

Formations of Government Contracts

Law 502-20

Fall 2004

Discussion Problem 2

The Department of the Military (Military) issued a solicitation for a broad range of security services in Iraq. The solicitation envisioned award of a cost-plus-fixed-fee (CPFF) contract for a 1-year base period, with up to two 1-year options, to the offeror whose proposal represented the Best Value (Cost-Technical trade-offs) to the government. The request for proposals (RFP) advised that the agency intended to award without discussions, but reserved the right to hold discussions if necessary.

The RFP anticipated use of three evaluation factors: (1) technical/management, (2) past performance, and (3) cost/price. The RFP advised offerors that technical/management would be slightly more important than past performance, and that these two factors combined would be more important than cost/price.

With respect to the technical/management evaluation factor, the RFP identified four equally important subfactors: (a) technical/management methodology and responsiveness; (b) the offeror's response to a hypothetical problem; (c) staffing plan; and (d) personnel qualifications. Each subfactor, as well as the overall factor, was to be assigned a rating of *excellent*, *good*, *marginal*, or *unsatisfactory*.

The RFP reserved the ratings of *excellent* and *good* for proposals that could be awarded as submitted and contained no deficiencies and/or weaknesses. In other regards, the ratings of *excellent* and *good* designated the extent to which a proposal exceeded the basic requirements of the solicitation, was low in risk, and presented a high likelihood of successful performance. In contrast, the RFP reserved the ratings of *marginal* and *unsatisfactory* for proposals that could be deemed attractive only with at least some re-writing of the proposal. In other words, the ratings of *marginal* and *unsatisfactory* designate the extent to which a proposal failed to meet one or more basic requirements of the solicitation, bore some potential for risk, and/or presented a low likelihood of successful performance. The RFP defined a marginal rating as follows:

Marginal is defined as any proposal that contains at least one significant deficiency and/or weakness. The proposal fails to meet at least one of the objectives/requirements, contains at least one deficiency/ weakness/disadvantage, and some improvement is necessary. The proposal may be correctable only with some amount of re-writing of the proposal.

The RFP contained the following admonitions applicable to proposals rated *marginal* or *unsatisfactory* under the technical/management evaluation factor, or any of its subfactors. First, the RFP advised that a *marginal* or *unsatisfactory* rating in *any one* subfactor would result in a *marginal* or *unsatisfactory* rating for the factor as a whole. Second, the RFP advised that

proposals determined to be *unsatisfactory* would be eliminated from further consideration.

Under past performance, a proposal could receive any of the four ratings described above – *excellent, good, marginal, unsatisfactory* – or a rating of *neutral*, indicating no record of relevant past performance. With respect to the cost/price factor, the agency advised that it would calculate a probable cost for each offeror, and that this probable cost would be used for source selection purposes.

The Military received four proposals. Luhsir’s proposal was rated *good* under three technical/management subfactors, and *marginal* under one technical/management subfactor (staffing plan). These ratings resulted in an overall rating of *marginal* under the technical/management factor. When combined with Luhsir’s past performance rating of *excellent*, the overall proposal rating was *marginal*.

In contrast, Whinnor’s proposal was rated *good* under the technical/management evaluation factor, and *neutral* under the past performance factor, resulting in an overall proposal rating of *good*. In addition, a third offeror (Offeror A) was rated *excellent* under the technical/management factor, and *good* under the past performance factor, resulting in an overall proposal rating of *excellent*. The summary of the evaluation results follows:

OFFEROR	OVERALL RATING	TECHNICAL/ MANAGEMENT RATING	PAST PERFORMANCE RATING	TOTAL EVALUATED COST
Offeror A	Excellent	Excellent	Good	\$402.0 million
Whinnor	Good	Good	Neutral	\$388.0 million
Luhsir	Marginal	Marginal	Excellent	\$201.0 million
Offeror B	Marginal	Marginal	Excellent	\$1.042 billion

The Military’s evaluation team noted that the major shortfall in Luhsir’s proposal related to its staffing plan. The RFP, under the heading of security escorts, required that the contractor provide transportation and personnel protection of personnel from terrorist or criminal attacks during travel to/from secure project work-sites for as many as an average of 75 round-trips daily, anywhere in Iraq, which would entail personal protection for an average of two (2) government travelers. Contractor services were to include all protective/defensive actions required to counter, deter, detect, and respond to threats to designated personnel through threat analysis, operations security, responsive communications, and integrated team support using armed vehicle escorts. For planning purposes, there was no minimum number of security personnel specified for each escort mission.

Throughout the competition, the staffing requirement sparked a number of questions from potential offerors seeking additional guidance about matters such as the average roundtrip

mileage of an escorted trip, the maximum number of travelers on a trip, the number of regions within Iraq involved in a trip, and the number of trips that might require motorcades. One questioner asked how many of the 75 trips per day would occur simultaneously. The government answered:

This will be dependent on each day's unique situation, but use plus or minus (+/-) 20 for a rough estimate.

In the portion of its proposal wherein Luhsir explained its approach to providing security escorts, under the heading Staffing, the proposal narrative referred to the number of simultaneous trips, but not to the total underlying number of trips per day, as set forth below:

In computing the Regional Security Escort/Movement Control requirements, Luhsir used a rough estimate of +/- 20 missions per day of an unspecified duration. Our assumption led us to propose staffing 4 Personal Security Details (PSD's) at the National level, one PSD at each Regional level, and 16 Security Escort/Movement Control Teams at all other levels. All inclusive, Luhsir will provide 26 security escort teams – including PSD and Security Escort/Movement Control Teams – which meet the specified requirements (+/- 20), allow for overflow personnel to meet unspecified missions, and ensure the ability to meet motorcade operational needs throughout Iraq during Phase-In.

The source selection authority (SSA) reached several conclusions. First, she reaffirmed the Military's intent, stated in the solicitation, to make award without discussions. Second, she concluded that the proposals of Luhsir and Offeror B needed substantial improvements to be eligible for award, and decided that, since there would be no opportunity to make improvements without establishing a competitive range, the proposals could properly be eliminated from further consideration. Third, she compared the strengths and weaknesses in the proposals of Offeror A and Whinnor, and concluded that the added benefits and advantages offered by Offeror A's proposal did not justify incurring the additional cost. As a result, the SSA concluded that it was in the best interest of the Government to award this contract to Whinnor.

During the debriefing, among other things, Luhsir learned that, in evaluating Luhsir's proposal, the Military – and in particular, the SSA – was concerned that Luhsir had misread the solicitation. Specifically, a number of the members of the Military's proposal evaluation team discussed their concern that Luhsir had not proposed a sufficient number of security escort teams to provide an average of 75 trips per day, with as many as 20 of those trips occurring simultaneously. The Military explained this concern in detail during the debriefing. This angered Luhsir, which argued that a rating of *marginal* for its proposal under the staffing plan subfactor was based on an obvious misreading of its proposal by the Military. Specifically, it argued that it did not overlook the 75 round-trip per day requirement. Rather, the Military overlooked other places in its proposal where it explicitly acknowledged the requirement. (Luhsir pointed out that the Transportation section of its proposal repeated the RFP's

requirement of 75 round-trips per day.) Luhsir argued that the matter was, at best, ambiguous, and could (and should) have been resolved had the contracting officer (CO) merely picked up the phone and asked Luhsir. Also, Luhsir cannot understand why the Military refused to simply include Luhsir in the competitive range and permit it to submit a revised proposal.

You recently opened a law office (and are anxiously awaiting your first paying client). Luhsir's President, Eyam Anghree, visits your office. You listen patiently to his tale of woe. He complains about the way the Military evaluated Lushir's proposal, the way the Military evaluated Whinnor's proposal, and the SSA's decision to exclude Luhsir's proposal from the final selection decision. Specifically, Luhsir tells you that the *marginal* ratings it received under the staffing subfactor was unreasonable, and hence its rating of *marginal* under the technical/management factor itself was also unreasonable. Anghree could not believe that the government was going to pay a premium price for what Anghree believes is a similar (or at best marginally superior, and at worst grossly inferior) offer from Whinnor (which Anghree believes has never performed this type of work before). **He asks you if he has any legal arguments worth making (and, if so, what responses he should expect to hear from the government).** Anghree makes clear he is *not* interested in a laundry list of *any* possible arguments – he only wants to know about important potential issues.

Rules:

(1) Your memo must be typed (or printed from a word processor), and double spaced, and limited (strictly) to either: (a) 1000 words using a commercial word processing word count system (this count must represent the final, entire text of your submission); or (b) 800 words (excluding citations), which entails manual counting or exclusion of footnotes (which may not contain additional text).

(2) In the top, right-hand corner of the first page of your memo, type your social security number (your name must *not* appear on your memo). Directly below your social security number, type your word count (and counting system) for your answer.

(3) We encourage joint analysis of the memo (involving students currently enrolled in the class). We assume, however, that your work product represents your own research and writing. (Don't forget: this is a research assignment!)

(4) Memos are due no later than 6:00 p.m., Monday, November 22, 2004. Memos may be turned in at the beginning of class that evening.