



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Custom Data Services

File: B-271288.2

Date: October 9, 1996

Frank Casey for the protester.

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DIGEST

1. Protest challenging agency's decision to "bundle" agency's requirements into one procurement rather than issuing multiple solicitations is dismissed as untimely where agency's "bundling" approach was apparent from the face of the request for proposals, but protest was not filed prior to the closing time for receipt of proposals.
2. Agency properly excluded protester's technically unacceptable proposal from the competitive range since it had no chance of being selected for award despite its low price.
3. Protest challenging technical evaluation of proposal is dismissed as untimely where not filed within 14 days after protester was informed of deficiencies in its proposal.
4. Where agency holds discussions with competitive range offerors and requests best and final offers (BAFO), offerors properly may revise their proposals in their BAFOs.
5. Protester is not an interested party to challenge acceptability of awardee's proposal where it would not be in line for award even if the proposal were rejected.

DECISION

Custom Data Services (CDS) protests the award of contracts to SSAI and Eagle Systems under request for proposals (RFP) No. 68335-95-R-0063, issued by the Department of the Navy for engineering and technical services. The protester complains that the agency improperly "bundled" the solicitation's requirements, and objects to the technical evaluation of its proposal and its "premature" elimination from the competitive range.

We deny the protest.

BACKGROUND

The RFP, issued as a small business set-aside on January 31, 1995, and amended four times prior to closing, sought offers to furnish engineering and technical services to Navy integrated logistics support (ILS) managers supporting the design, development, test, evaluation, procurement, production, deployment, and in-service support for aircraft launch and recovery equipment, aircraft-platform interface systems and subsystems, and all Navy/Marine Corps aircraft support equipment. The solicitation identified six areas ("tasks") in which support services would be required: ILS planning and management; maintenance planning/logistics support analysis; supply support; support equipment; technical data; and training and training support. Award was to be made to the offeror whose offer constituted the best value to the government, technical factors and price considered.

Nine offerors submitted proposals by the April 4 closing date. Six of the nine proposals, including CDS's, received technical evaluations of unacceptable; these offerors were informed by letters dated February 15, 1996, that their proposals had been excluded from the competitive range. The Navy conducted discussions with the three remaining offerors, upon conclusion of which the competitive range was narrowed to the proposals from two firms, SSAI and Eagle. The Navy conducted two additional rounds of discussions with these firms and requested best and final offers (BAFO) from them. Upon receipt of the BAFOs, the Navy decided to split the award between the two offerors. The Navy's rationale for doing so was that one of the two firms offered superior professional staff experience--but at a higher price--and while its superior staff competence was required for the more complex tasks (and thus was worth the price premium), it was not required for the less complex tasks. On June 4, the Navy awarded contracts to SSAI and Eagle.

DISCUSSION

CDS first challenges the agency's decision to "bundle" the requirements into one procurement instead of issuing multiple solicitations for individual tasks. This contention is untimely. The agency's "bundling" approach was apparent from the face of the RFP. Under our Bid Protest Regulations, protest grounds that concern an alleged impropriety in a solicitation must be filed before the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1996). Here, proposals were due by April 4, 1995. Accordingly, CDS's current protest, filed on July 3, 1996, is untimely on this ground.¹

¹In fact, CDS raised its "bundling" objection in a prior protest filed February 29, 1996, which also was dismissed as untimely, on March 4.

CDS next argues that its proposal should have been retained in the competitive range given that the agency was considering the possibility of—and did in fact make—multiple awards. The protester concedes that there were deficiencies in its proposal, but contends that an award to it of certain tasks would have allowed the government to take advantage of the firm's expertise in many of the required areas. Along the same lines, the protester argues that its proposal should have been included in the competitive range since it was lower in price than either awardee's.

The first of these two arguments is premised on the assumption that the agency divided the award on a task-by-task basis. Such was not the case, however; the Navy awarded contracts for all tasks to both awardees. The contracting officer explains that she did not consider splitting the award on a task-by-task basis to be a viable option because the projects to be performed often cross task lines and it would be impracticable to have several different contractors working to provide a completed product. The protester does not dispute the reasonableness of the contracting officer's explanation. Since the protester's argument that its proposal should have been retained in the competitive range is based on an incorrect assumption concerning the nature of the award, we see no basis to object to the agency's action in this respect.

Regarding the second argument, the competitive range consists of those firms that, based on the technical and cost evaluation factors identified in the solicitation, have a reasonable chance of being selected for award. Federal Acquisition Regulation (FAR) § 15.609 (FAC 90-31). A firm, like CDS, whose proposal has been determined technically unacceptable has no chance of being selected for award no matter how low its price; thus, its exclusion from the competitive range is proper. Crown Logistics Servs., B-253740, Oct. 19, 1993, 93-2 CPD ¶ 228.

The protester also challenges the agency's technical evaluation of its proposal. We will not consider this ground of protest since it was not raised in a timely manner. CDS was notified—by letter dated February 15, 1996 and at a debriefing held on February 26—that its proposal had been determined technically unacceptable. The letter (and the debriefing) described the proposal's major deficiencies. To be timely, the protest had to be filed within 14 days after the protester learned of its basis for protest. 4 C.F.R. § 21.2(a)(2).² Thus, CDS had until February 29 (or possibly March 11 if it learned additional details concerning its technical evaluation at the oral debriefing held on February 26) to file a timely

²For protests filed on or after August 8, 1996, the 14-day filing period has been changed to 10 days. See Bid Protest Regulations, section 21.2(a)(2), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(2)).

protest. Since CDS did not object to the evaluation until it filed its comments on the agency's protest report on August 27, this ground of protest is untimely.³

CDS next objects to the awards to Eagle Systems and SSAI on various grounds. First, CDS claims that the awardees improperly were allowed to "restructure" their offers in their BAFOs. The record shows that after the competitive range was established, the agency held discussions and called for BAFOs in accordance with the FAR. See FAR § 15.610, 15.611 (FAC 90-31). Thus, to the extent the awardees "restructured" their initial offers in their BAFOs, this action was entirely proper. Also, given that a period of approximately 14 months elapsed between the submission of initial proposals and the submission of BAFOs and that, in its BAFO, one of the awardees substituted weighted labor rates for the simple labor rates that it had used in its initial proposal, we do not think it remarkable (or indicative of any sort of impropriety) that the offeror increased its price in its BAFO.

CDS also complains that Eagle did not properly acknowledge the solicitation amendments; that Eagle must not have proposed a sufficient work force of its own given that it has hired, or attempted to hire, nine employees of other contractors since award; that some of the key personnel identified by SSAI in its proposal will not be available to perform; and that SSAI is improperly relying on the resources of a large business to perform the contract. The record reveals that the first of these assertions is incorrect: Eagle did properly acknowledge all amendments on the cover page of its offer. With regard to the second allegation, the fact that some of Eagle's employees were employed by another contractor prior to Eagle's receiving the award does not necessarily lead to the conclusion that Eagle did not identify these individuals in its proposal. The record in fact confirms that some of the personnel proposed by Eagle were not Eagle employees at the time proposals were evaluated, but that these individuals had furnished letters of commitment confirming their intent to work for Eagle in the event of an award to it. We will not consider the third and fourth allegations. Since CDS's proposal was rejected as technically unacceptable and there would be no basis to cancel and resolicit given that the award to Eagle was proper, CDS would not be in line for award even if SSAI's proposal were rejected. Accordingly, CDS is not an interested party to raise

³The protester explains that it did not challenge its technical evaluation at the time it first learned of it because it did not want to jeopardize its working relationship with one of the agency evaluators, who was managing one of its ongoing contracts. The fact that a protester may have decided that it was not in its best interest to file a protest at the relevant time does not provide a basis for waiving our timeliness requirements, however.

these issues.⁴ See American Overseas Book Co., Inc., B-266297, Feb. 9, 1996, 96-1 CPD ¶ 60.

Next, CDS objects to what it describes as "direct solicitation for employment for this effort by government personnel of current CDS employees performing other contracts." According to CDS, two of its employees were approached by one of the Navy's logistics management specialists, who inquired about their continued availability to work under the new contracts. While this behavior may have been inappropriate, there is no evidence--nor has the protester even alleged--that the actions of this individual, who was not a member of the evaluation team, had any impact on the evaluation and award process. Thus, the allegation does not provide a basis to conclude that the agency violated applicable procurement laws or regulations in making the award decisions. Accordingly, CDS fails to state a valid basis for protest on this ground. See 4 C.F.R. § 21.5.

Finally, CDS challenges the agency's release of the synopsis and abstract 10 days after award was made. This ground likewise fails to state a valid basis for protest since CDS's contention provides no basis to find any impropriety in the awards.

The protest is denied.

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⁴We note that in response to CDS's general assertions regarding the unavailability of SSAI's personnel, the agency states that to the best of the contracting officer's knowledge all key personnel have been available under SSAI's contract. Also, with regard to the protester's assertion that SSAI is improperly relying on the resources of a large business to perform the contract, the contracting officer investigated the extent to which the firms in the competitive range were relying on their subcontractors to assure that they complied with FAR § 52.219-14 (which requires that, under a contract awarded pursuant to a small business set-aside, at least 50 percent of the cost of contract performance incurred for personnel be expended for personnel of the small business contractor) and determined that SSAI would be performing more than 50 percent of the work itself. The protester has presented no evidence to refute this conclusion, and we have no basis to question it.