Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: Theisinger und Probst Bauunternehmung GmbH

File: B-275756

Date: March 25, 1997

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John E. Lariccia, Esq., Department of the Air Force, for the agency.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Award of a fixed-price contract to a higher-priced, technically superior offeror is unobjectionable where it is consistent with the solicitation evaluation criteria, the agency reasonably determined that the difference in technical merit was sufficiently significant to justify the marginal cost difference, and the record does not support the protester's theory that the agency's source selection authority must have confused proposals in making his selection.

DECISION

Theisinger und Probst Bauunternehmung GmbH protests the award of a contract to SKE/Klee under request for proposals (RFP) No. F61521-96-R2101, issued by the Department of the Air Force as a Simplified Acquisition of Base Engineering Requirements (SABER) procurement for alteration, maintenance, repair and minor construction work at various facilities in the Kaiserslautern Military Community, Germany. Theisinger contends that the award to a higher-priced offeror was improper because the agency's technical and past performance evaluations were flawed and the agency did not make a proper best value determination.

We deny the protest.

The solicitation, issued April 23, 1996, contemplated the award of an indefinite quantity, indefinite delivery, firm fixed-price 12-month contract with three 1-year options and a total ceiling of $25 million.

The RFP provided for award to the responsible offeror whose offer was found most advantageous to the government considering, in descending order of importance, technical factors, past performance and cost. The solicitation set forth four technical evaluation factors, in descending order of importance: (1) project

management; (2) project execution; (3) subcontracting support; and (4) experience. Under each of these four factors, proposals were evaluated against the following assessment criteria, also in descending order of importance: soundness of management approach, understanding the technical requirement, and identification and use of resources. The RFP provided that past performance would be measured using four evaluation factors in descending order of importance, including: (1) quality of service; (2) cost control; (3) timeliness of performance; and (4) customer satisfaction. Each of these past performance factors was to be measured using two assessment criteria, in descending order of importance: compliance with technical requirements and management approach. Cost was to be evaluated for completeness, realism and reasonableness, using weighted coefficients for various jobs within the construction industry and as identified by the RFP.

The RFP instructed offerors to submit with their proposals information on relevant contracts. The solicitation provided that the agency "shall place emphasis on the relevance of the prior performance in relation to this requirement, rather than on the number of contracts performed." Offerors were also instructed to "explain clearly why the identified contracts [were] deemed to be relevant to the SABER [c]ontract."

The Air Force received six offers by the RFP's June 6, 1996, closing date. Proposals were assessed under each evaluation factor using four color/adjectival ratings: (1) blue/exceptional (exceeds specified performance or capability in a beneficial way and has no significant weaknesses); (2) green/acceptable (meets evaluation standards and any weaknesses can be corrected); (3) yellow/marginal (fails to meet evaluation standards, but any significant deficiencies are correctable); and (4) red/unacceptable (fails to meet a minimum requirement of the RFP and the deficiency is uncorrectable without a major revision of the proposal). The technical evaluation team also assigned a proposal risk rating according to the following risk definitions: (1) high (likely to cause significant serious disruption of schedule, increase in cost, or degradation of performance even with special contractor emphasis and close government monitoring); (2) moderate (can potentially cause some disruption of schedule, increase in cost, or degradation of performance; special contractor emphasis and close government monitoring will probably be able to overcome difficulties); and (3) low (has little potential to cause disruption of schedule, increase in cost, or degradation of performance; normal contractor emphasis and normal government monitoring will probably be able to overcome difficulties).

The Air Force issued clarification and deficiency reports on August 13; offerors submitted responses to these reports by August 27. On October 9, the agency requested best and final offers (BAFO), and five were received. Based on BAFOs, three firms were determined eligible for award, including Theisinger, SKE, and the incumbent Bilfinger and Berger (B&B). Theisinger offered the lowest evaluated

price coefficient of [deleted];[1] SKE submitted the second lowest coefficient of [deleted], and B&B submitted the highest evaluated coefficient. In the technical area, all three proposals were rated green/acceptable overall with low risk. However, SKE's proposal received blue/exceptional ratings in two technical assessment criteria (soundness of management approach and understanding the technical requirement) under subcontracting support, resulting in a blue/exceptional rating for this technical factor. B&B's proposal received blue/exceptional ratings on three technical assessment criteria, including soundness of management approach and understanding the technical requirement, resulting in one blue/exceptional rating under the subcontracting support factor, and a blue/exceptional rating on the project management assessment criterion under project execution. Theisinger's proposal received only one blue/exceptional rating on one technical assessment criterion (understanding the technical requirement) under subcontracting support, and its overall rating on the subcontracting factor was green/acceptable. SKE's proposal was rated as moderate risk under experience. A summary of the ratings for all three offerors is given below.

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[1]Under a SABER contract, services are accomplished by the use of individual delivery orders. The cost of an individual project is computed by using prices from a unit price book (UPB), which lists 25,000 line items of pre-priced construction tasks. The appropriate line items required for completing the project are added together and multiplied by a coefficient that represents the contractor's overhead and profit. Offerors competing for a SABER contract submit their prices as coefficients, which are percentage factors representing an increase or a decrease to the UPB prices. For example, a coefficient of 1.0 would represent a price that matches the UPB price; a coefficient of 1.2 represents a price that is 20 percent more than the UPB's unit prices.

Theisinger

	Management Ability	Project Execution	Subcontract	Experience
Project Management	green/low	green/low	green/low	green/low
Understand Technical Requirement	green/low	green/low	blue/low	green/low
Use of Resources	green/low	green/low	green/low	green/low
Overall	green/low	green/low	green/low	green/low

SKE

	Management Ability	Project Execution	Subcontract	Experience
Project Management	green/low	green/low	blue/low	green/ moderate
Understand Technical Requirement	green/low	green/low	blue/low	green/low
Use of Resources	green/low	green/low	green/low	green/low
Overall	green/low	green/low	blue/low	green/ moderate

B&B

	Management Ability	Project Execution	Subcontract	Experience
Project Management	green/low	blue/low	blue/low	green/low
Understand Technical Requirement	green/low	green/low	blue/low	green/low
Use of Resources	green/low	green/low	green/low	green/low
Overall	green/low	green/low	blue/low	green/low

All three proposals were rated essentially equal under past performance, each receiving a green/acceptable rating. However, SKE and B&B were recognized as having had previous SABER contracts; Theisinger was not.

After a review of the each proposal's strengths and weaknesses, costs, and risks, the source selection authority (SSA) determined that SKE's proposal provided the best value to the government. The agency awarded the contract to SKE on December 9, and this protest followed.

The protester alleges that the SSA's decision is irrational and contains errors of fact and logic. Specifically, Theisinger contends that, because the SSA decision states that the SKE proposal "exceeds government requirements in two separate criteria," the SSA has confused SKE's proposal with B&B's proposal, which Theisinger alleges "was the only [proposal] to exceed two criteria." Theisinger then argues that the SSA used "this ostensibly superior SKE proposal to outweigh [Theisinger's] proposal. . . ." The protester argues that because Theisinger's proposal and SKE's were actually evaluated as essentially technically equal, cost should have been determinative and Theisinger should have been awarded the contract.

Theisinger bases its allegation that the SSA confused the SKE and B&B proposals on one sentence in the SSA decision, which reads "Within the technical area, SKE/KLEE offers a proposal which exceeds government requirements in two separate criteria." The Air Force explains, however, that the SSA inadvertently omitted the word "assessment," and that the sentence therefore should actually read, "[w]ithin the technical area, SKE/KLEE offers a proposal which exceeds government requirements in two separate assessment criteria." This explanation is reasonable and, indeed, reflects the fact, noted above, that SKE's proposal was evaluated as exceeding the government's requirements on two "assessment criteria" under the subcontracting evaluation factor.

Theisinger, in its submissions to our Office, concedes that both the SKE and the B&B proposals were rated blue/exceptional on two assessment criteria under the subcontracting factor and therefore rated blue/exceptional on this subcontracting factor, and that B&B was rated blue/exceptional on one additional assessment criterion. The protester nevertheless continues to argue that the SSA confused the two proposals, because "B&B's proposal with three blues, not SKE/Klee's with only two, was the only one to exceed two criteria. . . ."

We believe that the protester misconstrues the SSA's decision. As noted above, the SSA correctly indicates that SKE's proposal exceeds government requirements--meaning it earned better than acceptable ratings--on two assessment criteria. If the SSA had, in fact, confused SKE's and B&B's proposals, as the protester alleges, his decision would have stated that SKE exceeded government requirements under three criteria. The SSA decision goes on to state that although B&B's proposal "had one criterion judged technically superior to SKE/KLEE; their proposal was significantly more expensive than that submitted by SKE/KLEE." This clearly shows that the SSA was aware that B&B's proposal was judged blue/exceptional on three assessment criteria while SKE's proposal was judged blue/exceptional on only two assessment criteria. Contrary to the protester's allegation, there is no evidence in the record which suggests that the SSA confused the two proposals.

Theisinger next argues that the agency improperly evaluated its and the awardee's past performance, stating that although it and SKE were rated essentially equal on past performance, the SSA put too great a weight on SKE's SABER experience while discounting Theisinger's SABER-like experience under a contract with the city of Pirmasens.[2] Also, Theisinger argues that the SSA's decision does not reflect an integrated assessment of the proposals and fails to provide a clear rationale for the selection decision.

Source selection officials in negotiated procurements have broad discretion in determining the manner and extent to which they will make use of technical and cost evaluation results. Grey Advertising, Inc., 55 Comp. Gen. 1111, 1120 (1976), 76-1 CPD ¶ 325; Mevatec Corp., B-260419, May 26, 1995, 95-2 CPD ¶ 33. Agencies

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[2]The protester also alleges that the Air Force improperly evaluated SKE's past performance by crediting SKE for SABER experience. Theisinger contends that the awardee's SABER experience was in a joint venture, that the other joint venture firm was the lead partner, and that the experience of the joint venture properly belongs only to the lead partner. The protester argues that since SKE should not be credited with SABER experience, the past experiences of SKE and Theisinger are essentially equal. The agency responded to this issue in its January 15, 1997 report, but Theisinger, in its comments filed on that report, did not rebut the agency's position. Therefore, we regard this issue as abandoned. Marquette Elecs., Inc., B-262016.2; B-262016.3, Feb. 15, 1996, 96-1 CPD ¶ 98.

may make cost/technical tradeoffs in deciding between competing proposals and the propriety of such tradeoffs turns not on the difference in technical scores or ratings per se, but on whether the selection official's judgment concerning the significance of that difference was reasonable and adequately justified in light of the RFP evaluation scheme. See Wyle Labs., Inc.; Latecoere Int'l, Inc., 69 Comp. Gen. 648 (1990), 90-2 CPD ¶ 107.

Here, the SSA report states that the past performance proposals of all three offerors were determined to be essentially equal, with all three receiving green/acceptable ratings. The report also states that both SKE and B&B had previous SABER contracts in the Kaiserslautern Military Community, while Theisinger had no prior SABER experience.

We disagree with the protester that the SSA put too great an emphasis on SKE's SABER experience. While the record indicates that the SSA did recognize that SKE had SABER experience, comparable to the $25 million anticipated cost of this procurement, and in the same geographical area and administered by the same contracting activity, it is also clear that the SSA understood that the past performance evaluations for all three offerors were essentially equal. To the extent SKE's SABER experience gave SKE a slight edge over the protester, it was because the experience was directly relevant to the work to be performed under this solicitation. Moreover, the record shows that the Air Force did consider Theisinger's contract with the city of Pirmasens. However, contrary to the protester's assertions that this contract was primarily a design and construction requirements contracts, the agency points out that it was limited to road construction. In contrast, the SABER contract here will require up to 30 design and construction disciplines. Moreover, Theisinger's Pirmasens's contract is valued at approximately [deleted], significantly less than the contract at issue or SKE's SABER contract. Under these circumstances, we find nothing improper in the SSA's slight emphasis on SKE's SABER experience.

Contrary to the protester's allegation, the record shows that the source selection official reviewed the full technical evaluation record (including strengths, weaknesses, and concerns cited for the proposals), as well as the resulting adjectival ratings and cost evaluation results. The award determination statement describes the differences in the evaluations of the three proposals and concludes that SKE offered the most advantageous proposal to the government pointing out, for example, that SKE's proposal exceeded the government's requirements in subcontracting, that SKE has a solid past performance record, including SABER experience, and that SKE's proposed costs are only marginally higher than the lowest-cost proposal. The award determination also notes that this marginally

higher cost is outweighed by the superior technical proposal offered by SKE.[3] Moreover, the protester does not question the technical ratings for its own or for SKE's proposal.[4] In our view, the SSA report reflects an appropriate comparison of the competing proposals and includes a reasoned determination for selection of the second lowest cost offer. The crux of Theisinger's argument regarding the allegedly improper tradeoff determination stems from its view that SKE's evaluation reflects the agency's confusion of SKE's proposal with that of B&B. However, as explained

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[3]The SKE offer is approximately only [deleted] percent higher than Theisinger's lowest-cost proposal.

[4]Theisinger first protested on December 16, 1996, alleging that the agency's technical evaluation of proposals was flawed. The only specific allegation raised in this regard concerned the SSA's alleged confusion of the SKE and B&B proposals, discussed above. On January 15, 1997, counsel for the protester received the agency's report on the protest, which included the awardee's proposal and the agency's evaluations. Theisinger requested and was granted three extensions of time in which to file its comments, and did so on February 5. In those comments, for the first time, Theisinger argued that the agency's evaluation of SKE's proposal under the experience factor was improper. We decline to consider this issue because it is untimely. Under our Bid Protest Regulations, protests based on other than apparent solicitation improprieties must be filed within 10 days of when the protester knew or should have known the basis for protest. Bid Protest Regulations, § 21.2(a)(2), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(2)). Theisinger had been provided the information that should have put it on notice of this protest ground on January 15, upon receipt of the agency report, but did not raise the issue until its comments were filed 21 days later. In this respect, Theisinger argues that its initial protest encompassed this issue because it alleged generally that the agency failed to follow specified evaluation criteria and misevaluated proposals. We do not agree. Those allegations were broad in nature and the initial protest otherwise lacked any reference whatsoever to the evaluation of SKE's experience. See Ralph G. Moore & Assocs.--Recon., B-270686.3, Jan. 5, 1996, 96-1 CPD ¶ 268.

above, that assertion is contradicted by the record. Under these circumstances, and given that technical factors were more important than price, we have no basis to object to the selection decision.[5]

The protest is denied.

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[5]In its comments on the agency report, Theisinger protests, for the first time, that since the solicitation stated that offerors' past performance would be evaluated based on contracts awarded within the past 3 years, SKE's SABER contract, awarded in 1992 (outside the 3-year period), should not be considered by the agency. The protester also argues for the first time that the agency applied a new, unstated evaluation criterion regarding geographic location in evaluating past performance, and that the agency erred in evaluating costs. As noted above, our Bid Protest Regulations require that protests based on other than apparent solicitation improprieties be filed within 10 days of when the protester knew or should have known the protest basis. Here, Theisinger had been provided the information that should have put it on notice of these protest grounds on January 15, yet did not raise them until its comments were filed 21 days later. Thus, these issues are untimely and not for our consideration. Bid Protest Regulations, supra.