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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: CSE Construction

File: B-291268.2

Date: December 16, 2002

Nicholas E. Barrack, for the protester.
Rick Grebel, KCI Construction Company, Inc., the intervenor.
Dawn P. Wade, Esq., U.S. Army Corps of Engineers, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a negotiated procurement for a fixed-price construction contract, based upon a price/technical tradeoff, the selection of the higher-rated, higher-priced proposal was unreasonable where the source selection authority did not credit the protester for its substantially lower proposed price, but improperly viewed the protester's low price as too low and demonstrating the protester's lack of understanding of contract requirements, where the solicitation did not provide for an evaluation of offerors' understanding.
 2. Agency evaluated protester's and awardee's proposals unequally, where the two firms provided similar sparse information in response to a technical evaluation subfactor, but the protester's proposal received a lower technical rating.
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DECISION

CSE Construction, a small business concern, protests the award of a contract to KCI Construction Company, Inc. under request for proposals (RFP) No. DACA41-02-R-0006, issued by the U.S. Army Corps of Engineers for the design and construction of firing ranges at Fort Leonard Wood, Missouri. CSE challenges the agency's technical and price evaluation of its proposal.

We sustain the protest.

The RFP provided for the award of a fixed-price contract for design and construction services to upgrade an existing firing range and to build a new range at Fort Leonard Wood, Missouri. Offerors were informed that the agency planned to make award,

without conducting discussions, on the basis of a price/technical tradeoff. The technical evaluation factors were stated to be together more important than price. The following technical evaluation factors and subfactors were identified:

1. Past Performance	
	Quality of product and services
	Customer satisfaction
	Timeliness of performance
2. Corporate Experience	
	Construction experience with projects of similar type, size and complexity
	Designer experience with projects of similar type, size and complexity
3. Management Plan	
	General management structure and plan
	Management of multiple subcontractors including designer architect-engineer

RFP amend 2, at 27. The RFP provided that factor 1 was more important than factors 2 and 3, which were of equal importance, and that the subfactors were listed under each factor in descending order of importance.

With respect to price, the RFP requested only that offerors provide fixed prices for eight contract line items (CLIN) that comprised various aspects of the design and construction work. RFP amend. 2, at 3. That is, for each of the firing ranges, offerors were required to provide a fixed price for design, construction of buildings, site work, and utility work. The RFP requested no cost data or information explaining offerors' proposed prices for these CLINs. With regard to the price evaluation, the RFP stated that price

will not be point scored but will be subjectively evaluated for reasonableness over the life of the contract. . . . Because the evaluation of the price proposal will represent a portion of the total evaluation, it is possible that an offeror might not be selected because of an unbalanced or an unreasonable price proposal.

RFP amend. 2, at 27-28.

The Corps received three proposals, including those of CSE and KCI. The proposals were evaluated by the agency's technical evaluation team (TET), as follows:

Factor	Subfactor	KCI	CSE
Past Performance	Quality of product or service	Very Good	Very Good
	Customer satisfaction	Very Good	Very Good
	Timeliness of performance	Satisfactory	Very Good
Corporate Experience	Construction experience	Very Good	Satisfactory
	Designer experience	Excellent	Marginal
Management Plan	General management structure	Satisfactory	Marginal
	Management of multiple subcontractors	Satisfactory	Satisfactory

Agency Report, Tab 4, TET Report, Aug. 14, 2002, at 7. CSE received a marginal rating under the designer experience subfactor because CSE's proposed design subcontractor had no specific experience with firing ranges. CSE's marginal rating for the general management structure subfactor reflected the evaluators' judgment that CSE's organizational chart lacked detail and that there was no discussion of the firm's design/build strategy. *Id.* at 6.

CSE submitted the lowest price of \$2,558,716, and KCI submitted the next low price of \$4,875,000. The government estimate was \$4,325,100, and the third offeror submitted a price of \$4,910,256. Agency Report, Tab 5, Price Evaluation Team (PET) Report, Aug. 16, 2002, at 2. The PET concluded that CSE's price was unreasonably low, stating that:

This low offeror is CSE from Rolla, Missouri, which is approximately 35 miles from Fort Leonard Wood. This project is a design/build, which implies a certain amount of impreciseness. Also, no internal information was supplied on the proposals and further internal evaluation is not possible at this point. The [government estimate] was and is perceived as being reliable.¹

It is advised that the low proposal by CSE be ask[ed] to verify their proposal. If this proposal is verified, it is believed there is sufficient reason to not consider the proposal fair and reasonable based on technical evaluation criteria in the RFP.

Likewise, it is not reasonable to define the two high firms (KCI and [the third offeror]) as not fair and reasonable.

¹ The PET chair prepared the government estimate. Agency Report, Tab 16, Declaration of PET Chair, Oct. 11, 2002, at 1.

While there is significant variation in the individual bid items, there is not specific indication of unbalanced bidding.

Id. at 3-4. The PET concluded that KCI proposal was “most desirable” from the standpoint of price. Id. at 4. CSE was not asked to verify its price.

The evaluation results were provided to the source selection authority (SSA), who determined that “KCI’s technical proposal was markedly superior to [CSE’s] and [the other offeror’s] proposals.” Agency Report, Tab 9, Source Selection Decision, at 3. With respect to CSE’s proposal, the SSA stated that:

CSE’s price proposal was significantly below both the Government Estimate and all other proposals. CSE was the lowest priced proposal at 59% of the Government Estimate. This price proposal is too low and reflects a lack of understanding of the requirements of this project. CSE is considered to be the second best qualified offeror for this effort. However, with the two [technical] subfactor rankings of “marginal,” and an unreasonably low price, I am unwilling to select this proposal.

Id. at 2.

Award was made to KCI on the basis of initial proposals, and this protest followed. Performance of KCI’s contract has been stayed pending our decision in this matter.

CSE disputes the agency’s determination that the firm’s proposed price was unreasonably low and reflected a lack of understanding of the requirements of the project. In this respect, CSE has provided detailed cost information to show how its proposed price was calculated. This information was not requested by the RFP nor seen by the Corps before its source selection decision.

Before awarding a fixed-price contract, an agency is required to determine that the price offered is fair and reasonable. Federal Acquisition Regulation (FAR) § 15.402(a). An agency’s concern in making a price reasonableness determination focuses primarily on whether the offered prices are higher than warranted, and the results of the analysis may be used in negotiating reasonable prices. See McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9. Although not required, an agency may also provide for a price realism analysis in a solicitation for the award of a fixed-price contract for the purpose of assessing whether an offeror’s low price reflected on its understanding of the contract requirements or the risk inherent in an offeror’s approach. WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 3; PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381 at 5. Where there is no relevant evaluation criterion pertaining to realism or understanding, a determination that an offeror’s price on a fixed-price contract is too low generally concerns the offeror’s responsibility, i.e., the offeror’s ability and

capacity to successfully perform the contract at its offered price. See Possehn Consulting, B-278579, Jan. 9, 1998, 98-1 CPD ¶ 10 at 3; Envirsol, Inc., B-254223, Dec. 2, 1993, 93-2 CPD ¶ 295 at 5.

Here, there was no technical or price evaluation factor providing for the evaluation of the offerors' understanding of the requirements. The price evaluation factor provided only for the evaluation of the "reasonableness" of the proposed price (that is, whether the price was unreasonably high) and for whether the price proposal was unbalanced, which is not contended here. See RFP amend. 2, at 27-28. Moreover, the RFP did not request cost or pricing information or any other information that would allow the agency to determine that a low proposed price reflected a lack of understanding of the contract requirements.²

The agency's apprehension that CSE's price was too low would appear to concern the firm's responsibility, that is, whether CSE could satisfactorily perform at its proposed price, Possehn Consulting, *supra*, at 4, or whether CSE may have made a mistake in its proposed price. Since CSE is a small business concern, if the agency believed that CSE could not satisfactorily perform the contract at its proposed price, the Corps was required to refer this finding of non-responsibility to the Small Business Administration (SBA) for that agency's review under its certificate of competency procedures.³ Id. If the agency believed CSE had made a mistake in its proposed price, it was required to request that CSE verify its price. FAR § 15.306(b)(3)(i), which incorporates the bid mistake rules of FAR § 14.407-3 (contracting officer should obtain sufficient information to be reasonably assured that the bid confirmed is without error). As noted above, the agency did not request verification here.

In any case, here, the record establishes that CSE's proposal was not considered for award by the SSA based primarily upon her judgment that CSE's proposed price was unreasonably low and reflected a lack of understanding of the contract requirements. See Agency Report, Tab 9, Source Selection Decision, at 2. That is, although CSE was considered to be the "second best qualified offeror," CSE was not selected because of its two marginal ratings and "unreasonably low" price. Id. In performing the price/technical tradeoff required by the RFP, the SSA did not consider CSE's significantly lower price to be an advantage to be weighed against the awardee's higher technical rating. We think that if CSE's price advantage had

² The submission of a "below-cost" price is not by itself legally objectionable. See Arctic Slope World Servs., Inc., B-284481, B-284481.2, Apr. 27, 2000, 2000 CPD ¶ 75 at 13.

³ There is no evidence in the record that the Corps considered CSE to be non-responsible or performed any analysis to determine whether CSE had the necessary resources to perform at its proposed price.

been properly weighed in the agency's price/technical tradeoff analysis, it would have had a reasonable possibility of being selected for award. Accordingly, we sustain CSE's protest on this basis.

CSE also objects to the marginal and satisfactory ratings its proposal received under the corporate experience and management plan factors. With respect to the marginal rating the firm received under the general management structure/plan subfactor to the management plan factor, CSE complains that its proposed design/build strategy is clearly described, and is "simple, effective and economical." Protester's Comments at 4. The Corps responds that CSE's proposal did not provide sufficient information in response to this factor.

From our review of the proposals we find that neither CSE nor KCI provided much of the information requested by the RFP for this subfactor. In fact, the consensus evaluation documentation indicates that both firms' proposals were similarly sparse. Specifically, the evaluators, in rating CSE's proposal as marginal under this subfactor, noted as weaknesses that:

Proposal does not indicate available manpower and utilization for a project of this size. The proposal does not provide much information or detail on design-build management strategy and tactics. The organizational chart does not show that the firm has an understanding of the design-build process or of [Corps] [quality control (QC)]/Safety requirements. No QC/Safety officer was identified.

Agency Report, Tab 7, CSE Consensus Rating Sheet for the General Management Structure and Plan Subfactor.

The evaluators, in rating KCI's proposal as satisfactory under this subfactor, noted as weaknesses that:

Organizational chart is simple and lacks detail. There is limited discussion on design/build strategy. The chain of command is not clear from the organizational chart.

Agency Report, Tab 7, KCI Consensus Rating Sheet for the General Management Structure and Plan Subfactor.⁴ The evaluators also noted as a general comment that KCI had not identified its key personnel. Although not mentioned by the evaluators, KCI's proposal, like CSE's, does not indicate available "manpower and utilization."

⁴ The consensus rating sheet also identifies as a deficiency (that is, "omitted material required by the RFP") that KCI is "[m]issing the design/build strategy." There is no explanation in the record to reconcile the evaluators' inconsistent consensus comments that KCI's design/build strategy was missing rather than limited.

Given that a “marginal” rating reflected a proposal that lacked detail and left issues requiring clarification, see Agency Report, Tab 3, Source Selection Plan, at 26, we fail to see why KCI received a higher rating than CSE under this factor. Indeed, our review of the record, including the proposals, suggests that both proposals’ responses in this area were similarly sparse. Accordingly, we think that the Corps should review its evaluation ratings under this subfactor and ensure that the two firms are treated equally.

With respect to the other evaluation ratings that CSE received, and specifically the marginal rating the firm received under the designer experience subfactor to the corporate experience factor, we find no basis from our review of the record to question the agency’s evaluation judgment. For example, the RFP’s proposal preparation instructions stated with regard to the designer experience subfactor:

Designer experience with projects of similar type, size, and complexity. For this [sub]factor, a project of similar type, size and complexity is considered to be a firing range, or complex of pre-engineered buildings and facilities, with site improvement work and construction similar to a firing range facility that incorporates most or all of these features: standardized range[] design; modernized target system(s); control tower; latrine facilities; ammunition facilities; classroom facilities; and covered bleacher facilities.

RFP amend. 2, at 19. Although CSE complains that it should have received a higher rating under this subfactor, the protester admits that its proposed design subcontractor does not have any experience designing firing ranges, nor does the protester argue that its proposed subcontractor’s experience is of similar type, size, and complexity to the contract work, as defined by the solicitation. Although CSE clearly disagrees with the agency’s evaluation of its proposal under the designer experience subfactor and certain other subfactors, its disagreement does not show that the agency’s evaluation of these subfactors was unreasonable. See UNICCO Gov’t Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134 at 7.

We sustain the protest.

We recommend that the Corps assess CSE’s low proposed price in accord with this decision and evaluate the firms’ proposals under the general management structure/plan subfactor. If the agency believes that CSE may have made a mistake in its proposed price, that should be handled in accordance with FAR § 15.306(b)(3)(i). If CSE is found to be nonresponsible, this matter should be referred to the SBA for that agency’s review. If CSE is found to be responsible, the Corp should perform a new price/technical tradeoff analysis that gives CSE credit for the firm’s low proposed price. If a firm other than KCI is selected for award, KCI’s contract should be terminated and award made to that other firm. We also recommend that CSE be reimbursed the reasonable costs of filing and pursuing the

protest. 4 C.F.R. § 21.8(d)(1) (2002). CSE should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the Corps within 60 days of this decision.

Anthony H. Gamboa
General Counsel