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**Comptroller General
of the United States**

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

Decision

Matter of: A&D Fire Protection Inc.

File: B-288852.2

Date: May 2, 2002

Andrew R. Otero for the protester.

Patrick J. LaMoire, Esq., and Phillipa L. Anderson, Esq., Department of Veterans Affairs, 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

An agency's selection of the higher-priced awardee based upon a cost/technical tradeoff was unsupported by the record, where the agency's tradeoff analysis was primarily based upon the agency's erroneous judgment that the awardee had offered an accelerated performance schedule (when in fact the awardee had promised only to perform the required contract schedule), which outweighed the protester's price advantage.

DECISION

A&D Fire Protection Inc. protests the award of a contract to Stronghold Engineering, Inc. under request for proposals (RFP) No. 101-AC-0189, issued by the Department of Veterans Affairs (VA), for design and construction services at the Fort Rosecrans National Cemetery, San Diego, California.

We sustain the protest.

The RFP was restricted to firms certified under the Small Business Administration's section 8(a) set-aside program and provided for the award of a fixed-price contract for the design and construction of columbarium niches at the National Cemetery in San Diego, California.¹ Offerors were informed that award would be made "on the basis of both cost and technical considerations most advantageous to the government." The RFP listed the following evaluation factors, in descending order

¹ Columbarium niches are recesses designed to contain urns of ashes.

of importance: (1) price, (2) construction management including experience, (3) past performance with projects of similar scale and scope, and (4) schedule. Offerors were further informed that all technical factors combined were approximately equal in importance to price. RFP at 5. Offerors were also informed that the agency intended to make award without conducting discussions. RFP at 00101-4.

The RFP provided for completion of the project within 420 days after contract notice to proceed and stated that:

[t]he Offeror will provide a written commitment as to the time frame (number of days after receipt of the notice to proceed) within which the Offeror will guarantee completion. The maximum anticipated completion of this project (including design and construction of the entire project) is indicated on the OF308 (Solicitation and Offer). Shorter schedules, if obtainable, may receive more favorable scoring. The offeror[']s time frame will establish the contract completion date and assessment of liquidated damages (see Spec 01001) will be based on that date.

RFP at 7.

The VA received six proposals, including those of A&D and Stronghold, which were evaluated as follows:

Offeror	Overall Technical Score (of 100 maximum points)	Price
A	73.6	\$3,675,000
Stronghold	72.4	\$3,398,124
B	72.4	\$4,660,605
A&D	66.2	\$3,250,000
C	56.4	\$4,122,249
D	40.8	\$3,563,063

Agency Report, Tab I, Technical Proposal Evaluation Memorandum (July 9, 2001), at 1; Tab J, Price Proposal Evaluation Memorandum (July 9, 2001), at 1.

Under the construction management/experience technical factor (which the RFP stated had a weight of 50 points), the proposals of Stronghold and A&D received identical scores of 35.8 points. The VA noted that both firms proposed to use the same design firm, which had considerable experience in cemetery work with the VA. Neither firm had direct experience performing cemetery work for the VA, but Stronghold's construction experience was found to more closely relate to cemetery construction than did A&D's. Agency Report, Tab R, Memorandum of Evaluation Team Leader (Oct. 16, 2001), at 1-2.

Under the past performance factor (which had a weight of 25 points), the proposals of Stronghold and A&D received scores of 17.8 and 14.8 points, respectively. Stronghold's 3-point advantage reflected the evaluators' judgment that although each firm had demonstrated client satisfaction, Stronghold had provided "[s]everal highly innovative examples of past partnering and communication with both the client and the community" while A&D's "information presented . . . standard practices." Id.

Under the scheduling factor (which had a weight of 25 points), the proposals of Stronghold and A&D received scores of 18.8 and 15.6 points respectively. Each firm demonstrated its understanding of the required schedule and the agency's needs. Stronghold's 3.2-point higher score reflected the agency's view that Stronghold had proposed an accelerated performance schedule. Id.

The results of the technical evaluation were presented to the contracting officer with the team's recommendation that the proposals of A&D and offerors C and D be eliminated from further consideration on the basis of those firms' proposals' lower technical scores. The evaluation team also stated that the proposals of Stronghold and offerors A and B were technically equivalent, and recommended that these firms' proposals be retained in the competition. Agency Report, Tab I, Technical Proposal Evaluation Memorandum (July 9, 2001), at 2.

Subsequently, the evaluation team leader reported to the contracting officer that Stronghold's proposal had offered the lowest overall price of the proposals retained in the competition, and recommended that award therefore be made to Stronghold. Agency Report, Tab K, Memorandum of Evaluation Team Leader (July 11, 2001), at 1. The contracting officer accepted the evaluation team leader's recommendation, and award was made to Stronghold on the basis of initial proposals, without conducting discussions. Agency Report at 8.

A&D protested to our Office, complaining that, although the RFP stated that price was "the most important factor," its overall low price was not considered by the agency in the source selection. We agreed and sustained A&D's protest because the VA had improperly failed to consider A&D's price in making its award selection. A&D Fire Protection, Inc., B-288852, Dec. 12, 2001, 2001 CPD ¶ 201. We recommended that the VA perform a cost/technical tradeoff in accordance with the terms of the solicitation, and that if a firm other than Stronghold was selected for award, the agency should terminate Stronghold's contract and make award to that firm.

In response to our recommendation, the VA evaluated the differences between the firms' proposals and performed a cost/technical tradeoff analysis.² Agency Report,

² The VA did not conduct discussions with the offerors or reevaluate proposals.

Tab W, Cost/Technical Tradeoff Reevaluation of Offers (Jan. 7, 2002). The agency identified the schedule and past performance evaluations as discriminators that distinguished Stronghold's proposal from A&D's, and calculated a dollar value for each of these two discriminators.³

Specifically, the VA stated that "[i]n their proposal Stronghold Engineering proposed to shorten the completion time by up to 65 days," while A&D proposed only to satisfy the 420-day solicitation schedule. The agency stated that the cemetery lacked columbarium spaces and was required to store remains until they could be interred at the cemetery. The cost impact of storing the remains was calculated by the VA to be \$2,500 per day.⁴ Based upon this cost factor, the VA calculated that Stronghold's shorter completion schedule would save the agency \$162,500. *Id.* at 2.

With respect to past performance, the agency stated that "significant weight was placed on the contractor's past record of efficiently performing the project to avoid the least amount of disruption in the project's surrounding environment." The VA calculated a cost factor of \$150 per day "for impact of the construction on cemetery operations (e.g., the cost of personnel and materiel needed to divert visitors from the noise, dust and disruption caused by the construction)." Over the 420-day contract completion schedule, the VA calculated the total possible cost impact as \$63,000. The agency then calculated that the cost savings of Stronghold's 12-percent higher past performance score (17.8 points for Stronghold versus 14.8 points for A&D) would be \$7,560 (which represents 12 percent of the \$63,000). *Id.*

Based upon this analysis, the agency concluded that award to Stronghold reflected the best value to the government because the costs associated with Stronghold's evaluated technical advantages (that is, a shorter schedule and better past performance) totaled \$170,060, which offset A&D's \$148,124 price advantage. *Id.* at 3. The award to Stronghold was confirmed, and A&D protested to our Office.

A&D challenges the agency's cost/technical tradeoff analysis and states that, contrary to the agency's cost/technical tradeoff determination, Stronghold has offered "no commitment with the VA to [perform to] an accelerated construction schedule," and that Stronghold merely offered to "attempt" to complete the contract sooner than the contractually required 420 days. Protest at 2.

³ We note that in performing a cost/technical tradeoff there is no requirement that a selection official "dollarize" by calculating a precise value for technical advantages. *KRA Corp.*, B-278904, B-278904.5, Apr. 2, 1998, 98-1 CPD ¶ 147 at 14.

⁴ A&D does not challenge the VA's calculation of the daily cost factors associated with storing remains and with past performance.

In reviewing protests of alleged improper evaluations and source selection decisions, our Office examines the record to determine only whether the agency's judgment was reasonable and in accord with the stated evaluation criteria. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. Such judgments are by their nature often subjective; nevertheless, the exercise of these judgments in the evaluation of proposals must be reasonable and must bear a rational relationship to the announced criteria upon which competing offers are to be selected. Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10. In deciding between competing proposals, cost/technical tradeoffs may be made; the propriety of which turns not on the difference in technical scores or ratings, *per se*, but on whether the source selection officials judgment concerning the significance of that difference was reasonable and adequately justified in light of the RFP evaluation scheme. DynCorp, B-245289.3, July 30, 1992, 93-1 CPD ¶ 69 at 8.

Here, we find no support in the record for the agency's judgment that Stronghold had offered technical advantages that outweighed A&D's \$148,124 price advantage. As explained above, the agency's determination that Stronghold's proposal reflected the best value to the government was chiefly based upon the agency's conclusion that Stronghold offered a shorter contract completion schedule than did A&D.⁵ This conclusion was in error.

As asserted by the protester, Stronghold did not promise to complete the construction in less time than that required by the solicitation or that offered by A&D. Rather, Stronghold stated in its proposal that it

guarantees completion of the Ft. Rosecrans Columbarium, Phase 1 within the 420[-day] completion schedule, if not considerably sooner.

It is our strong intention to shorten the completion of this project by utilizing multiple crews, operating concurrently for critical path activities. It is our strong belief this will shorten the completion time by up to 65 days, thereby providing a start to finish construction schedule of approximately 360 days from notice to proceed.

Agency Report, Tab D, Stronghold Technical Proposal, Short Schedule Narrative (June 26, 2001). Stronghold's "intention" and "belief" that it could compete the contract work sooner than the minimum 420-day completion schedule required by the RFP is not the contractual commitment that the solicitation required to receive additional evaluation credit for an accelerated schedule. See RFP at 7. In this

⁵ The agency determined that the difference in the firms' past performance scores represented only a value of \$7,560 to the agency. This amount is *de minimis* as compared to A&D's price advantage and insufficient to justify the award selection under the agency's cost/technical tradeoff logic.

regard, the RFP provided that the offeror's proposed time frame for completing the contract work would establish the date upon which the assessment of liquidated damages would be calculated and would establish the offeror's promised contract completion schedule. Here, Stronghold promised only to complete the contract within 420 days of receiving notice to proceed. See Agency Report, Tab L, Notice of Award Letter from the VA to Stronghold (Aug. 22, 2001) at 1 (Stronghold is "to complete the work within (420) Calendar Days after date of receipt of Notice to Proceed").

VA nevertheless argues that it was appropriate to provide Stronghold with evaluation credit for the firm's representation in its proposal that Stronghold would attempt to shorten the contract schedule, even though Stronghold had no contractual obligation to do so. In this regard, VA states that Stronghold's statements of intention represented Stronghold's availing itself of the opportunity to "sell' itself, by marketing its scheduling 'know-how' and demonstrating how it could achieve, if so desired by the owner, a more expeditious delivery of the project." Agency Report at 16.

This argument, made only by legal counsel in response to the protest, is inconsistent with the contemporaneous evaluation record, which shows that the agency's evaluators credited Stronghold for proposing to shorten the completion time by 65 days. See Agency Report, Tab G, Evaluation Notes of Stronghold Proposal, at 3, 5, and 10; Tab W, Cost/Technical Tradeoff Analysis Memorandum (Jan. 7, 2002), at 2. As indicated, the contracting officer's selection of Stronghold's proposal as reflecting the best value to the government was largely based upon the agency's belief that Stronghold had promised an accelerated performance schedule. See Agency Report, Tab X, Letter of Contracting Officer to A&D (Jan. 18, 2002), at 2 ("In this regard, Stronghold's proposal of an accelerated construction schedule offered increased value for which the associated savings in costs to veterans for delays in interment and storage of remains until suitable facilities became available would certainly justify consideration for award, despite the larger proposal price as compared to A&D's proposal price.") In sum, we find unsupported the agency's cost/technical tradeoff analysis that is premised upon the erroneous judgment that Stronghold had promised an accelerated performance schedule, and we sustain A&D's protest on this basis.

A&D also complains that the VA improperly allowed Stronghold to continue performance of Stronghold's contract notwithstanding the protest. The record shows that A&D filed its initial protest on September 10, 2001, within 5 calendar days of receiving a requested and required debriefing on September 5. We notified the VA of the protest on September 10, the day it was filed.

Under the Competition in Contracting Act of 1984 (CICA), as amended, a contracting officer may not allow performance of a contract pending our protest decision, where the agency receives notice of a protest filed within 5 calendar days of a required debriefing. 31 U.S.C. § 3553(d)(3)(A) (2000). An agency may authorize performance

of a contract pending our decision, despite the triggering of a stay, where the head of the procuring activity authorizes in writing and provides notice to our Office that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for our decision. 31 U.S.C. § 3553(d)(3)(C).

The VA does not dispute that A&D's original protest triggered the stay provisions of CICA and acknowledges that the agency allowed Stronghold to continue to perform the contract despite A&D's protest. Nevertheless, the VA argues that they made "good faith efforts" to authorize Stronghold's contract performance pending a decision from our Office. Agency Report at 13. Here, the VA states that its project manager drafted a Justification for Continuation of Performance to authorize contract performance by Stronghold based upon urgent and compelling circumstances. This draft document was reviewed and approved by the agency's counsel and forwarded

to VA's Office of Facilities Management for signature and submission to GAO. However, upon reaching the Office of Facilities Management, and as a result of an administrative error due [to] the change in responsibilities and authority with regard to the administration of cemetery construction projects from VA's Office of Facilities Management to VA's National Cemetery Administration, the document was lost. Consequently, [the project manager] not knowing that the "Justification for Continued Performance" had been lost, was unaware that it had not been submitted to GAO.

Agency Report at 14.

Although it may be that a reasonable determination could be made that urgent and compelling circumstances exist that would not permit the VA to await our decision in A&D's protest, the fact remains that the VA did not comply with the requirements of CICA. That is, there is no evidence that the VA (nor does the VA assert) that a written determination to override the stay was ever approved and signed by a person with authority to make this determination. Furthermore, VA did not inform us, as required by CICA, that it was authorizing performance of Stronghold's contract, notwithstanding A&D's protest. Even now in response to A&D's second protest, the VA has not produced a written determination to allow Stronghold's continued performance of the contract.

The protest is sustained.

We recommend that the agency appoint a new evaluation team to reevaluate the proposals, and that a new award selection be made. In making this new source selection decision, we note that the agency is not required to "dollarize" the advantages of the higher technically rated proposal. In view of the agency's failure to properly authorize continued contract performance, we further recommend that the agency direct Stronghold to halt performance of the contract until the agency can perform a new cost/technical tradeoff in accordance with the terms of the RFP.

If a firm other than Stronghold is selected for award, the agency should terminate Stronghold's contract and make award to that firm. We also recommend that the VA reimburse A&D the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2001). A&D's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel