DECISION

ProTech Corporation protests the award of a contract to Atherton Construction, Inc. under request for proposals (RFP) No. W912DQ-04-R-0015, issued by the U.S. Army Corps of Engineers, for the construction of military family housing.

We sustain the protest in part and deny it in part.

The RFP provided for the award of fixed-price contract for construction services described as a "Site Adapt/Design Build" of 62 new military family housing units, consisting of 30 duplexes and two "single story detached units." The construction project was divided into three phases, which the contractor was required to perform in the following sequence: phase one -- design and optional fast-track construction; phase two -- construction of new family housing units; and phase three - demolition of existing family housing units. See RFP at 1, 202. With respect to phase two, the RFP advised that "[t]he contractor will not be allowed to start construction of any portion of any housing unit, including its foundation until all main utilities are

complete and operational and all curb and gutter, roads and pavements are installed.”¹ RFP at 202.

The solicitation schedule contained four contract line item numbers (CLINs) for the base requirement, for each of which offerors were required to propose a lump-sum price.² The schedule also contained eight CLINs that were identified as “betterments” that offerors were not required to propose or price.³ RFP at 3-6. Offerors were informed that “[a]ll betterments offered in the proposal become a requirement of the awarded contract,” and that the “[d]etermination of the Offeror’s total price for the proposed work will be based on the TOTAL of the BASE SCHEDULE and BETTERMENT SCHEDULE. Immediate award will be made of the BASE SCHEDULE and the BETTERMENT SCHEDULE, if the cost is less than or equal to the Cost Limitation - Target Ceiling as stated below.” RFP at 9, 204. The RFP identified the target ceiling to be \$14,969,000. See RFP at 9.

Offerors were informed that award would be made on a “best value” basis considering the following evaluation factors: project management plan, experience, past performance, betterments, and price.⁴ The project management plan factor was stated to be the most important factor and to be twice as important as any of the other technical evaluation factors. The experience, past performance, and betterments factors were stated to be equal in importance to each other. With respect to betterments, offerors were not required to propose any betterments, but

¹ In this connection, the statement of work (SOW) advised offerors that “[t]he maintenance, upkeep and any repairs required to utilities, curbs and gutters, roads and pavements will remain the responsibility of the Contractor” and that “the Contractor shall repair any damage to these items at no additional cost to the Government.” See SOW at 01010-2.

² The schedule set forth the base-work items: CLIN 0001, site work (“All work outside the 5 ft line, excluding Demolition and any items listed in the Betterment Schedule”); CLIN 0002, demolition (“Demolition of seventy-two (72) Existing Housing Units, associated Infrastructure and Site Restoration”); CLIN 0003, “CONSTRUCT (62) DWELLING UNITS;” and CLIN 0004, design costs (“All Design Costs for line Items 1 thru 3”).

³ CLIN 0005, sod upgrade, was for installing sod in the backyard and side yards; CLIN 0006 was for installing ceiling fans and light kits instead of basic light fixtures; CLIN 0007 was to add whole-house attic fans; CLIN 0008 was for hardwood flooring and ceramic tile flooring instead of sheet vinyl flooring; CLIN 0009 was to add brick veneer; CLIN 0010 was for 9-foot ceilings on the first floor of each unit; CLIN 0011 was for a water loop to the O’Donnell Heights’ units; and CLIN 0012 was for geothermal heat pumps instead of standard furnace and air conditioning.

⁴ The RFP identified subfactors for each of the technical evaluation factors.

the RFP informed offerors that “[m]ore betterments will be considered more favorably than fewer betterments.” The RFP stated that price was equal in importance to the technical evaluation factors combined. See RFP at 42-44. In addition, the RFP provided for a 10-percent price evaluation preference in favor of Historically Underutilized Business (HUB) Zone small business concerns. See RFP at 93; Federal Acquisition Regulation § 52.219-4.

The agency received proposals from five offerors, including ProTech (a HUBZone small business concern) and Atherton (a large business). ProTech proposed a total price of \$14,958,000, including prices for six betterments; Atherton proposed a total price of \$14,966,949, and did not offer any betterments.⁵ The proposals were evaluated by the agency’s source selection evaluation board (SSEB). The technical evaluation factors were adjectivally evaluated,⁶ and prices were evaluated for realism, reasonableness, and completeness.

Following the evaluation of initial proposals, the proposals of ProTech and Atherton were included in the competitive range. Discussions were conducted with both firms. With respect to ProTech’s technical proposal, the Corps informed the firm that, among other things, its 424-day construction schedule did not appear reasonable and there was “[n]o indication of completing all site work, including paving, prior to next phase of work.” With respect to the protester’s price, the Corps informed ProTech that although the firm’s total price was below the target ceiling and was reasonable in comparison to the government estimate, some of ProTech’s line items appeared unbalanced. The Corps requested that ProTech submit price support data to allow analysis of each CLIN. AR, Tab 14, Discussions Letter from Corps to ProTech, at 2-3.

Final proposal revisions were received from both offerors. Although ProTech increased its construction schedule to 730 days, the SSEB continued to note as a proposal weakness that:

[s]ite has site utilities out of sequence. RFP indicates the contractor will not be allowed to start construction of any portion at any housing

⁵ The government estimate for the base work, including all betterments, is \$16,802,196 (\$15,142,034 for the base requirement and \$1,660,162 for the betterments).

⁶ With the exception of the betterments factor, the technical evaluation factors received ratings of either excellent, above average, satisfactory, marginal, or unsatisfactory. Proposals were evaluated under the betterments factor as either excellent (any 5 betterments or more), above average (any 4 betterments), or satisfactory (any 3 betterments or fewer). See Agency Report (AR), Tab 9, Source Selection Plan, app. B; Tab 16, SSEB Report, at 5-21.

unit including its foundation until all main utilities are complete and operational and all curbs and gutters, roads and pavements are installed. Final site utilities, pour concrete pavement and pads, pave and stripe drives and parking site curb; gutter/pavement all occur after construction of housing units begins.

AR, Tab 19, Final SSEB Evaluation, at 3.

ProTech’s and Atherton’s revised proposals were evaluated as follows:

| | Atherton | ProTech |
|------------------------------------|-----------------|----------------|
| Project Management Plan | Excellent | Satisfactory |
| Experience | Excellent | Above Average |
| Past Performance | Above Average | Satisfactory |
| Betterments | Satisfactory | Excellent |
| Price (without HUBZone preference) | \$14,966,949 | \$14,958,000 |
| Price (with preference) | \$16,463,644 | \$14,958,000 |

AR, Tab 21, Source Selection Decision, at 5-9.

The source selection authority (SSA) concluded, based on an integrated assessment of the proposals under each factor, that Atherton’s proposal was a “superior technical value, with little risk” that warranted paying a higher price. Specifically, the SSA noted Atherton’s “excellent” proposal rating under the most important project management plan factor, whereas ProTech was found to have an “overly optimistic” schedule. In this regard, the SSA noted that ProTech’s schedule included erroneous assumptions and out-of-sequence events that were prohibited by the solicitation (such as “fast-tracking the building foundations prior to completion of the final design”). *Id.* at 8. With respect to the experience factor, which the SSA stated was the “second most important factor,” the SSA noted Atherton’s “excellent” rating as compared to ProTech’s “weaker” proposal in this respect with an “above average” rating. With regard to ProTech’s “excellent” rating under the betterments factor, the SSA stated:

In this, the fourth, and least most important factor, ProTech offers a clearly better proposal by offering six of eight Betterments while Atherton offered none. Given the nature of Design-Build Betterments, and the terms of the RFP, an offer that includes the base requirements only, and does not include any betterment is rated SATISFACTORY. ProTech on the other hand, received an EXCELLENT for this factor. Considering the relative weighting stated in the RFP, Atherton’s

proposal represents a technical value of 63% of Protech's proposal for this factor.⁷

Id.

With respect to price, the SSA recognized that, after application of the HUBZone preference, ProTech's evaluated price was more than \$1.5 million lower than Atherton's evaluated price. However, the SSA also found that ProTech's offer included several CLINs with understated prices that presented price and performance risk. Specifically, the SSA noted:

A serious concern with accepting this unbalanced price proposal is that several underpriced line items do not reflect the actual work required by the RFP. Where other overpriced line items offset this, and result in an overall advantageous price, the allocation of price elements to the wrong line item can create price and performance risk to the contract. For example, this offer proposes to perform all site work for \$1.42 Million while the Government Estimate for this line item is \$4.17 Million. It appears that some of the site work price elements have been allocated to the line item for building construction, with a proposal of \$11.06 Million compared to the Government Estimate of \$10.04 Million. The problem with this imbalance is that the contractor will only get paid the contract line item amount for the work, as it is completed. If the contractor expends \$4.17 million in effort to complete the site work, but will only be paid \$1.42 Million for the line item that creates a deficit that will only be made up months later when he gets paid for the building construction and other high priced line items that will be completed later in this contract. If the contractor is in a negative cash flow situation early in the contract, there is a significant risk that quality or timeliness will suffer.

AR, Tab 21, Source Selection Decision, at 7.

Award was made to Atherton, and this protest followed. Performance of Atherton's contract has been stayed pending our decision in this matter.

ProTech raises numerous challenges to the agency's evaluation of proposals and selection of Atherton's proposal for award. In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable

⁷ The record does not explain how the SSA concluded that Atherton's offer of no betterments, as permitted by the RFP, represented a technical value of 63 percent of ProTech's proposal of six betterments under this factor.

and in accord with the evaluation factors set forth in the RFP and with applicable procurement statutes and regulations. See Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD 223 at 4.

ProTech objects that the agency downgraded its proposal under the project management plan because ProTech proposed to perform site utilities work after construction of the housing units began. The protester complains that “[i]t is not customary for a contractor to pave and place curbs, gutters and sidewalks before it begins foundations due to the damage caused to the site improvements during construction.” Protester’s Comments at 13.

Regardless of the protester’s view of industry practice, the RFP unambiguously provided that “the contractor will not be allowed to start construction of any portion of any housing unit, including its foundation until all main utilities are complete and operational and all curb and gutter, roads and pavements are installed.” RFP at 202. We have no basis to object to the agency’s evaluation here, which was in accord with the solicitation requirements.

ProTech also challenges the agency’s evaluation of its proposal under the experience factor, complaining that the agency downgraded the proposal because one of the seven projects ProTech identified as relevant experience was a “low dollar amount” (\$9.3 million). This was identified by the SSEB to be a weakness under the experience factor. AR, Tab 16, SSEB Report, at 18. In this regard, ProTech argues that the RFP only required offerors to identify three projects for evaluation under this factor, see RFP at 32, and that none of ProTech’s required three was for a “low dollar amount.” Protester’s Comments at 9.

Although it is true that the SSEB noted that the value of one of the projects identified by ProTech was in a “low dollar amount,” the basis of the SSEB’s assignment of (only) an “above average” rating to ProTech’s proposal under the experience factor was that most of the projects identified by ProTech were for multiple family housing and only one was for a “single/duplex construction project.” See AR, Tab 16, SSEB Report, at 18. In contrast, the SSEB found that Atherton, whose proposal was rated “excellent” under this factor, had submitted more single-family construction projects for consideration than had ProTech. Id. at 5. Given that the RFP informed offerors under this factor that “[e]xamples of duplex and single-family construction projects, will receive the highest consideration,” see RFP at 43, we find the agency reasonably rated more highly Atherton’s proposal, which identified a larger number of single-family construction projects. We find that the agency did not unreasonably evaluate ProTech’s proposal under this factor.

ProTech also objects to the evaluation of its proposal as “satisfactory” under the past performance factor. Offerors were informed that in assessing proposals under this factor the agency would evaluate the offeror and its architect engineer separately and that the “Contractor’s past performance will be weighted 4 times that of the

[architect engineer].”⁸ RFP at 43. ProTech contends that its proposal was evaluated under the past performance subfactors as either “excellent” or “above average” and that its architect engineer received a neutral rating under these subfactors, and therefore at a minimum ProTech’s overall past performance rating should have been “above average.” The record shows, however, that ProTech’s own performance was assessed as merely “satisfactory” under each subfactor and that its architect engineer’s performance was assessed as “excellent” and “above average.” AR, Tab 16, SSEB Report, at 18. Because ProTech does not specifically challenge any of these ratings, we have no basis to object to the agency’s overall assessment of ProTech’s past performance as “satisfactory,” given the fact that the RFP called for ProTech’s own past performance to be weighted four times that of the architect engineer.

ProTech also challenges the agency’s evaluation of its price proposal. For example, ProTech objects to the agency’s assignment of price and performance risk associated with CLIN pricing that the agency found was understated. As noted above, the agency documented the basis for its conclusion that ProTech’s pricing for the site work was understated and posed a price and performance risk to the government. ProTech has not shown that the agency’s judgment is unreasonable. Rather, ProTech merely disagrees with the agency’s judgment, arguing that its site work pricing was not understated but rather that the government estimate and Atherton’s pricing for this CLIN are overstated. ProTech’s disagreement provides no basis for us to find the agency’s judgment unreasonable.

ProTech also contends that the agency erred in comparing ProTech’s price of the base requirement and betterments to Atherton’s price for the base requirement. ProTech asserts that only its pricing for the base requirement should have been compared to Atherton’s pricing. We disagree. The solicitation provided that proposed pricing for betterments that was below the ceiling price would be evaluated as part of the offeror’s total price. See RFP at 9.

While we deny all the bases of protest related to the evaluation of proposals, we now turn to the one basis of protest that we find has merit, which concerns the source selection analysis.

ProTech protests that the SSA’s cost/technical tradeoff decision was unreasonable because the SSA did not give appropriate weight to ProTech’s offered betterments in this source selection decision. Specifically, ProTech complains that, although the RFP stated that the betterments factor was equal in weight to the experience and past performance factors, the SSA believed that the betterments factor was the least important evaluation factor.

⁸ As noted above, this factor contained a number of subfactors.

In reviewing an agency's evaluation of proposals and source selection decision, we examine the supporting record to determine whether the decision was reasonable, consistent with the stated evaluation criteria, and adequately documented. Johnson Controls World Servs., Inc., B-289942, B-289942.2, May 24, 2002, 2002 CPD ¶ 88 at 6. An agency's source selection decision does not satisfy this standard where the weight applied to evaluation factors in the selection decision differs from that announced in the solicitation. See Lithos Restoration, Ltd., B-247003.2, Apr. 22, 1992, 92-1 CPD ¶ 379 at 5; Bendix Field Eng'g Corp., B-219406, Oct. 31, 1985, 85-2 CPD ¶ 496 at 4-5.

We agree with ProTech that the source selection decision was unreasonable because the SSA in making his cost/technical tradeoff determination accorded the betterments factor less weight than identified by the RFP. As noted above, the SSA stated that the betterments factor was the "fourth, and least most important factor," but this factor was identified in the RFP as being equal in weight to the experience and past performance factors. Compare AR, Tab 21, Source Selection Decision, at 9, with RFP at 44. In fact, the SSA erroneously stated that all of the technical evaluation factors were listed in the RFP in descending order of importance. See AR, Tab 21, Source Selection Decision, at 1, 8-9. Thus, when the SSA performed his cost/technical tradeoff to determine whether Atherton's apparently superior technical proposal outweighed ProTech's significant price advantage, the SSA diminished the importance of the betterments factor, which was the only factor under which ProTech's proposal was evaluated as having a technical advantage over Atherton's proposal.

The SSA's failure to accord the betterments factor the evaluation weight identified in the solicitation was exacerbated by the SSA's judgment that, under this factor, Atherton's offer of no betterments represented 63 percent of the value of ProTech's offer of six betterments. See *id.* at 9. This may have had the effect of further diminishing the value of ProTech's offer of betterments, where the awardee chose to offer only the solicitation's basic requirement. We fail to see how such an evaluation was in accord with the solicitation's evaluation scheme that informed offerors that "[m]ore betterments will be considered more favorably than fewer betterments."⁹ RFP at 44.

If the SSA had applied the correct weight to the betterment factor, there is a reasonable possibility that ProTech's lower priced proposal would have been

⁹ ProTech also complains that Atherton's proposal was evaluated as "satisfactory" under the betterments factor, even though Atherton proposed no betterments. ProTech apparently believes that Atherton's proposal should have received a lower rating for this factor. We disagree, given that the RFP did not require offerors to propose betterments. We find that agency reasonably concluded that Atherton's acceptable offer was satisfactory.

selected for the award; accordingly, we find that ProTech was prejudiced by the agency's flawed source selection analysis. See 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 therefore sustain the protest on this basis.

We recommend that the Corps make a new source selection decision, and if a firm other than Atherton is selected for award, terminate Atherton's contract and make award to that other firm. We also recommend that the agency reimburse ProTech the reasonable costs, including attorneys' fees, of filing and pursuing the one protest ground that we have sustained.¹⁰ 4 C.F.R. § 21.8(d) (2004). ProTech's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel

¹⁰ As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9; Data Based Decisions, Inc.--Claim for Costs, B-232663.3, Dec. 11, 1989, 89-2 CPD ¶ 538 at 4. We are limiting our recommendation as to the protester's costs in this case, however, because the bulk of ProTech's protest concerned, not the source selection analysis (which we found defective), but the evaluation of proposals (which we found reasonable). The protest issue that we have sustained is thus distinct and severable from ProTech's other protest grounds. See Department of the Army--Modification of Remedy, B-292768.5, Mar. 25, 2004, 2004 CPD ¶ 74 at 2-3.