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Comptroller General
of the United States

Decision

Matter of: J.W. Holding Group & Associates, Inc.

File: B-285882.11; B-285882.12

Date: October 23, 2002

Daniel S. Koch, Esq., Paley, Rothman, Goldstein, Rosenberg & Cooper, for the protester.
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Julius Rothlein, Esq., U.S. Marine Corps, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's new price realism determination was consistent with limitation on reopened discussions (which essentially restricted changes to price proposals) where, although it was based on staffing not clearly indicated in awardee's prior technical proposal, that staffing level was reflected in prior price proposal.

DECISION

J.W. Holding Group & Associates, Inc. (JWH) protests the U.S. Marine Corps's (USMC) award of a contract to Sodexho Management, Inc. (SMI) under request for proposals (RFP) No. M00027-00-R-0002, for food services. JWH challenges the evaluation of proposals.

We deny the protest.

BACKGROUND

The RFP provided for award of a primarily fixed-price incentive contract for a base period of 5 years, with 3 option years, to provide regional garrison food service at 23 messhalls on the West Coast. (Another RFP, No. M00027-00-R-0001, provided for award of a similar contract for 32 messhalls on the East Coast.) Under the solicitation, the contractor would provide full food service at 13 of the 23 West Coast messhalls, and management and mess attendant services (with food preparation performed by USMC cooks) at 10 of the messhalls. In addition, the contractor would assume responsibility for the procurement of food (the price of which was to be included in the fixed incentive price per meal) and (after a transition period) maintenance (on a fixed-price basis) and repair (on a time and materials basis) of food preparation and serving equipment. Further, seven messhalls were set aside under the Javits-Wagner-O'Day Act (JWOD), 41 U.S.C. § 46-48c (2000), for performance by JWOD organizations for the blind or other severely handicapped as subcontractors. RFP § H.5(f).

Award was to be made to the offeror whose proposal represented the "best value" to the government based on four evaluation factors: (1) price; (2) integrated organization and management, including subfactors for organization and management plan, advanced food technology plan, quality control plan, and phase-in plan; (3) small business subcontracting plan; and (4) past performance. Price was the most important criterion and was equal in importance to the other criteria combined. With respect to price, the solicitation provided for an evaluation "to determine that the price . . . is realistic for the work to be performed; i.e., it reflects a clear understanding of the requirement and is consistent with the various elements of the offeror's technical proposal." RFP § M.3.4.1. (The solicitation indicated that, in addition to consideration under the price criterion, results of the price realism analysis may be used in making the performance risk assessment and responsibility determination. Id.) The solicitations specified that the price realism evaluation would include consideration of the completeness (with respect to required pricing information), reasonableness and realism of the proposed prices.

Four offerors submitted proposals. SMI's, JWH's and a third offeror's (Eurest Support Services (ESS)) proposals were included in the competitive range. After conducting written and oral discussions, USMC requested final proposal revisions (first FPRs). Based on its evaluation of the resulting first FPRs, the agency concluded that SMI's proposal represented the best value and therefore made award to SMI. (SMI also received the award under the East Coast solicitation.)

JWH protested the award; we denied that protest. J.W. Holding Group & Assocs., Inc., B-285882.3, B-285882.6, July 2, 2001, 2002 CPD ¶ __ at 3. However, we sustained protests filed by ESS (against the award of both the West Coast and East Coast contracts) to SMI. Eurest Support Servs., B-285813 et al., July 3, 2001, 2002 CPD ¶ __ at 14-15. Specifically, we concluded that USMC's price evaluation did not reasonably account for SMI's [DELETED]-percent reduction from its initial pricing based on a [DELETED] staffing reduction, and consequent [DELETED] increase in assumed productivity, in its first FPR. We also found that the price evaluation did not adequately consider that SMI had largely failed to substantiate its [DELETED] FPR reduction in the costs associated with its proposed use of central food production facilities. We concluded that USMC lacked a reasonable basis for its conclusion that SMI's evaluated price represented the lowest cost to the government, and recommended that the agency reopen discussions with offerors in the competitive range and request revised proposals.

In implementing our recommendation, USMC decided to limit the reopened discussions to the areas of concern identified in our decision. The amended solicitation provided that changes to offerors' organization and management plans, small business subcontracting plans, and past performance information, were not solicited; that those plans/information, as included in the initial proposals and first FPRs, instead would remain in effect; and that the first FPR evaluation of these factors would carry forward to the second FPR. Amended RFP §§ L.8.2(b); M.3.4.2. The amended RFP stated, under the amended description of the technical evaluation factors, that "[o]nly proposal changes based upon the issues addressed in this Amendment 0014 will be evaluated by the Government." Id. In this regard, USMC included as an attachment to SMI's copy of the amendment a number of requests for information, including requests to justify and explain its first FPR reductions in staffing and central food processing facility costs.

SMI and the other offerors were further cautioned as follows: "The only pricing revisions to be permitted in this second FPR will be limited to escalation changes directly resulting from the delay in the start of contract performance, and the issuance of revised Wage Determinations and Collective Bargaining Agreements (CBA), incorporated in the enclosed Amendment 0014." USMC Letters to Offerors, Jan. 24, 2002, at 4; RFP § L.8.2(b). Offerors were instructed to provide a breakdown supporting the updated pricing proposed in accordance with RFP § L.10.2, which required that detailed cost information and detailed staffing by messhall be submitted; that "[s]upport for any revisions in pricing from that proposed in the first FPR must include a detailed breakdown of the basis for the revision"; and that any revisions to pricing in the second FPR must be substantiated as "directly and only attributable to" escalation, or new wage determinations and CBAs. USMC Letters to Offerors, Jan. 24, 2002, at Encl. 1; RFP § L.10.2.1.[1] Subsequently,USMC indicated that an offeror also could correct an "arithmetic error" in its first FPR. Amend. No. 17, Question/Answer No. 5.

USMC determined that, of the three second FPRs it subsequently received, only SMI's essentially complied with the established restrictions on the scope of the reopened discussions and furnished the required proposal information and explanation. USMC found that ESS and JWH had reduced their pricing without a sufficient showing that the reductions were consistent with the established restrictions. USMC thereupon requested ESS and JWH to clarify the bases for their price reductions. After evaluating the responses, USMC again determined that

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[1] USMC reemphasized the limits on pricing changes when it stated in amendment No. 16 that "[a]ny changes must be solely attributable to the delay rather than to changes in an offeror's technical approach, management philosophy or assumptions," and reiterated that "the basis for the changes must be clearly delineated and adequately substantiated." Amend. No. 16, Question/Answer No. 2.

neither ESS nor JWH had adequately justified their price reductions. The agency thus disallowed the reductions for purposes of the price evaluation. In total, USMC disallowed approximately $[DELETED] in reductions by ESS and $[DELETED] in reductions by JWH. Source Selection Decision (SSD) at 2; Agency Report, Aug. 9, 2002, at 9.

In evaluating the pricing (with the above adjustments), the agency used three different estimating approaches: (1) the basic government cost estimate (GCE)--which was based upon the government's estimate of projected labor costs, adjusted for potential labor savings from the use of central food production, and the government's estimate of other costs--considered in conjunction with the offeror's proposed target price, ceiling price and share ratios to derive a total cost to the government; (2) a tailored GCE, in which the basic GCE was adjusted to reflect the extent to which the offeror proposed to take advantage of central food production; and (3) a projected cost, in which the offeror's proposed target labor cost was revised to reflect the tailored GCE labor estimates, but other, non-labor costs were included as proposed. Final Summary of Findings, July 3, 2002, at 18-21, 28-9; Agency Report, Aug. 9, 2002, at 4-6. The evaluation results were as follows:

	JWH	ESS	SMI
Share Ratio (USMC/ Contractor)	[DELETED]	[DELETED]	[DELETED]
Proposed Target Price	$[DELETED]	$[DELETED]	$[DELETED]
Projected Cost	$[DELETED]	$[DELETED]	$[DELETED]
Tailored GCE	$[DELETED]	$[DELETED]	$[DELETED]
Risk			
Proposal	Moderate	Low	Low
Performance	Moderate	Moderate	Low
Technical Score	66.2	84.2	84.3

Agency Report, Aug. 9, 2002, at 8-9.

USMC determined that the technical proposals submitted by SMI and ESS were essentially equal, and that both were "far superior" to JWH's. In considering price/cost, the agency placed "greater weight"on JWH's tailored GCE than on its lower projected cost. SSD at 4. Noting that non-labor costs were incorporated in the projected cost as proposed, such that omitting non-labor costs would understate the resulting projected cost, the agency viewed JWH's projected cost estimate as invalid on the basis that JWH's proposal unrealistically failed to include any provision for other direct costs (ODC) or G&A costs. Final Summary of Findings, July 3, 2002, at 32. Thus, based on the tailored GCE, the agency determined that the most probable cost of SMI's proposal (up to $[DELETED]) was lower than both JWH's ($[DELETED]) and ESS's ($[DELETED]). SSD at 4. As a result, USMC ranked SMI's proposal first, with the best technical proposal, lowest risk and lowest price; ESS's second, with a technical rating equal to SMI's but far superior to JWH's, and a lower risk than JWH's; and JWH's third. Upon learning of the resulting award to SMI, and after being debriefed, JWH filed this protest with our Office challenging USMC's evaluation conclusions.

In reviewing an agency's evaluation of proposals and source selection decision, our review is confined to a determination of whether the agency acted reasonably and consistent with the stated evaluation factors and applicable procurement statutes and regulations. United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 10-11; Main Bldg. Maint., Inc., B-260945.4, Sept. 29, 1995, 95-2 CPD ¶ 214 at 4. Based on our review of the record, we find no basis to question the award to SMI.

SMI STAFFING

JWH asserts that USMC improperly permitted SMI to change its technical proposal, in violation of the limits the agency had placed on the scope of discussions, so as to increase the level of staffing above the level evaluated under SMI's first FPR. In this regard, in its first FPR, SMI [DELETED] reduced its initially proposed staffing (as well as its price), but furnished little or no substantiation and much less detail than previously furnished concerning the resulting staffing levels. In particular, SMI furnished no detailed staffing information in its first FPR cost proposal, while in its technical proposal it furnished only staffing charts, indicating the staffing at each messhall in each of several consolidated staffing categories from phase-in until full performance (with full implementation of proposed central food production). SMI's first FPR technical proposal indicated a total staff of [DELETED] full-time equivalents (FTE), including [DELETED] FTEs at the [DELETED] messhalls, which was [DELETED] FTEs fewer than the [DELETED] FTEs at [DELETED] messhalls shown in SMI's initial proposal. SMI Initial Proposal, West Coast Staffing Chart, Day 540; SMI First FPR, Final Discussion Points, West Coast Staffing Chart, Day 540; USMC Comments, Oct. 8, 2002, Encl. 1.[2] USMC in its evaluation of SMI's first FPR and selection of SMI for award, and the parties in their submissions during the protests of the ensuing award to SMI, assumed that SMI's staffing level was the [DELETED] FTEs shown in SMI's first FPR technical proposal.

In its second FPR, SMI advised the agency that the staffing charts in the technical proposal of its first FPR indicating staffing of [DELETED] FTEs did not fully reflect the staffing included in its first FPR pricing. According to SMI's second FPR, while the staffing levels in SMI's initial proposal were consistent with the staffing levels in place at USMC facilities operated by small businesses, the [DELETED] FTE staffing level in SMI's first FPR technical proposal was based on the expectation that SMI

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[2] According to SMI, the number of [DELETED] staffing positions at the [DELETED] messhalls, as distinct from the total number of FTEs at the [DELETED] messhalls, was [DELETED] FTEs in its initial proposal, and this was reduced by [DELETED] FTEs to [DELETED] FTEs in SMI's first FPR. SMI Comments, Oct. 8, 2002, at 2.

could introduce the productivity levels achieved on SMI's comparable commercial contracts. However, according to SMI's second FPR, SMI recognized in preparing its first FPR that [DELETED]. SMI's second FPR indicated that SMI therefore had included in its first FPR pricing a "risk mitigation factor" consisting of an additional [DELETED] FTEs, for a total staffing of [DELETED] FTEs. SMI Second FPR, Discussion Point 2A, at 6-8. In determining that SMI's second FPR included adequate staffing, USMC included in the evaluated staffing level the additional [DELETED] FTE risk mitigation factor. Initial Evaluation of Second FPRs, May 13, 2002, at 11-12.

JWH asserts that, because SMI did not make its risk mitigation staffing visible in its first FPR, and the agency did not include the additional [DELETED] FTEs in its evaluation of first FPRs, the added staffing constituted a prohibited change in SMI's technical proposal and therefore should not have been evaluated.

JWH's position is not persuasive. Although SMI's risk mitigation allowance of [DELETED] FTEs may not have been evident on the face of its first FPR technical proposal, the record supports USMC's position that, viewing the initial proposal and first FPR together, it was apparent prior to the initial award that SMI's pricing included an additional staffing allowance of approximately [DELETED] FTEs, which would be consistent with a total staff of at least [DELETED] FTEs. In this regard, while SMI's staffing charts indicated a [DELETED] FTE reduction in staffing at [DELETED] messhalls in its first FPR, the total dollars subcontracted to [DELETED] as indicated in SMI's first FPR ($[DELETED]) remained essentially the same as the cost of the [DELETED] subcontracts indicated in its initial proposal ($[DELETED]) after accounting for the 3-month increase in the contract term (from 93 to 96 months). Initial Price Proposal, Subcontracting Plan, at 2; First FPR, Discussion Points, Subcontracting Plan, at 2; <u>see</u> USMC Comments, Oct. 8, 2002, at 1-2, Encl. 1. We agree with USMC that, unless one unreasonably assumes that SMI was proposing an increase in the average hourly [DELETED] labor rate of approximately [DELETED] percent (from $[DELETED] in the initial proposal to $[DELETED] in the first FPR), USMC Comments, Oct. 8, 2002, Encl. 1, the most reasonable interpretation of SMI's unchanged pricing was that, notwithstanding the apparent staffing reduction in its first FPR staffing charts, SMI's first FPR pricing in fact still included all of the [DELETED] FTEs indicated in SMI's initial proposal.

Considering the actual staffing included in SMI's FPR pricing was consistent with the scope of the reopened discussions. SMI's explanation that its FPR pricing included an additional risk mitigation allowance of [DELETED] FTEs was responsive to the goal established for the reopened discussions--that SMI demonstrate the realism of its proposed pricing, including demonstrating that it was offering adequate staffing. Indeed, the agency would have failed in its obligation to evaluate the reasonableness of the proposed pricing had it not considered the actual staffing included in SMI's pricing. Also consistent with the limitations established in the reopened solicitation is the fact that the additional staffing was not used to alter the evaluation of SMI's organization and management plans, small business subcontracting plan, and past performance. RFP § M.3.4.2. We conclude that USMC reasonably evaluated SMI's second FPR based on a staffing level of [DELETED] FTEs.

JWH'S EVALUATION

JWH challenges USMC's disallowance of the deletion from its second FPR of all hours (approximately [DELETED] hours per month, resulting in a reduction of approximately $[DELETED]) for JWH utility workers at the seven JWOD messhalls supported by the National Industries for the Severely Handicapped (NISH), which were included in JWH's first FPR. According to JWH, its first FPR included utility worker hours in JWH's own labor force based on the assumption that NISH would not be performing this function at the seven messhalls, but NISH's proposal to JWH for second FPRs made clear that NISH would in fact be furnishing mess attendant utility workers. JWH claims that the deletion of the hours amounted to correction of an inadvertent duplication of effort, rather than a prohibited change in approach.

This aspect of the evaluation was reasonable. As noted by USMC, any mistake related to the deletion of JWH utility worker hours at the NISH messhalls was not apparent from JWH's second FPR or its subsequent clarification response. When asked by USMC to clarify how its reduction in JWH utility worker hours complied with the limits on the scope of discussions, JWH responded as follows: "We had staffed these messhalls with Utility/G.I. Man but NISH is taking responsibility for these hours. Thus, according to NISH's price proposal, we had to delete our Utility/G.I. Man, which accounts for the decrease in labor hours." USMC Clarifications Request, May 13, 2002, at 2, Encl. 2; JWH Clarifications Response, May 20, 2002, at 1. USMC interpreted JWH's response as indicating, not that there had been a discrepancy in its first FPR, but that NISH now would be assuming responsibility for furnishing the utility worker hours. Based on this interpretation, and the fact that there was no apparent indication of an increase in NISH labor in the second FPR, the agency concluded that JWH simply was reducing its overall effort and pricing, which was not permitted. We find the agency's interpretation reasonable, especially given that JWH was explaining a change that first appeared in its second FPR, well after the time when the agency could reasonably expect that any mistake in division of effort would have been discovered. It follows that the agency reasonably disallowed the reduction in hours and associated pricing.

JWH questions USMC's determination that the projected cost estimate for JWH's proposal, which was significantly lower than the tailored GCE, was invalid. As indicated above, the agency discounted the projected cost estimate--in which non-labor costs were incorporated as proposed rather than as estimated/evaluated--on the basis that JWH's proposal unrealistically failed to include any provision for ODC or G&A costs. JWH claims that these costs in fact were incorporated in its proposal.

This argument is untimely. In its initial protest, JWH simply asserted that "the ODCs and G&A were included in its proposal, on a chart entitled 'indirect labor costs.'"

Protest, July 15, 2002, at 7. JWH did not explain, however, nor is it otherwise evident, how the chart to which JWH apparently refers specifically and clearly identifies JWH's projected ODC and G&A costs. Subsequently, in its August 19 comments, JWH furnished a declaration from a JWH vice president that provided a more detailed explanation of its claim that its proposal included ODC and G&A costs. Under our Bid Protest Regulations, protests based on other than solicitation improprieties must be filed within 10 days of when the protester knew or should have known their bases. 4 C.F.R. § 21.2(a)(2) (2002). Our Regulations do not contemplate the piecemeal presentation or development of protest issues; where a protester raises a broad ground of protest in its initial submission but fails to provide details within its knowledge until later, so that a further response from the agency would be needed to adequately review the matter, these later issues will not be considered. Vision Blocks, Inc., B-281246, Jan. 14, 1999, 99-1 CPD ¶ 20 at 4; Litton Sys., Inc., Data Sys. Div., B-262099, Oct. 11, 1995, 95-2 CPD ¶ 215 at 2. JWH's August 19 explanation therefore is untimely.

In any case, the additional information furnished by JWH does not show that JWH's second FPR specifically and clearly identified, broke out and quantified the overall extent of ODCs and G&A. For example, the JWH vice president indicates that G&A costs were "included within a [DELETED]% burden applied to direct labor, on the pay charts by mess hall, and are included in all rollups of costs. The [DELETED]% includes about [DELETED]% for FICA, FUTA, Workers Compensation, etc., fees, and about [DELETED]% for G&A." However, JWH's first FPR identified the [DELETED] percent rate as a fee paid to its "employee benefits and payroll accounting small business subcontractor," to enable it to "account for all employee health and welfare benefits, manage all federal and state tax contributions, social security reporting and depositing, workmen's compensation, etc." First FPR Price Proposal, Price Proposal Overview, at 6 of 7. This contemporaneous explanation does not appear to be consistent with JWH's current claim that the rate covers all of its G&A expense. (Moreover, notwithstanding the requirement that the second FPR set forth the offeror's G&A expense, JWH's second FPR did not explain this [DELETED] percent rate.)

In fact, the record indicates that JWH's evaluated price actually was understated by a significant amount. Although JWH, in response to a clarification request from USMC, updated its second FPR's pricing to reflect the latest applicable wage rate determinations and collective bargaining agreements, USMC has determined, and JWH has not shown to be incorrect, that the agency's evaluation did not reflect this increase in JWH's pricing. USMC calculates that the net effect of making the appropriate correction would be an increase in JWH's proposed target price from $[DELETED] to $[DELETED], that is, above SMI's proposed target price ($[DELETED]), and would have increased the tailored GCE for JWH's proposal from $[DELETED] to $[DELETED], that is, above SMI's tailored GCE ($[DELETED] to $[DELETED]).[3]

The protest is denied.

Anthony H. Gamboa
General Counsel

[3] JWH asserts that the costs of SMI's central food production facility were understated by approximately $[DELETED]. However, where the record does not demonstrate that, but for the agency's actions, the protester would have had a reasonable chance of receiving the award, our Office will not sustain a protest, even if a deficiency in the procurement is found. 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). Here, even if SMI's pricing was significantly increased, it is clear that JWH would not be next in line for award. After adjusting the evaluated JWH pricing upward to reflect the latest applicable wage rate determinations and collective bargaining agreements, the record indicates that the tailored GCE for JWH would be $[DELETED], higher than ESS's $[DELETED]. USMC Comments, Sept. 6, 2002, Memorandum for the Record, at 3. Since ESS's technical proposal was evaluated as more advantageous, receiving a technical score of 84.2 and low/moderate risk ratings, while JWH's received a score of only 66.23 and moderate risk ratings, it is clear that ESS, not JWH, would be next in line for award. Accordingly, JWH was not prejudiced by any deficiency in the evaluation of SMI's pricing.