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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: YORK Building Services, Inc.

File: B-296948.2; B-296948.3; B-296948.4

Date: November 3, 2005

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Ruth E. Ganister, Esq., Rosenthal and Ganister, for Obsil, Inc., an intervenor.
Elin M. Dugan, Esq., United States Department of Agriculture, for the agency.
Paul N. Wengert, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where source selection official failed to document rationale for source selection consistent with differential weighting of technical evaluation factors and emphasis on technical superiority as required by solicitation.

DECISION

YORK Building Services, Inc., a small business, protests the award of a contract by the United States Department of Agriculture (USDA) under request for proposals (RFP) No. RFP-OPPM-05-R-70 for janitorial services at the Agriculture South Building, the Jamie L. Whitten Building, and the Cotton Annex building,¹ and for recycling services only at the Sydney R. Yates Building, all located in Washington, DC. YORK objects that the evaluation of proposals was inconsistent with the RFP.

We sustain the protest.

The USDA issued the RFP as a small business set-aside on September 9, 2004, seeking fixed-price proposals for a base period and four 1-year option periods. RFP at 8-9. The RFP emphasized the importance of technical superiority over price in the source selection, and listed three technical factors in descending order of importance: technical approach, management plan, and past performance. RFP

¹ The RFP was amended to change the scope of services to be provided at the Cotton Annex building to recycling services only. RFP amend. 1.

at 121-23. Offerors were required to provide detailed information with respect to each aspect of the non-price factors for evaluation purposes. RFP at 121.

USDA received 25 proposals, of which it found 23 technically unacceptable; the proposals of YORK and Obsi1, Inc. were the only two deemed technically acceptable. The contracting officer, who served as the source selection official (SSO), included only these two proposals in the competitive range. She conducted discussions with YORK and Obsi1, after which they submitted final proposal revisions. Contracting Officer's (CO) Statement at 1. The SSO noted the results of the evaluation in her source selection decision as follows:

Final Proposal Revisions (based on a 12-month period):

The final proposal revisions, including technical clarifications were timely received May 17. The Evaluation Panel reconvened and conducted follow up evaluations between May 24, 2005, through June 7, 2005. The Contracting Officer (CO) received the panel's final scores June 8, 2005.

<u>Company</u>	<u>Overall Evaluated</u>	<u>Total</u>	<u>Base Price</u>	<u>+Options</u>
	<u>Prior Rating</u>	<u>Revised Rating</u>		
a. Obsi1	81	88.0	\$3,321,595.37	\$16,662,584.10
b. YORK	82	87.5	[\$deleted]	[\$deleted]

Agency Report (AR), Tab D, Source Selection Decision, at 2.²

The SSO ultimately concluded that the proposals were technically equal and made award to Obsi1 on the basis of its lower price. After a debriefing, YORK protested to our Office.

YORK raises a number of challenges to the procurement. As explained below, while we conclude that several are not meritorious, we sustain the protest on the basis of other flaws in the evaluation and selection raised by the protester.

YORK first argues that the lower price offered by Obsi1 reveals that Obsi1 would not provide sufficient labor to perform the services specified in the RFP, and that Obsi1's low price created performance risks that the agency failed to appreciate. The agency responds that Obsi1 committed to perform the required services, and even assuming that YORK is correct that Obsi1's fixed price is below the cost of performance, an offeror, in its business judgment, properly may decide to propose, and an agency

² A second round of discussions directed only to an issue involving the pricing of a line item to be used in the event of changes to the square footage was held on May 31. AR, Tab D, Negotiation Memorandum, at 4. YORK does not raise issues unique to the second round of discussions.

may accept, a price that is below cost. See Brewer-Taylor Assocs., B-277845, Oct. 30, 1997, 97-2 CPD ¶ 124 at 4. We agree with the agency that this issue is without merit.³

YORK next objects that the agency misevaluated Obsi1's price by taking into account a "renovation credit" of almost \$[deleted] over the life of the contract to reflect a portion of the facilities that will be under renovation and, therefore, would not require services under the contract. YORK objects that the RFP limited deductions for added or deleted floor space to a separate contract line item price, specifically providing a rate for added or deleted space, RFP at 79-80, and that lowering Obsi1's evaluated price by allowing it to deduct the lump sum "renovation credit" in contemplation of the renovations resulted in an unequal competition. Supplemental Protest at 8. However, in addition to the contract line item price for additions and deletions of space, as cited by YORK, the RFP provided as follows:

Currently the USDA Headquarters Complex is undergoing major renovations. Approximately 118,500 square feet of space will be under construction during each phase of renovation that should last throughout the entire duration of this contract. Therefore, when submitting offers do not include an amount for the 118,500 square feet of space that is expected to be out of service during the base and option years of this contract.

RFP amend. 1.

As a result, while an offeror could take the square footage deduction into account when calculating its fixed price, as YORK presumably did, we do not think it was objectionable for an offeror to choose to show the actual recalculation, as Obsi1 did. Obsi1 explains that this was intended to function as a "demonstration" to the SSO that Obsi1 had properly calculated its price. Intervenor's Supplemental Comments at 10. We conclude that the agency's evaluation, based on Obsi1's price after the deduction of the "renovation credit," was reasonable.

³ While acknowledging that an agency is not ordinarily required to conduct a price realism analysis where, as here, the solicitation seeks fixed prices, YORK nevertheless argues that the RFP required the agency to conduct a price realism analysis, because the RFP stated that "[t]he Government will evaluate price/cost of all offers included in the technical competitive range." Second Supplemental Protest at 22. The agency did evaluate the prices of both offerors in the competitive range, and found them reasonable. AR, Tab D, Negotiation Memorandum, at 4; AR, Tab D, Source Selection Decision, at 5. We agree with the agency, however, that the cited language did not require it to conduct a price realism analysis, nor would one have been required even if the agency had concluded that the price offered by Obsi1 was below cost.

YORK also objects that the agency conducted defective discussions by failing to advise YORK that its price was generally too high and by not discussing the fact that the agency had increased YORK's evaluated price under contract line item number (CLIN) 1 for the basic services in the base period. The agency revised YORK's CLIN 1 price from a 9-month period, as initially proposed by YORK, to a 12-month price (essentially a [deleted] percent increase for CLIN 1). YORK argues that since section B of the RFP specified that the base period would run from the date of award to September 30, 2005, it proposed a base period price for 9 months in its initial proposal⁴ in order to redistribute significant nonrecurring and winter weather-related costs across the shortened base period, in view of the anticipated date of award. Supplemental Protest at 46. The agency responds that, while the length of the base period was uncertain (but would clearly be shorter than 1 year since there was less than a year between proposal submission and September 30, 2005), the RFP instructed offerors to provide both a "unit price" (based on "months" and indicated a quantity of "12") and also a "total" price for the base period.⁵ Therefore, the agency argues that it was appropriate to revise YORK's base period total price to a 12-month price for purposes of evaluation and that no discussions were required.

The agency's actions in this respect were consistent with the price evaluation scheme disclosed in the RFP. RFP at 8. YORK effectively concedes that there was an apparent conflict between the stated base period term (from date of award to September 30, 2005) and the price calculation method (12 months) as indicated in the RFP. The agency's evaluation on the basis of 12 months was consistent with the RFP; absent any indication in the proposal that YORK's 12-month price could not be calculated by multiplying its monthly unit price by 12, we think that the agency had no obligation to raise the issue during discussions. Additionally, since the agency did not view YORK's proposed price as unreasonably high, we also find no error in not raising the fact of YORK's price being higher than Obsil's price during discussions. Uniband, Inc., B-289305, Feb. 8, 2002, 2002 CPD ¶ 51 at 12.

⁴ In its initial proposal, YORK changed the CLIN 1 quantity from 12 months to 9. AR, binder 2, Tab D, York Initial Proposal Volume I, at 122. The record indicates that, apparently due to the passage of time, YORK shortened the base period pricing to 4 months when submitting its final proposal revisions, which the agency similarly revised to 12 months for purposes of evaluation. AR, Tab D, Negotiation Memorandum, at 3; CO Statement at 5.

⁵ To the extent that there was an apparent conflict in the RFP between the base period term and the price calculation method, the conflict was patent. Rather than changing the pricing schedule in its proposal, YORK was obligated to protest this matter prior to the closing date for the submission of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2005).

YORK identifies a number of alleged errors in the technical evaluation. YORK argues that the record shows that the agency improperly gave the technical approach and management plan evaluation factors equal weight, rather than giving the most weight to the technical approach factor, consistent with the weighting disclosed in the RFP. YORK also objects that the agency record does not contain documentation that would meaningfully support the determination of technical equivalence for the YORK and Obsi1 proposals. Rather, YORK suggests that the evaluators focused merely on determining that both proposals were technically acceptable and that the SSO mechanically relied on total point scores to determine technical equality, and then the SSO awarded to Obsi1 on the basis of its lower price.

An agency's obligation to conduct an evaluation consistent with the evaluation scheme set forth in the RFP includes the importance or weighting of the factors. 41 U.S.C. §§ 253a(b)(1)(B), 253b(a) (2000); Federal Acquisition Regulation §§ 15.204-5(c), 15.304(d), 15.305(a); Dismas Charities, Inc., B-292091, June 25, 2003, 2003 CPD ¶ 125 at 9; see also M&S Farms, Inc., B-290599, Sept. 5, 2002, 2002 CPD ¶ 174 at 8. The record confirms that, in evaluating proposals, the evaluators treated the technical approach and management plan evaluation factors as having equal weight by allowing a maximum of 35 points for each. AR, Tab D, Standards for Evaluation of Proposals, at 4. This weighting was contrary to the terms of the RFP, which indicated that technical approach was the most important evaluation factor. The record also indicates that the evaluators primarily sought to determine technical acceptability in evaluating final proposal revisions, which resulted in similar point scores and a final evaluation report that merely confirmed technical acceptability. The SSO appears to have then relied on those point scores in a mechanical fashion in concluding that the proposals of YORK and Obsi1 were technically equal and in awarding to Obsi1 on the basis of its lower price. Point scores are merely a guide to intelligent decisionmaking and their proximity does not, itself, establish technical equality. See Ogden Support Servs., Inc., B-270012, B-270012.2, Mar. 19, 1996, 96-1 CPD ¶ 177 at 6.

Although the SSO did discuss each offeror's past performance based on her own review, her consideration of the two most significant factors in the technical evaluation did not go beyond concluding that the YORK and Obsi1 proposals met solicitation requirements and were technically acceptable. With regard to Obsi1's proposal, the SSO stated that

Obsi1, Inc. clarified all technical concerns and submitted final proposal revisions that are inclusive of work statement requirements. Obsi1 proposal score remains slightly above York's proposal, but both are substantially equal.

AR, Tab D, Source Selection Decision, at 3.

Concerning YORK's proposal, the SSO's comments similarly lacked any indication that she considered, or was aware of, the substance of the technical proposals or any evaluation consistent with the criteria in the RFP:

York Building Services, Inc. too has responded satisfactorily to the panel concerns and demonstrates its capacity to perform required services and its proposal is substantially equal to Obsi1. York has also submitted a best and final offer inclusive of all requirements.

Id. at 4.

In explaining her selection decision, the SSO states that her determination that “both Obsi1, Inc. and York Building Services, Inc. reflect comparable technical superiority” was based upon “[her] review of the technical proposals and from the Technical Evaluation Panel’s report.” Id. Yet the record provides no support for this claim, as the SSO discussed only the least important of the evaluation factors, past performance.

Significantly, to the extent that the SSO relied on the technical panel’s report, the final technical report is conclusory and suggests an effort to confirm minimal acceptability, rather than to evaluate proposals on a comparative basis, giving the relative weights required by the RFP. The final technical panel report is one page and two lines in length, most of which consists of a summary of the procurement. After noting that “these offerors . . . demonstrated a thorough understanding of the Solicitation and at least a minimally acceptable level of experience, and an ability to provide janitorial service,” the entire evaluation for each offeror merely noted acceptability and the total score:

Obsi1, Inc. average score – 88

Overall the Panel found Obsi1 Inc.’s proposal overall acceptable. Obsi1 addressed all the clarifications to the proposal that were requested. Proposal addressed Environmental Products well overall and provided the list of products intended to be used as required by the PWS. Recycling Plan was clarified and found acceptable. Offeror clarified how they would address service calls.

York Bldg. Services, Inc. average score 87.5

Overall the Panel found York Building Service, Inc.’s proposal overall acceptable. York addressed all the clarifications that were requested. The offeror corrected the inconsistencies in their custodial work schedule. The offeror also provided information on the cleaning products by brand name and intended uses as required.

AR, Tab D, Final Panel Evaluation Report, at 1-2.

Thus, the record reflects that both the evaluation panel and the SSO evaluated final proposal revisions merely to verify their acceptability, rather than to assess relative quality or to evaluate whether either proposal was superior to the other under the evaluation factors and weightings required by the RFP.

The agency essentially argues that YORK cannot establish that it suffered competitive prejudice by any of these evaluation flaws. For example, the agency argues that YORK cannot show that if the evaluation factors had been properly weighted, YORK's score would have been so high as to render a finding of technical equality impossible. Supplemental AR at vii. The agency also stresses that "the CO did not rely only on numerical scores to find that the York and Obsi1 proposals were technically equivalent." Supplemental AR at vii. The agency emphasizes that the SSO did discuss both offerors' excellent past performance in her final source selection decision and argues that a rescoring of that evaluation factor would not have overcome the price advantage of selecting Obsi1. Supplemental AR at x.

In making these arguments, the agency has attempted to supply in its agency report new rationales, based on a hypothetically correct evaluation, for which there is no support in the contemporaneous record. Our Office will accord little or no weight to such arguments, which have been crafted in the heat of litigation. KEI Pearson, Inc., B-294226.3, B-294226.4, Jan. 10, 2005, 2005 CPD ¶ 12 at 8 n.13; Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Although YORK has not attempted to demonstrate that a reevaluation would necessarily preclude a finding of technical equality, as the agency suggests a protester must do, a protester is not required to show that it would definitely receive the award. Rather, our requirement that a protester demonstrate competitive prejudice means only that the protester must show 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 conclude that, on this record, YORK was competitively prejudiced by the errors. Of particular significance, the record shows that YORK's proposal was scored higher than Obsi1's proposal on the most important evaluation factor, technical approach. The SSO's reliance on total scores (which themselves did not reflect the RFP's relative weighting of the factors) indicates that her selection decision did not consider the significance of YORK's apparent technical advantage under the most important technical evaluation factor.

It is not clear from the current record whether the evaluation scheme in the RFP, which emphasizes technical merit over price, reflects the USDA's needs. Therefore, we recommend first that the USDA review the RFP to determine whether its evaluation scheme meets its needs. If not, we recommend that the USDA amend the RFP accordingly and reopen the competition. If the RFP accurately reflects the USDA's needs, we recommend that the USDA reevaluate the proposals consistent with the evaluation factors and the weighting scheme stated in the RFP, and

adequately document the reevaluation. After performing its reevaluation, the USDA should make a new source selection. Upon the conclusion of this process, the USDA should either confirm the award to Obsi1 and provide a debriefing to YORK, or terminate the award to Obsi1 and award to YORK. In any event, we recommend that the USDA reimburse YORK the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees incurred.⁶ YORK's certified claim for costs, detailing the time expended 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).

The protest is sustained.

Anthony H. Gamboa
General Counsel

⁶ As a general rule, our Office will recommend reimbursement of costs on all issues pursued, not merely those on which the protester prevailed. Department of the Army--Modification of Remedy, B-292768.5, Mar. 25, 2004, 2004 CPD ¶ 74 at 2-3. We do so here because the issues on which YORK is unsuccessful are interconnected and based on common factual underpinnings, and thus are not so clearly severable from the other issues as to constitute a separate protest. Blue Rock Structures, Inc.--Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ ____ at 3.