Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Trusted Hand Service, Inc.

File: B-285355

Date: August 21, 2000

Katy Moon for the protester.
Denise Rhone for Sparkle Cleaning Associates, Inc., an intervenor.
Emilia M. Thompson, Esq., Naval Undersea Warfare Center Division, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency did not mislead protester into raising its price where although it informed the protester that its price was low in comparison to the government estimate, it also informed the protester that the government estimate might be outdated and that the protester's pricing might be justified, and, rather than telling the protester to revise its prices, told it to review its prices and provide either a confirmation of pricing or a revision.

DECISION

Trusted Hand Service, Inc. protests the award of a contract to Sparkle Cleaning Associates, Inc. under request for proposals (RFP) No. N66604-00-R-0152, issued by the Department of the Navy for custodial and sidewalk snow removal services at the Naval Undersea Warfare Center Division, Newport, Rhode Island. The protester complains that the agency enticed it to increase its price and then selected Sparkle for award based on its lower price.

We deny the protest.

The RFP, which requested prices for a base and 4 option years, contemplated the award of a fixed-price contract combining definite-quantity line items and indefinite-quantity line items. The solicitation furnished detailed information regarding the nature, volume, location, and frequency of the various cleaning services to be performed. The RFP provided for award to the offeror whose proposal represented the best value to the government, with technical capability of significantly greater

importance than price. Subfactors to be considered under technical capability were management approach and past performance. RFP § MX35.

Nine offerors submitted proposals prior to the January 6, 2000 closing date. The contracting officer determined that only the two lowest-priced offers, those of Trusted Hand and Sparkle, should be included in the competitive range. Competitive Range Determination, Mar. 3, 2000, at 1. Both proposals were rated as low risk for past performance and as unacceptable but susceptible to being made acceptable for management approach. Technical Evaluation Report, Feb. 24, 2000, at 1.

The contracting officer conducted discussions with both offerors and requested revised proposals. Both offerors corrected all technical deficiencies. Agency Report, June 9, 2000, at 9. Sparkle raised its price significantly (from $4,527,086 to $6,996,776), while Trusted Hand reduced its price from $5,318,456 to $5,189,529.

The contracting officer, concerned by the substantial increase in Sparkle's price, reopened discussions with Sparkle and instructed it to review its pricing and provide a final revision. The contracting officer asked Trusted Hand to review its pricing as well, noting that:

> In comparison to the Government estimate, we had been concerned initially that your overall pricing was based on a low number of hours. There were a few high prices that I see you have adjusted downward, but overall the original pricing was low and you have revised them even lower.
>
> The Government believes that very low prices may lead to administrative problems, and, therefore, become false economy. Our Government estimate may be out of date, and you may be correct in your pricing. However, I would like you to review again your pricing and provide either a confirmation of pricing or a revision . . . .

Letter from Contracting Officer to Trusted Hand (Apr. 11, 2000).

Upon receipt of the agency's letter, a representative of Trusted Hand contacted the contracting officer, stating that he had heard that the frequency of services was going to be reduced, and inquiring whether this was the case. The contracting officer informed Trusted Hand that she was not aware of an anticipated reduction in the frequency of services. The contracting officer instructed Trusted Hand to calculate its price based on the information in the solicitation and informed it that should the frequency of services be reduced after award, the government would

expect a corresponding reduction in price.[1] Agency Report, supra, at 11. The contracting officer then contacted Sparkle and conveyed the same information. Id.

Sparkle responded to the contracting officer's second request for a revised proposal by decreasing its price to $5,373,100.50. Trusted Hand, on the other hand, increased its price to $5,419,027.11. Trusted Hand noted that its first revised proposal had been prepared "using information [regarding an anticipated reduction in the frequency of services] that was not a part of the Solicitation"; use of this information, the protester acknowledged, "was an error on [its] part." Letter from Trusted Hand to Contracting Officer at 1 (Apr. 18, 2000).

The technical evaluation panel (TEP) determined that the proposals of both offerors, as revised, were acceptable, but ranked Sparkle's higher than Trusted Hand's for the following reasons:

- Sparkle made an extra attempt to note inefficiencies occurring under the present contract and proposed ways to solve them, which indicated a more pro-active management approach.

- Sparkle attended a site visit and obtained a copy of the drawings, which, in the TEP's view, provided it with more insight into the scope of the requirement.

- The manager/owner of Sparkle attended face-to-face discussions and indicated personal involvement in any future contract, which, in the TEP's view, reduced risk to performance should any difficulties during contract administration require the involvement of management.

Final Evaluation Report, Apr. 25, 2000, at 2. The contracting officer determined that since the TEP had ranked Sparkle's proposal above Trusted Hand's, and since Sparkle's total price was lower than Trusted Hand's, Sparkle's proposal represented the best overall value to the government. Business Clearance Memorandum, supra, at 4. On May 3, the agency awarded a contract to Sparkle.

Trusted Hand complains that the agency misled it into raising its price by telling it that its initial price, which was virtually identical to the price at which award was ultimately made to Sparkle, was too low.

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[1] The contracting officer notes that some of the services are to be performed less frequently under this contract than under its predecessor, but that the lower frequencies are reflected in the RFP. Business Clearance Memorandum, Apr. 25, 2000, at 4.

It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. Hago-Cantu Joint Venture, B-279637.2, July 20, 1998, 98-2 CPD ¶ 99 at 4. Specifically, an agency may not, even inadvertently, mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns; misinform the offeror concerning a problem with its proposal; or misinform the offeror about the government's requirements. Id. With regard to the specific facts of this case, an agency may not mislead an offeror into raising its price. SIMSHIP Corp., B-253655.2, Dec. 2, 1993, 93-2 CPD ¶ 293 at 4; Marine Transport Lines, Inc.; Lant Shipping, Inc., B-238223.2, B-238223.3, July 30, 1990, 90-2 CPD ¶ 80 at 6.

Here, we do not think that the record supports the protester's allegation that the agency misled it into increasing its price. Although the contracting officer did inform the protester in her letter of April 11 that its original pricing was low in comparison to the government estimate, she went on to note that the government estimate might be outdated and that Trusted Hand might be justified in its pricing. Moreover, she did not instruct--or even advise--the protester to revise its pricing; she told it to review its prices "and provide either a confirmation of pricing or a revision." Letter from Contracting Officer to Trusted Hand (Apr. 11, 2000). Given that the contracting officer informed Trusted Hand that the government estimate might be out of date and that the protester's pricing might be justified, and that she gave the protester the option of confirming or revising its pricing, we think that the protester's decision to increase its final revised price to a level slightly higher than its original price can be attributed only to its exercise of its own business judgment, and not to any improper action on the agency's part.

Trusted Hand also complains that, in ranking Sparkle's technical proposal above its own, the agency considered factors other than, and unrelated to, those stated in the RFP, such as Sparkle's attendance at the site visit and the presence of its owner/manager at face-to-face discussions, and a factor that, according to the protester, it had been instructed not to consider, i.e., means of achieving cost efficiencies. Protester's Comments, June 21, 2000, at 2.

It is unnecessary for us to address the protester's argument regarding the ranking of technical proposals given that it is apparent from the record that, even had the agency ranked the proposals as technically equivalent, it would have selected Sparkle's proposal for award based on its lower price. In this regard, the protester has not argued that its technical proposal should have been ranked ahead of Sparkle's; it has argued only that the two proposals should have received equivalent rankings. The solicitation made clear, however, that in the event that technical proposals were rated as technically equal, price would become the determinative factor in the selection of an awardee. Accordingly, it is clear that the agency would have selected Sparkle for award even if Sparkle had not been ranked higher, as the protester argues. Under these circumstances, the protester was not prejudiced as a

result of the agency action it challenges. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3 (protester must demonstrate a reasonable possibility that it was prejudiced); see Statistica, Inc. v. Christopher, 103 F.3d 1577, 1581 (Fed. Cir. 1996).

The protest is denied.

Robert P. Murphy
General Counsel