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Comptroller General
of the United States

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Decision

Matter of: Beneco Enterprises, Inc.

File: B-283154

Date: October 13, 1999

Clark B. Fetzer, Esq., Kirton & McConkie, for the protester.
Robert J. Marks, Esq., Marks & Golia, for Straub/Pacific LLC, an intervenor.
Daniel J. Dykstra, Jr., Esq., U.S. Army Corps of Engineers, for the agency.
Christine F. Davis, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where a solicitation provided for multiple awards based on a price/technical tradeoff, in which technical factors were to be significantly more important than price, an agency improperly rejected the protester's highest-rated proposal without considering its significant technical superiority and without comparing it to each of the three awardees' lower-rated proposals.

2. Where a solicitation stated two price evaluation factors, but did not state their relative importance, the solicitation gave rise to a presumption that the factors were approximately equal, and the agency erred in according one of the price factors virtually no weight in determining each proposal's evaluated, composite price.

DECISION

Beneco Enterprises, Inc. protests the award of three contracts to [Offeror A], Straub/Pacific LLC, and [Offeror B], under request for proposals (RFP) No. DACA09-99-R-0006, issued by the U.S. Army Corps of Engineers, for construction services at installations under the jurisdiction of the Corps's Los Angeles District and the Bureau of Prisons' Western Region. Beneco protests that the Corps misevaluated price and did not treat it as significantly less important than technical concerns in the price/technical tradeoff, as required by the RFP evaluation scheme.

We sustain the protest.

The RFP contemplated the award of three indefinite delivery, indefinite quantity (IDIQ) contracts, with an overall maximum amount of $90 million for the 36-month

duration of the contracts.[1] RFP amend. 3, at 00100-6 and Defense Department Form 1707. The RFP explained that, after award, the three successful contractors would be eligible to compete for fixed-price or time-and-materials task orders or might be awarded sole-source task orders, if circumstances dictated. RFP amend. 3, at 00850-1. The RFP stated that the government anticipated awarding most task orders based on a competition between the awardees. Id.

The RFP contained general specifications that were to apply to the task orders. RFP § 01005. In addition, the RFP included detailed specifications that were to apply to a "sample project" task order calling for repairs and additions to a military dining hall. The solicitation advised that the government might or might not issue a task order for the sample project. RFP amend. 3, Bid Schedule for Sample Project, Note 1 and at 00010-3.

The solicitation contemplated an initial proposal award based on a price/technical tradeoff. The RFP identified six technical evaluation factors and their relative importance, which the source selection plan (SSP) quantified on a 1,000-point scoring scale, consistent with the RFP, as follows: (1) past performance/quality (350 points), (2) management (200 points), (3) customer satisfaction (200 points), (4) understanding of requirements (100 points), (5) scheduling (100 points), and (6) small, small disadvantaged, and women-owned business participation (50 points). RFP amend 3, at 00150-6; SSP at 5-1 to 5-6.

The RFP also listed two price evaluation factors, sample project price and a "pricing factor," but did not state their relative importance. RFP amend. 3, at 00150-1, 00150-4. For the sample project price, the RFP sought lump-sum prices for three line items comprising the sample project requirements.[2] RFP amend. 3, Bid Schedule for Sample Project. For the pricing factor, the RFP asked offerors to propose a factor representing their indirect costs and profit; the RFP advised that the government would determine the prices for any sole-source task orders by multiplying this factor

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[1]We were unable to locate an RFP provision stating the minimum ordering amount applicable to each IDIQ contract awarded, as required by Federal Acquisition Regulation (FAR) § 16.504(a)(1). The contracting officer's statement indicates that the agency intended to include a guaranteed minimum ordering amount of $1 million per contract during the 36-month performance period. Contracting Officer's Statement ¶ 2. Since we sustain the protest and recommend corrective action, the agency, in implementing the recommended action, should ensure that the RFP provides for a minimum order.

[2]No information was requested as to the cost elements of the proposed prices.

against predetermined unit prices appearing in a specified industry handbook (the R.S. Means Western Edition Book). RFP amend. 3, at 00010-3, 00850-6, 00850-7.

As the basis for award, the solicitation stated:

> The technical evaluation factors, when combined, are significantly more important than cost or price. The Government is more concerned with obtaining superior technical, management, quality, and/or past performance features than with making award at the lowest overall price/cost to the Government.

RFP at 00150-4.

The Corps convened a source selection evaluation board (SSEB) to evaluate 15 proposals received in response to the RFP. The SSEB determined that four proposals were technically unacceptable and the rest, including the protester's and the awardees', acceptable. Beneco's technical proposal received the highest score of 835 points, [Offeror A's] proposal tied for the second-highest score of 828 points, Straub's proposal received the seventh-highest score of 730 points, and [Offeror B's] proposal received the eighth-highest score of 615 points. Agency Report, Tab 8, Best Value Comparative Analysis, June 15, 1999, ¶ 5. Beneco's proposal also earned better adjectival ratings than the awardees' proposals (three "very good" ratings and three "excellent" ratings, including an "excellent" rating under the most important past performance/quality factor). Agency Report, Tab 7, Source Selection Evaluation Report, June 14, 1999, at 2, 4, 8, 21. The SSEB remarked that Beneco's proposal "demonstrated high quality in all respects and has the best probability of success among the evaluated offers," as evidenced by its point score, adjectival ratings and supporting narratives. Id. at 4.

In its price evaluation, the Corps calculated each proposal's "composite" (i.e., evaluated) price from the sample project price and the pricing factor proposed by each offeror. Although the RFP did not state the relative importance of the two price factors, the agency heavily emphasized the proposed sample project price in determining each proposal's composite price. Contracting Officer's Statement ¶ 14. Specifically, the composite price was the sum of the proposed sample project price plus a price representing 10 percent of the sample project price times the proposed pricing factor. SSP at 6-7.

Based on this price evaluation methodology, [Offeror B's] composite price was lowest ($1,979,565), Straub's was third lowest ($2,142,801), [Offeror A's] was fourth lowest ($2,174,355), and Beneco's was ninth lowest ($2,513,998).[3] Agency Report,

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[3]The above price rankings exclude the prices offered by the four technically unacceptable proposals.

Tab 8, Best Value Comparitive Analysis, June 15, 1999, ¶ 5. Because the sample project prices were weighted so much more heavily than the pricing factors, the proposals had the same price ranking and nearly the same relative price difference based on a comparison of sample project prices as they did based on a comparison of composite prices. Id. In contrast, offerors' proposed pricing factors bore little relationship to their composite price rankings: [Offeror B's] pricing factor was the fifth lowest, Beneco's was the seventh lowest, Straub's was the eighth lowest, and [Offeror A's] was the highest. Id.

Following the price and technical evaluations, the Corps conducted three rounds of price/technical tradeoffs to determine the three awardees, based upon the tradeoff methodology stated in the SSP.[4] Under this methodology, the Corps conducted a series of tradeoffs, beginning by comparing the lowest-priced proposal with the highest-rated one, and then comparing the winner in that tradeoff against the other proposals.

The Corps thus began the first tradeoff round by performing a tradeoff between [Offeror B's] lowest-priced proposal and Beneco's highest-rated proposal. The agency prepared a chart, described as a "Comparative Analysis" of the two technical proposals, which quoted the SSEB's consensus findings and scores for each proposal, but did not synthesize the information to reach any findings as to the relative strengths and weaknesses of the two proposals. Agency Report, Tab 8, Best Value Comparative Analysis, encl. 3. Beneco's proposal dramatically outscored [Offeror B's] under the most important past performance/quality factor (307 points versus 200 points on a 350-point scale), where the SSEB downgraded [Offeror B's] proposal because "[f]ew contracts [were] completed on time," among other past performance/quality problems. Beneco's proposal also outscored [Offeror B's] under management ability (150 points versus 125 points on a 200-point scale); customer satisfaction (175 points versus 125 points on a 200-point scale); and understanding requirements (80 points versus 40 points on a 100-point scale). Finally, Beneco's proposal earned the same score as [Offeror B's] under the scheduling factor (75 points on a 100-point scale) and almost the same score as [Offeror B's] under the small, small disadvantaged, and women-owned participation factor (48 points versus 50 points on a 50-point scale)--the only two factors under which [Offeror B's] proposal earned better than a "satisfactory" rating. Id.; Agency Report, Tab 7, Source Selection Evaluation Report, at 2-3.

In its tradeoff decision, the Corps observed that the technical score of Beneco's proposal was 220 points (36 percent) higher than [Offeror B's], while its composite price was $534,433 (27 percent) higher than [Offeror B's]. The agency then concluded that,

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[4]The SSP was not incorporated into the RFP or otherwise disclosed to the offerors.

> while Beneco is likely to be able to perform the tasks described in the contract in a manner more technically advantageous to the Government; it is noted that, based upon the benefits and advantages of the higher-rated technical proposal . . . payment of the significant additional price for Beneco . . . is neither justified, nor in the best interest of the Government.

Agency Report, Tab 8, Best Value Comparative Analysis ¶ 9. The Corps did not discuss any portion of the "Comparative Analysis" chart, or state any other reason, as support for this conclusion.

After reaching its conclusion that [Offeror B's] proposal was more advantageous, the Corps, pursuant to the SSP tradeoff methodology, rejected Beneco's highest-rated proposal from consideration for any of the three awards, and did not compare it to any other lower-rated proposal, including [Offeror A's] or Straub's proposals. Contracting Officer's Statement ¶¶ 24, 32, 34; Agency Report, Tab 8, Best Value Comparative Analysis, ¶¶ 9, 21, 30. Instead, the Corps conducted a tradeoff between [Offeror B's] lowest-priced proposal and [Offeror A's] next highest-rated proposal, and determined that [Offeror A's] proposal was worth the $194,790 price premium. Agency Report, Tab 8, Best Value Comparative Analysis, ¶ 11. The Corps then subjected [Offeror A's] proposal to a tradeoff with Straub's third lowest-priced proposal (not making a tradeoff with the second lowest-priced proposal because it was lower-rated than [Offeror B's]). Id. at ¶ 12. After deciding that [Offeror A's] proposal was worth the $31,554 price premium relative to Straub's proposal, the agency selected [Offeror A] as the first awardee because its proposal was higher-rated and lower-priced than any proposal not eliminated in the first tradeoff round. Id. at ¶¶ 13, 14, 17. As the Corps had eliminated Beneco's proposal in a tradeoff with [Offeror B's], it did not subject [Offeror A's] lower-rated proposal to a tradeoff with Beneco's highest-rated proposal.

The Corps then began the second round of tradeoffs to select the second awardee. After rejecting other higher-rated proposals in successive tradeoffs with [Offeror B's] proposal,[5] the Corps decided that Straub's seventh highest-rated proposal was worth the $163,236 price premium above [Offeror B's] proposal. Id. at ¶ 25. The agency then selected Straub as the second awardee because its proposal was higher-rated and lower-priced than any proposal not eliminated in the preceding rounds. Id. at ¶ 28. Here, too, as the Corps had eliminated Beneco's proposal in a tradeoff with

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[5]The Corps rejected these other proposals just as it had Beneco's--without comparing them to any other lower-rated, lower-priced proposal and without specific rationale for their rejection, other than a reference to their higher price in relation to [Offeror B's] proposal. Agency Report, Tab 8, Best Value Comparative Analysis, ¶¶ 21, 23, 24.

[Offeror B's], it did not compare Straub's lower-rated, lower-priced proposal with Beneco's highest-rated proposal.

Having rejected all proposals rated higher than [Offeror B's] in the preceding rounds (except for Straub's and [Offeror A's]), the Corps then selected [Offeror B] as the third awardee. Id. at ¶¶ 29-33. Despite its "grave concern" regarding [Offeror B's] low past performance/quality score, see id. at ¶ 25(c), the Corps determined that [Offeror B] could successfully perform the work. Id. at ¶¶ 34-37.

In the end, the Corps made the three awards based on the lowest-, third lowest-, and fourth lowest-priced acceptable proposals (only skipping the second lowest-priced acceptable proposal, which was lower-rated than [Offeror B's] proposal). The Corps also awarded [Offeror B], under the contract's first task order, the sample project based upon its lowest sample project price. Agency Report at 5; Contracting Officer's Statement, ¶ 35. This protest followed.

Beneco protests the price/technical tradeoffs. The protester claims that the Corps did not treat technical considerations as significantly more important than price during the tradeoffs, as required by the RFP, and essentially ignored the technical superiority of Beneco's proposal over the proposals selected. Beneco also argues that the Corps disregarded the fact that Beneco's pricing factor was lower than [Offeror A's] or Straub's, and that sample project price improperly drove the Corps's tradeoff decisions, contrary to the RFP evaluation scheme. Protest at 6; Comments at 5. Had the Corps used a tradeoff methodology and a price formula that comported with the RFP evaluation scheme, Beneco contends that the Corps would have selected its proposal for award.[6]

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[6]Beneco protested within 10 days of its debriefing, at which the agency first disclosed the information necessary for it to protest, i.e., the technical scores of Beneco's and the awardees' proposals, as well as the pricing factors proposed by the awardees. The agency and the intervenor argue that the protest is untimely because Beneco did not request its debriefing in writing within 3 days of receiving the award notification, such that the debriefing was not a required debriefing. As a result, the agency and the intervenor argue that our Office should find the protest untimely because it was filed more than 10 days after award notification. We disagree that the protest is untimely. Non-required debriefings are permitted, see FAR § 15.506(a)(4)(i), and a protest based on information first revealed in a non-required debriefing, as here, may be filed within 10 days of the debriefing. Trifax Corp., B-279561, June 29, 1998, 98-2 CPD ¶ 24 at 5; 4 C.F.R. § 21.2(a)(2) (1999).

In addition, the intervenor argues that Beneco untimely raised in its comments to the agency report its argument that offerors' proposed pricing factors did not receive due weight in the price/technical tradeoffs, when Beneco could have raised this issue

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In a negotiated procurement, agency selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and price evaluation results. TRW, Inc., B-234558, June 21, 1989, 89-1 CPD ¶ 584 at 4. However, they do not have the discretion to announce in the solicitation that a particular evaluation scheme will be used and then use another in the actual evaluation, unless the offerors are informed of the change and given the opportunity to revise their proposals with the new scheme in mind. Kempter-Rossman Int'l, B-220772, Feb. 4, 1986, 86-1 CPD ¶ 127 at 3. An agency may not justify an award based upon adherence to a source selection plan that is inconsistent with the evaluation scheme set forth in the solicitation. See SDA Inc., B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ 320 at 9-10. After the evaluations, the selection authority may make price/technical tradeoffs; the extent to which one may be sacrificed for the other is governed by the test of rationality and consistency with the established evaluation factors. Coastal Science and Eng'g, Inc., B-236041, Nov. 7, 1989, 89-2 CPD ¶ 436 at 3.

The contemporaneous record does not explain why the agency rejected Beneco's significantly superior proposal to save an evaluated $534,433 represented by [Offeror B's] proposal--a proposal which earned less than two-thirds of the available evaluation points, garnered only "satisfactory" ratings under evaluation factors representing 850 evaluation points, and was the source of "grave concern" regarding its past performance/quality. The contemporaneous record simply reflects that the agency was unwilling to pay a 27-percent price premium to obtain a proposal with a 36-percent higher technical score, without any discussion of the proposals' relative strengths and weaknesses. Furthermore, there is no indication in the contemporaneous record that the agency, in reaching this conclusion, accounted for the fact that technical factors were significantly more important than price factors under the stated evaluation scheme.

In responding to this protest, the contracting officer explained the rationale for selecting [Offeror B's] proposal over Beneco's, as follows:

> Given a choice between two technically acceptable offers for a $2 million-plus construction project, it would be unreasonable to pay $400,000 or $500,000 extra to have the same project built by a better contractor. Technical competency and execution were significantly more important than mere price, but even a wealthy private enterprise would not pay that much extra.

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in its protest based on information obtained at the debriefing. We disagree that Beneco did not raise this issue in its initial protest, which states, among other things, that "Beneco clearly should have been awarded a contract, because Beneco's technical rating was the highest and its Price Factor was the second lowest." Protest at 6.

> AFARS [Army Federal Acquisition Regulation Supplement §] 15.611 clearly establishes that the selection process is price-driven, and any departure from the lowest price must be justified by non-price advantages. This principle was followed throughout the selection process.

Contracting Officer's Statement ¶ 41.

The foregoing demonstrates, and the record confirms, that the selection process in the instant procurement was indeed price-driven, contrary to the stated evaluation scheme. While the contracting officer intoned that technical considerations were significantly more important than price under the evaluation scheme, the record shows that the agency did not recognize or account for the significance of Beneco's technical superiority (which was greater than [Offeror B's] evaluated price advantage), and essentially converted the tradeoff to a price competition between two acceptable proposals.

Furthermore, the contracting officer mistakenly suggested that the RFP was for the award of a "$2 million-plus construction project" (the sample project), when, in fact, it was not. Rather, the RFP was for the selection of three contractors eligible to receive subsequent task orders for up to $90 million of work, and the RFP evaluation scheme was structured to favor the selection of contractors who were highly qualified, not those who proposed the lowest sample project price. Indeed, the RFP did not even require the agency to award the sample project based on the instant competition, see RFP amend. 3, Bid Schedule for Sample Project, Note 1, nor did it suggest that the agency intended to award the sample project based on the lowest-priced proposal, especially one that earned the tenth lowest score for understanding the requirements (40 out of 100 points) and the eighth lowest score for past performance/quality (200 out of 350 points). See Agency Report, Tab 8, Best Value Comparative Analysis, encl. 2.

The Corps's improper emphasis on price also appeared in the tradeoff methodology employed in this procurement, which resulted in the selection of three of the four lowest-priced proposals, without subjecting each of the selected proposals to a tradeoff with Beneco's highest-rated proposal. As a result of the methodology applied, once the agency rejected Beneco's highest-rated proposal based upon the flawed tradeoff with [Offeror B's] lowest-priced proposal, Beneco's proposal lost any opportunity to receive one of the other multiple awards because its proposal was never compared either to [Offeror A's] or Straub's lower-rated ones. Moreover, even had the Corps properly documented that Beneco's proposal did not warrant the price premium relative to [Offeror B's] lowest-priced proposal, it does not necessarily follow that Beneco's proposal did not warrant the smaller price premium as

compared to [Offeror A's] or Straub's lower-rated proposals.[7] Where price is secondary to technical considerations, an agency may not select a lower-priced, lower-scored proposal, as here, unless it determines that the premium involved in selecting a higher-rated, higher-priced proposal is not justified. TRW, Inc., supra, at 4.

Finally, the Corps's price/technical tradeoffs also suffered from an underlying impropriety in the price evaluation. The instant RFP stated two price factors, the sample project price and the pricing factor, but did not state their relative importance. RFP amend. 3, at 00150-1, 00150-4. Where, as here, a solicitation is silent as to the relative importance of the evaluation factors, offerors can assume that the factors are approximately equal. Foundation Health Fed. Servs.; Humana Military Healthcare Servs., Inc., B-278189.3, B-278189.4, Feb. 4, 1998, 98-2 CPD ¶ 51 at 6. Here, the Corps used a formula to determine offerors' composite prices, which gave virtually no weight to offerors' proposed pricing factors.[8] This evaluation formula was thus not consistent with the RFP. It also clearly prejudiced Beneco, whose proposed pricing factor was lower than either Straub's or [Offeror A's] ([Offeror A] proposed the highest pricing factor of all offerors).

The agency and the intervenor argue that, because the RFP indicated that the proposed pricing factor would apply only to sole-source task orders, which the agency anticipated awarding less frequently than competitive task orders, offerors should have known that the pricing factor would receive little weight in the price

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[7]As noted above, Straub's proposal scored only 730 points as compared to Beneco's 835 points. Agency Report, Tab 8, Best Value Comparative Analysis, ¶ 5. While [Offeror A's] proposal scored 828 points, almost as many as Beneco's, its adjectival ratings (one "satisfactory," two "excellent," and three "very good" ratings) were lower than Beneco's (three "excellent" and three "very good" ratings). Agency Report, Tab 7, Source Selection Evaluation Report, at 4, 21.

[8]As noted above, the composite price was the sum of the proposed sample project price plus a price representing 10 percent of the sample project price times the proposed pricing factor. Because this formula made sample project price the multiplicand for the pricing factor multiplier, sample project price accounted for well over 90 percent of offerors' composite prices, e.g., it constituted 97 percent of the composite price in the case of Beneco's proposal. Furthermore, since the pricing factor was to apply only to predetermined unit prices to determine the price of subsequent sole-source task orders, see RFP amend. 3 at 00010-3, 00850-6, 00850-7, it is unclear why the agency used sample project price as the multiplicand for the pricing factor in its price evaluation.

evaluation. See RFP amend. 3, at 00010-3, 00850-1. We disagree that the RFP indicated that the pricing factor would have less significance in pricing subsequent task orders than the sample project. To the contrary, the sample project constituted only one task order, among a potential $90 million in IDIQ contracts, that the government might award, and the RFP stated that the government might not even award a task order for the sample project based on the instant competition.[9] In any event, we disagree that the RFP reasonably implied that the agency would effectively disregard the pricing factor in its price evaluation, where the evaluation scheme provided for the evaluation of both the pricing factor and the sample project price, presumably in equal measure. See Foundation Health Fed. Servs.; Humana Military Healthcare Servs., Inc., supra.

The protest is sustained. We recommend that the agency perform new price/technical tradeoffs based on the proposals submitted, using a tradeoff methodology and a price evaluation formula that are consistent with the established evaluation criteria. In the alternative, the agency could amend the evaluation criteria stated in the RFP to more accurately reflect its needs and receive and reevaluate revised proposals. If [Offeror A's], Straub's, or [Offeror B's] proposal is not selected following the new award decision, the respective contract should be terminated. We also recommend that Beneco be reimbursed its costs of filing and pursuing its protests, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). Beneco should submit its certified claim for costs, detailing the time spent and costs incurred, to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General

of the United States

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[9]The intervenor argues that the agency properly emphasized sample project price because, unlike the proposed pricing factor, it provided "a direct indication to the Corps of future expectations for competitively bid task orders." Intervenor's Comments, Sept. 20, 1999, at 3. It is not apparent to our Office that the sample project price is any more indicative of future price expectations than the pricing factor or that the offerors' relative prices for further task orders would be consistent with the sample project pricing. This is so because the sample project pricing was on a lump-sum basis with no cost breakdown information and disclosed nothing about offerors' labor rates or technical efficiencies. Furthermore, because the sample project comprised only a small fraction of the contract's potential total value, one could argue that offerors had an incentive to propose very low sample project prices for evaluation purposes.