February 12, 1996

P.S. Protest No. 95-53

RESEARCH MANAGEMENT CORPORATION

Solicitation No. 483083-95-A-N246

DIGEST

Protest against elimination of a proposal to provide support and professional personnel services from consideration is denied where the protester was informed of the deficiencies in its proposal during discussions but declined to correct them in its best and final offer.

DECISION

Research Management Corporation (RMC) protests its elimination from consideration for award of a training services contract.

Solicitation 483083-95-A-N246 was issued on July 6, 1995, to 69 prospective offerors, seeking proposals to furnish professional and support personnel to the Technical Training Center (TTC), Norman, OK. The solicitation called for a 24 month contract, with four additional option periods of 24 months each.

Solicitation section E.4 provided that the contracting officer's representative (COR) would be responsible for "the technical aspects of the project and technical liaison with the contractor." Among the COR's duties listed in the solicitation was to "[d]etermine the amount and quality of the work performed and materials furnished, to be paid under any monthly progress payments." Section G.1, Wage Determination, stated that the contract would be subject to the provisions of the Service Contract Act of 1965 and an applicable Department of Labor Wage Determination under that act.

Solicitation section M.1 a. stated that award would be made "to the responsible offeror whose proposal offers the best value to the Postal Service, (i.e. a combination of price, price-related factors, and/or other factors). The primary areas to be used in determining

which proposal offers the best value to the Postal Service are listed below in descending order of importance:

> Technical Responses to Statement of Work
> Project Management and Corporate Capability
> Experience."

Section M.1 b. stated in pertinent part that the Postal Service "is more concerned with obtaining superior technical/management features than with making award to the lowest estimated cost to the Postal Service. However, the Postal Service will not make award at a significantly higher price to achieve slightly superior technical/management features."

Attachment #1 to the solicitation was conflicts the Statement of Work (SOW). Paragraph III A. of the SOW stated in part:

> The contractor shall provide the necessary staff to fulfill the requirements of the Statement of Work. The number of non-exempt and/or exempt contract positions is at the discretion of the USPS. . . . [1]

SOW paragraph IV A. stated that the "USPS will determine all work assignments and organizational placement of personnel provided under this SOW. The contractor, through the on-site Contract Coordinator, shall coordinate all contract staff work activities with the COR."

SOW paragraph VIII, Time Recording, stated:

> The contract personnel shall use the TTC's office automation system for entry of timecard information.[2] Work hour data shall be entered weekly by the contractor's personnel and verified by the designated primary/alternate team time administrator every Thursday afternoon. The COR will review and approve time entries. The COR is responsible for ensuring the accuracy of the timecards and that partial work days have been properly recorded, i.e., sick, vacation, night, overtime, etc.
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> At the end of each week, the contractor will be provided with the record of the

[1] Employees are "exempt" from the Service Contract Act if they are employed in a bona fide executive, administrative, or professional capacity, as those terms are defined by the Department of Labor for purposes of the Fair Labor Standards Act. 29 C.F.R. 4.156. The listing of positions at Attachment 4 of the solicitation identified 10 exempt positions. Of those positions, only that of the Contract Coordinator, discussed *infra*, appears to be an executive or administrative position; the others appear to be professional positions.

[2] According to the contracting officer, the TTC timekeeping system "allows contract workers to electronically enter their daily work hours, electronic verification/approval and eliminates the need to keep manual time cards. . . ." The COR "has security authorization to access the time keeping data for all contract workers at the TTC. The COR reviews and approves the daily and weekly time keeping data, and the system automatically shows the initials of the COR as having approved the time keeping data."

hours worked. This record will indicate the specific work area of each contract worker.

Attached to the statement of work were "job qualification requirements" for 24 separate positions, only one of which was listed as a supervisor or manager over all of the contract personnel. The latter was the Contract Coordinator (CC), an "exempt" employee whose primary function is "to perform as the contractor's on-site representative," and who is required to have "[e]xtensive experience in the area of contract administration or program management." The CC is to serve as "on-site liaison" between the contractor and the COR, and serves as "supervisor of all administrative matters involving contract employees including questions/problems concerning records, pay, benefits, . . . etc."

A preproposal conference was held on July 14. Thirteen offers were received by the initial offer due date of August 21, after which date the technical evaluators met to assign ratings to the technical/management proposals.[3] RMC's initial proposal received a rating of Acceptable.[4] After ratings were established, the contracting officer designated the competitive range, and those offerors within it, including RMC, were advised on September 11 that written discussions would be conducted with them and that their best and final offers (BAFOs) would be due September 25. RMC was advised of nine deficiencies in its proposal, including that it required its employees to complete and sign timecards manually in addition to using the TTC's automated time reporting system; and that it indicated that some of RMC's employees other than the CC were to be assigned management and supervisory duties. The letter stated that RMC's requirement that its employees "enter their time on RMC's time sheets on a daily basis and reenter this information on TTC automated system on a weekly basis" was "cumbersome" and that RMC should provide a plan which does not require dual time reporting systems. The letter also requested an explanation of RMC's plan to utilize its personnel in supervisory or management positions. In its BAFO, RMC delineated management and supervisory tasks for several of its employees at the TTC, and stood by its proposal to require its employees to sign timecards in addition to utilizing the TTC's automated system.

On October 17, the contracting officer informed RMC that it was no longer in the competitive range because of its dual timekeeping systems and its utilization of contract personnel other than the CC as managers or supervisors, two deficiencies which it failed to correct in its BAFO. Because of those deficiencies, RMC's technical rating was surpassed

[3] The contracting officer describes the evaluation ratings as follows: "Exceptional" meant that the proposal met or exceeded the "most important factors"; risk [of nonperformance] was low and "the proposal indicates a very high probability of successful performance" with "no deficiencies in major subject areas or items." "Acceptable" meant that there were no critical deficiencies "and others [could] be readily corrected." "Marginal" meant that some important evaluation factors were not met, risk was evident and there was "a low probability of success. There [were] SERIOUS DEFICIENCIES in the proposal, but they are correctable." "Unacceptable" meant that the proposal would have to be completely rewritten.

[4] An evaluation committee memorandum dated September 1 stated that RMC's proposal "meets all significant factors. Risk is low and there is a good probability of success." Its deficiencies were considered to be correctable.

by several other offerors whose proposals had been evaluated as Exceptional.

On October 26, RMC protested to the contracting officer, alleging that the technical evaluators' judgment was "arbitrary and capricious," stating that its "timekeeping methods. . . are consistent with time-tested procedures in all of our past and present government contracts." RMC also stated that the personnel utilization issue "does not make sense" and that all "managers and supervisors at RMC or at any facility . . . are required to direct, coach, and provide assistance to their work teams to accomplish work requirements in a safe manner."

The contracting officer denied the protest as "obviously without merit"[5] on November 6. She stated that her decision was based on the SOW's requirement that contract personnel use the TTC time reporting system and that RMC's system "is not compatible with" the TTC's. She also wrote that RMC's plan to utilize its personnel in supervisory positions "does not comply with the requirements of the solicitation and is not compatible with the team concept used by the TTC." RMC then submitted a protest to this office, which received it November 17.[6]

RMC's protest to this office asserts that its BAFO technical proposal was not] deficient and should not have been eliminated from the competitive range for the following reasons:

-- In over eleven years of providing services under government contracts, "we have developed and use internal controls to prevent fraud, waste, and abuse of company and government funds. One of these internal controls is our timekeeping system which requires employees and a supervisor to sign timecards to certify the accuracy of the recorded labor effort."

-- "Since the contract [will beunder the [Service Contract Act] with a Department of Labor Wage Determination, it is even more imperative that employees be required to sign their timecards to reflect their acknowledgement of time worked in each labor category." The protester emphasizes that "[t]his requirement protects the Postal Service, RMC, and the employee against possible future claims of abuse or fraud."

-- RMC's proposal does not conflict with the SOW's specification for automated entry of timecard information because "employees can sign their entries either before or after their weekly timecard entry into the system; therefore, our proposal

[5] Procurement Manual (PM) 4.6.6 c.4. states that the contracting officer, "[with] the concurrence of assigned counsel, [may] determine that the protest is obviously without merit and advise the protester in writing accordingly."

[6] The filing of RMC's protest suspended the award; however, pursuant to PM 4.6.5 a., the contracting officer received authorization from the Vice President, Purchasing, to make the award without awaiting the protest decision. Award was made to the University of Oklahoma, on the basis of its having proposed the lowest price ($7,776,602.50) of several proposals which received ratings of Exceptional. When proposals are considered to be technically equivalent, award may be made on the basis of price. *See Cordant, Inc.*, P.S. Protest No. 94-08, June 23, 1994.

> does comply with the [SOW]."
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> -- The solicitation's reference to several of the positions being exempt from the DOL wage determinations connotes to RMC that those individuals "perform some sort of leadership, supervisory, or managerial functions. . . ." Consequently, "RMC assumed several positions within the work force would be supervisory or managerial positions reporting directly to RMC's on-site Contract Coordinator. . . . This does not seem to be a reason to deem our proposal, 'not acceptable.'"
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> -- RMC "has over eleven years of successful contracting experience in providing technical and non-technical support services to various federal government agencies, and we are qualified to manage the personnel who will perform the services required under the referenced solicitation."

In her statement in response to the protest the contracting officer asserts that it makes no difference that RMC intends for the contractors to sign their timecards *and* use the TTC's automated system, rather than intending to replace the automated system. She asserts that the automated system has adequate controls to prevent abuse or fraud, including allowing only the COR or the CC to change the timekeeping data electronically, and points out that TTC's system "has been audited/approved by the U.S. Department of Labor and the U.S. Postal Service Inspection Service." The contracting officer states that adding another procedure requiring signed timecards would waste time and resources:

> The existing 110 contract workers are accomplished in using the TTC automated system. Utilization of a second (manual) time keeping system would require additional effort and work time for these contract workers. Two systems encourage problems, and require too much administrative time. If the manual time cards are submitted untimely or contained different information from the electronic time cards, which system would determine contract worker's pay and leave? Because contract workers would be required to take extra time for dual entries, normal work activities would be disrupted.

The contracting officer emphasizes that "TTC's automated time keeping system is not acceptable to RMC. RMC's dual time keeping system is not acceptable to the Postal Service." She asserts that lowering RMC's BAFO technical score was consistent with finding its insistence on using its own system, despite the SOW's requirements, unacceptable.

On the second issue, the contracting officers stresses that the CC position is the only one that is "an exempt contract position to perform supervisory and/or managerial duties." Further, she states that at the preproposal conference, "there was no discussion of performance of supervision and/or management duties by any 'exempt' contract worker, except the Contract Coordinator." She points out that RMC's proposal listed several managerial and supervisory duties which RMC's personnel would perform at the work sites, stating:

> [I]t is the responsibility of the Postal Service to determine all contract worker

> assignments and team assignments. The existing teams have [been] fully incorporating contract workers into teams and have determined what type work each of the team members is responsible for providing. . . . TTC's utilization of contract workers as integrated members of work teams is not acceptable to RMC. RMC's proposed utilization of contract workers as supervisors and managers is not acceptable to the Postal Service.

The contracting officer states that after BAFOs, RMC's proposal was deemed to be out of the competitive range. She concludes that that action was consistent with the determination that RMC's proposal was not and would not be made compliant with the solicitation requirements.

Three offerors, including the awardee, submitted comments in which they supported the contracting officer's position on this protest.

DISCUSSION

RMC's protest that its proposal was improperly rated challenges the technical determinations of the contracting officer and her evaluators.

> [T]his office will not substitute its judgment for that of the technical evaluators, nor will we disturb the evaluation unless it is shown to be arbitrary or in violation of procurement regulations.
>
> The determination of the relative merits of technical proposals is the responsibility of the contracting office, which has considerable discretion in making that determination. It is not the function of our office to evaluate technical proposals or resolve disputes on the scoring of technical proposals. In reviewing a technical evaluation, we will not evaluate the proposal *de novo*, but instead will only examine the contracting officer's evaluation to ensure that it had a reasonable basis. The protester bears the burden of showing that the technical evaluation was unreasonable. A protester's mere disagreement with the contracting officer's judgment does not meet its burden of proving that the technical evaluation was unreasonable.

New Breed Corporations, P.S. Protest No. 93-20, October 21, 1993 (citations and internal quotations omitted). RMC's protest does not come close to meeting its burden of proof.

The thrust of RMC's protest is that it should not have been penalized because its dual timekeeping system and proposed utilization of personnel have worked in the past for other government agencies and are better ways of performing the contract than the methods set forth in the SOW. RMC's protest is basically a disagreement with the contracting officer about what the Postal Service should want and what would be in its best interests. In factual disputes such as these the contracting officer's position is afforded a presumption of correctness which the protester has the burden of overcoming with more than its opinions. *See Interleaf, Inc.*, P.S. Protest No. 94-15, August 4, 1994.

RMC had ample opportunity to correct the perceived deficiencies before it submitted its

BAFO since it was specifically notified of them during discussions. Since it failed to change its proposal accordingly, the actions of the technical evaluators and the contracting officer were reasonable under the circumstances.

The protest is denied.

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