

Analysis of Boeing bid protest issues related to selection in a best value procurement

The Air Force's recent awarding of the Tanker Replacement contract to Northrop Grumman has been challenged by the other offeror, Boeing, which filed a bid protest with GAO on 11 March 2008. This analysis addresses issues related to best value procurements, certain language in the Air Force's RFP, and selected GAO bid protest and Federal Circuit Court rulings as a basis for suggesting the most likely outcome of the Boeing protest.

1. Relationship between technical and cost factors in best value selections

The Tanker Request for Proposal (RFP) provided for a capability based, best value source selection conducted in accordance with Federal Acquisition Regulation 15.3 (RFP § M.1.1). Although best value source selections involve a range of approaches described in FAR 15.101 as a "Best Value Continuum," FAR 15.101 specifies only two best value approaches:

- Tradeoff Process - Allows for a technically higher rated offeror to be selected over the lowest price offeror (Subpart 15.101)
- Lowest Price Technically Acceptable Source Selection Process - Allows for the proposal with the lowest evaluated price to be selected from among the technically acceptable proposals (Subpart 15.101-1)

Unlike the Lowest Price Technically Acceptable Source Selection Process, which does not allow tradeoffs, the Tradeoff Process allows for Cost/Price to be more important, equal to, or less important than the technical factors, when combined, as the RFP must state. The tanker procurement was conducted using the Tradeoff approach, and the Air Force specifically stated that technical factors, when combined, were significantly more important than Cost/Price. Because the RFP indicated that the Air Force would give greater weight to technical factors, Cost/Price would not have been the basis of the Air Force's selection of the Northrop Grumman offer, as will be discussed further below.

Here we note that although it is possible for the government to make a selection based on Cost/Price in a best value procurement for which Cost/Price was indicated in the RFP to have relatively less weight than the technical factors, the government's latitude in doing so is limited. GAO has sustained protests in cases where the RFP indicated that greater weight would be assigned to technical factors, and Cost/Price was used instead as the basis for selection.¹ GAO has also sustained cases where the RFP indicated that technical quality was more important than cost, and the agency has instead grouped proposals as "acceptable" and used cost to break the tie.² Finally, just as GAO has ruled that agencies must be able to show in their source selection documents the reasoning why a technically superior offer was worth the higher price,³ it has likewise ruled that the government may not select a

¹ Comp.Gen. Dec. B-244385, Oct. 8, 1991; Comp.Gen. Dec. B-287013, B-287013.2, Mar. 30, 2001.

² Comp.Gen. Dec. B-244546, Oct. 25, 1991.

³ Comp.Gen. Dec. B-260788.2, Aug. 2, 1995.

lower price when the added value of a technically superior offer was not addressed.⁴ In short, if the government seeks technically superior offers, and the RFP indicates that technical quality is more heavily weighted than Cost/Price, then denial of the award to the technically superior offeror must be based on reasoning showing why the higher price of the technically superior offer is not justified.

2. Agency latitude in evaluation of technical factors

With regard to technical factors in the tanker selection, Boeing's main substantive protest issue is the allegedly incorrect evaluation of offers based on the factors and subfactors identified in the RFP. Boeing has alleged that the offers were treated unequally, and Boeing has disagreed with the relative weights assigned by the Air Force to SDR requirements and to KPP-factors for which objectives were not stated. However, the language in the RFP related to the Key System Requirements, the most important Mission Capability subfactor, did allow the Air Force certain latitude:

“... Depending on substantiating rationale, positive consideration will be provided for performance above the stated KPP thresholds up to the KPP objective level. No consideration would be provided for exceeding the KPP objectives. If there is no stated objective and, depending on substantiating rationale, positive consideration will be provided when the specific capability above the KPP threshold is viewed as advantageous to the Government (RFP § M.2.2.1.1.a).

Concerning SRD requirements, the RFP reads:

“... The government may give additional consideration if the offeror proposes to meet (or exceed if there is an objective) the SRD threshold or requirement, depending on substantiating rationale (RFP § M.2.2.1.1.b).

Based on this language, although the Air Force was bound by the language of the RFP not to give extra credit for exceeding stated KPP objectives, the RFP established a basis for the Air Force to apply its own rationale in the evaluation of selection criteria that were not related to KPP objectives. The substantiating rationale were not expressly set forth in the RFP or defined in the RFP in a quantifiable way.

In ruling on bid protests of best value selections involving non-stated, non-quantified measures, GAO has generally supported the government's latitude to make selections using award criteria that have not been expressly set forth for the offerors.⁵ For example, GAO has upheld government evaluation based on the comparative advantages of non-quantifiable factors that have not been disclosed as evaluation criteria in making trade-off selections, citing that the RFP provided for “an integrated assessment” of proposals, and noting that this language was not challenged prior to the RFP closing date.⁶ Thus any aspects of Boeing's complaint addressing ambiguity of the selection criteria in the

⁴ Comp.Gen. Dec. B-244385, Oct. 8, 1991.

⁵ GSBCA No. 11939-P, Comp.Gen. Dec. B-241983.2, Mar. 13, 1991.

⁶ GSBCA No. 11939-P.

RFP, or the Air Force's assignment of relative weight to requirements and discriminators, are likely be denied or dismissed by GAO as untimely.

3. Allegations of lack of consistency with the RFP and disparate treatment

Boeing's complaint regarding the evaluation based on technical factors is that Boeing was the victim of the Air Force's "bait and switch" tactic of stating that there would be no consideration given for exceeding the KPP objectives, and then awarding extra credit to Northrop Grumman for exceeding the KPP objectives. Boeing states that, had it known that the Air Force preferred a larger airplane, it would have offered a larger airplane. This argument can be broken down into two parts:

- 1) Contrary to the provisions of the RFP, the Air Force allegedly evaluated the Northrop Grumman offer as more advantageous because the Northrop Grumman-EADS airplane exceeded the KPP objectives by greater margins than the Boeing airplane.
- 2) Northrop Grumman allegedly must have known in advance that the Air Force would give the Northrop Grumman proposal extra credit for exceeding KPP objectives. Boeing did not know of the Air Force's preference and, had it known, it would have offered a larger airplane, as did Northrop Grumman.

In the first part of the argument, Boeing alleges that the Northrop Grumman was treated favorably because the Northrop Grumman-EADS airplane exceeded KPP thresholds by a larger margin than the Boeing airplane. Since the Air Force stated in its post-award debriefing to Boeing that it did not award extra credit for exceeding KPP objectives, it is unlikely that record will show that it did. More likely, it will show that the Air Force "gave consideration depending on substantiating rationale" to factors where a KPP-specific objective was not involved, in the process of selecting "the best overall offer, based upon an integrated assessment" of specified factors. In addition, Boeing's protest filing indicates disagreement with the Air Force's weighing of SRD discriminators, which allegedly was favorable to Northrop Grumman. However, relative weights of the SRD requirements were not specified in the RFP, and, as discussed above, GAO has upheld the agency's latitude to apply its own rationale in assigning relative weight to such factors.

The second part of the argument assumes that Northrop Grumman had prior knowledge that Boeing did not have regarding the Air Force's evaluation methodology, i.e., Northrop Grumman knew in advance that the Air Force would evaluate the Northrop Grumman offer more favorably based on the fact that the Northrop Grumman/EADS airplane was larger. GAO has sustained protests involving advantage to one offeror based on information provided to that offeror about what the agency preferred, however in those cases the record clearly showed disparate treatment. For example, in one case involving SeaSpace, after the agency revealed to the company that a more powerful computer was preferred, SeaSpace changed its best and final offer accordingly and won the contract, benefiting from information that the other offerors did not have.⁷ In the tanker case, Northrop Grumman decided which airplane to bid, as did Boeing, based on the RFP, and apparently not from any other information, and neither offeror ever changed its offer. Likewise, neither offeror protested in a timely way that the language in the RFP was vague. While it does appear that the offerors interpreted the RFP differently,

⁷ Comp.Gen. Dec. B-241564, Feb. 15, 1991.

and their different interpretations are more likely what led to their different approaches, such differences, in themselves, would not support an argument that the RFP was ambiguous.

4. Significance of protest claims related to Cost/Price issues

Finally, the Boeing complaint challenges the Air Force's evaluation of Cost/Price, including the following claims:

- Air Force refused to accept Boeing commercial cost estimates
- Northrop Grumman's cost of \$1.5 billion for SDD was unrealistically low
- MPLCC costs other than SDD were incorrectly calculated

Although, as noted above, GAO has sustained protests of best value awards based on Cost/Price to determine selection when offers differed in technical quality,⁸ in procurements where the technical quality of offers has been very similar, GAO has allowed for cost to determine the selection.⁹ In the tanker case, the Air Force has indicated that cost was not a tie-breaker in the selection, and as long as the record shows that cost was not a the determining factor, it is unlikely that the Air Force's cost evaluation, even if errors were made, will provide a basis for GAO to sustain the protest, since application of the Cost/Price factor would not have been prejudicial. It is likely that Northrop's proposed lower SDD cost and slightly lower MPLCC cost, as evaluated by the Air Force, did contribute to the Air Force's conclusion that the Northrop Grumman offer was the best offer. However, such a determination would have been consistent with the RFP, which specified that [technical factors], when combined, would be "significantly more important than Cost/Price", and that Cost/Price would "contribute substantially to the selection decision" [RFP § M.1.1].

Conclusion

If GAO determines, based on Air Force documents, that the Air Force did give extra credit to the offerors for exceeding KPP objectives, and, in so doing, gave more extra credit to Northrop Grumman for its larger airplane, as has been alleged, and as the Air Force has denied, then GAO will have a basis for sustaining the Boeing protest. GAO has consistently ruled in favor of protestors in cases where source selection has not been not consistent with the RFP based on the fundamental principle that methods for evaluation of offers and awarding of contracts must be consistent with what has been stated in the solicitation¹⁰. However, as long as the Air Force did not give extra credit for exceeding KPP objectives, given the latitude accorded to the government in making best value selections using award criteria that have not been expressly stated, quantified, or specified in terms of relative weights, and given the fact that the tanker RFP anticipated an integrated assessment to determine the best overall offer, GAO is likely to not find fault with the Air Force for making the award to Northrop Grumman.

In considering its approach, it appears that Boeing interpreted the tanker RFP as though a Lowest Price Technically Acceptable solution were sought, and therefore Boeing offered a modest airplane,

⁸ Comp.Gen. Dec. B-244385, Oct. 8, 1991; Comp. Gen. B-287013, B-287013.2.

⁹ B-249637.10, July 13, 1993.

¹⁰ Hunt Building Co., Ltd. v. United States, 63 Fed. Cl. 141 (2004).

which in some ways was not that different from the KC-135 that the new tanker will replace. Northrop Grumman chose to interpret the RFP differently, as a tradeoff opportunity, and, consequently, Northrop Grumman offered more airplane, anticipating that a larger airplane's value to the Air Force would be worth the potentially higher cost. Although it is remarkable that the Northrop Grumman-EADS airplane may end up costing the Air Force less, this irony does not invalidate the selection or give merit to the Boeing protest. Boeing could have offered a more capable airplane, too, but it did not, and Northrop Grumman's offer, which was based on a different reading of the RFP, was determined by the Air Force to be the best offer. If the Air Force crossed every t and dotted every i, as it has said it did, then the award to Northrop Grumman will most likely be upheld.