Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: CDA Investment Technologies, Inc.

File: B-272093; B-272093.2

Date: September 12, 1996

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Kenneth S. Kramer, Esq., and Catherine E. Pollack, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Disclosure, Inc., an intervenor.
George Conril Brown, Esq., Valerie G. Preiss, Esq., and Angela E. Clark, Esq., Securities and Exchange Commission, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester was not prejudiced by any errors that may have occurred in the evaluation of awardee's proposed use of a subcontractor for manual data processing where the record shows that, given that the task at issue comprises a relatively minor portion (less than 2 percent) of the overall effort and will become obsolete early in the life of the contract, there is no reason to conclude that the proposal ratings would have materially changed.

2. Protester's contention that agency improperly evaluated its past performance is denied where the record shows that the agency evaluated proposals in accordance with the criteria announced in the solicitation, and the record reasonably supports the technical evaluation panel's decision to downgrade the protester's proposal in this area.

3. Contention that agency improperly conducted discussions only with awardee is denied where the record shows that, although at time of award agency sought to confirm that awardee intended to perform consistent with its proposal submitted approximately 1-1/2 years earlier, the agency reasonably concluded that the awardee did not make any material changes to its proposal.

DECISION

CDA Investment Technologies, Inc. protests the award of a contract to Disclosure, Inc. under request for proposals (RFP) No. SECHQ1-94-R-0013, issued by the Securities and Exchange Commission (SEC) for processing various forms required to be filed with the SEC. The protester contends that the SEC improperly evaluated Disclosure's proposal; that the SEC's evaluation of CDA's past performance was unreasonable; and that the agency conducted improper discussions.

We deny the protest.

BACKGROUND

The RFP, issued October 31, 1994, contemplated the award of a fixed-price contract for the required services for a base period with up to four 1-year option periods. Section C of the RFP required the contractor to perform several tasks, including keying in and processing data filed with the SEC on Forms 13F, 3, 4, 5, and 144.[1] The successful offeror is also required to provide computer readable tapes and printouts, including official summaries of the information filed on those forms, to the SEC and to maintain an "on-line" database for use by the SEC.

Offerors were required to submit separate technical and business (i.e., price) proposals. Section M of the RFP stated that technical proposals would be evaluated on the basis of the following factors (the subfactors within each factor are shown in parentheses and were of equal importance): (1) technical qualifications (demonstrated ability including past performance on similar contracts; reliability and maintainability of the computer system; computer flexibility to respond to requests for special projects; understanding of contract requirements); (2) experience and references of key individuals (demonstrated ability of key personnel); (3) past performance (quality of the offeror's past work for government and nongovernment customers); and (4) facilities (adequacy of the physical plant and equipment, and flexibility of physical plant and equipment to handle special projects). The technical qualifications factor was more important than the other three, which were of equal importance.

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[1]SEC rules require securities holdings by certain "insiders," such as officers and directors, to be reported to the SEC on Form 3; subsequent transactions are reported on Form 4; and an annual report is submitted on Form 5. Form 144 is a notice of intent to sell restricted securities. Form 13F is a report of securities holdings filed quarterly by institutional investment managers. See 17 C.F.R. §§ 240.13f-1, 240.16a-3 (1996).

As for price, the RFP stated that the agency would award the maximum number of available points to the proposal offering the lowest total price, including options, and proportionately lower scores to higher-priced proposals. Of the total number of points available in the evaluation, technical and price were worth 75 and 25 percent, respectively. Award was to be made to the offeror whose proposal was deemed to be most advantageous to the government.

A technical evaluation panel (TEP) rated the six proposals the agency received by the time set on January 12, 1995, for receipt of initial proposals. The TEP concluded that no discussions were necessary with any offeror, but directed the contracting specialist to ask the offerors to clarify their intent with respect to their proposed use of subcontractors. Out of a maximum possible score of 75 weighted points, CDA's technical proposal received 69.3 points; while Disclosure's proposal earned 70.3 points. Of the six technical proposals, Disclosure's was ranked first and CDA's second, based on these scores. Both proposals received the maximum number of points in the price area.[2] Based on the combined technical and price scores, Disclosure's and CDA's proposals were ranked first and second, respectively (95.3 points for Disclosure's proposal, 94.3 points for CDA's). The TEP recommended that award be made to Disclosure.

Based on the TEP's recommendation, the contracting officer offered the contract to Disclosure on May 1, 1996, expressly incorporating its January 1995 proposal. Disclosure signed the contract on May 1 and returned it to the SEC with a cover letter dated May 2, the contents of which are discussed further below. On May 2, the contracting officer signed the contract on behalf of the government.

PROTESTER'S CONTENTIONS

CDA contends that the evaluation of Disclosure's proposal was unreasonable because it was based on inaccurate information regarding Disclosure's proposed use of subcontractors. CDA also argues that the TEP's evaluation of its past performance was unreasonable because the TEP downgraded its proposal for performance problems for which CDA contends it was not responsible. Finally, CDA argues that prior to award the SEC improperly held discussions only with Disclosure, thereby permitting Disclosure to modify its proposal, without giving CDA a similar opportunity.

[2]Both CDA and Disclosure offered proposals at no cost to the government, and thus each proposal earned 25 points for price, the maximum number of points available.

ANALYSIS

Evaluation of Disclosure's Proposal

CDA contends that the TEP's evaluation of Disclosure's proposal was unreasonable because it was based on inaccurate information regarding Disclosure's proposed use of subcontractors.

The record shows that in response to a request from the TEP, the contract specialist contacted all offerors on August 24 and 25, 1995, and asked each whether it "[planned] to utilize any subcontractors in the performance of any of the requirements stated in the solicitation." The contemporaneous notes of the responses show that on August 24, Disclosure answered that it "believes all work will be done in-house"; the next day, Disclosure stated that the firm would not be using any subcontractors, "except for some outside data entry services." In this connection, Disclosure's proposal stated that the firm "is considering the use of an outside vendor for keying the 13F filings . . . ."

With respect to CDA, while the firm's proposal stated that it planned to use "external keyers" to key in Form 13F data primarily during the quarterly filing deadlines, the contract specialist's notes state that in reply to the clarification question CDA stated that the firm "does not use subs"; this notation is followed by the remark: "(Not sure proposal states that)." Further, it appears from the contract specialist's notes that at least one other offeror responded that it might use outside temporary help to input Form 13F data during peak periods. Nevertheless, the contract specialist summarized the offerors' responses to the TEP as if all offerors had answered in the negative.

CDA contends that the SEC failed to identify and evaluate the subcontractors Disclosure intends to use to perform the data-entry services and instead improperly evaluated Disclosure's proposal under the assumption that the firm would perform all work in-house. Since Disclosure indicated its intent to use a subcontractor for some data entry, and since the TEP failed to evaluate this aspect of the proposal, CDA concludes that the evaluation was unreasonable. CDA maintains that had the TEP been aware that Disclosure intended to use a subcontractor, its proposal would have been downgraded because of the firm's failure to properly manage subcontractors under a previous contract.

Section L of the RFP required offerors to "identify any proposed subcontractors and provide evidence of their ability to fulfill the contract requirements." Although section M of the RFP does not specifically include a factor for the evaluation of proposed subcontractors, such evaluation clearly would be logically encompassed

by the "technical qualifications" evaluation factor. See Laidlaw Envtl. Servs. (GS), Inc., B-271903, Aug. 6, 1996, 96-2 CPD ¶ 75. In fact, the source selection plan developed for this procurement instructed the TEP that when evaluating "demonstrated ability" under the "technical qualifications" evaluation factor, if an offeror proposed a subcontractor, the TEP was to "consider evidence of the subcontractor's ability to perform." As explained below, however, we need not decide whether the SEC should have inquired further as to Disclosure's statement in its proposal that it was "considering the use of an outside vendor for keying the 13F filings" or whether the TEP improperly failed to evaluate that vendor's capabilities.

The agency states that the volume of Forms 3, 4, and 5 processed over the last year has been approximately 16,000 per month, while the volume of Form 144 is approximately 3,000 per month, for a total of approximately 19,000 forms processed per month or 57,000 forms per quarter (about 228,000 forms per year). On the other hand, the agency states that the volume of Form 13F--which is only filed on a quarterly basis--is approximately 1,100 per quarter (or about 4,400 forms per year). Based on these figures, it is clear that manual processing of Form 13F (i.e., keying in data from paper forms), constitutes less than 2 percent of the total work contemplated under the contract.[3]

In addition, the agency states, and the protester does not dispute, that keying in paper Form 13F data will soon be obsolete. The SEC explains that it is moving towards requiring that all Form 13F filings be made electronically by the end of 1996, rendering manual data entry unnecessary. Consistent with this move toward electronic filings, the SEC anticipates that the volume of paper Form 13Fs filed will decrease over time as electronic filing of that form becomes mandatory.[4]

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[3]While these figures vary slightly from those provided in the RFP in response to offerors' questions, the figures in the solicitation yield results consistent with our analysis and conclusion.

[4]Recognizing that electronic filing of Form 13 is the wave of the future, CDA stated in its proposal that "[t]oday, approximately 13 or one [percent] of Form 13F filings are received on tape and process[ed] via the [Electronic Data Gathering Analysis and Retrieval] system. This number is expected to grow materially over the period of the contract."

Competitive prejudice is an essential element of a viable protest. Lithos Restoration Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379. Where no prejudice is shown, or is otherwise evident, our Office will not disturb an award, even if some technical deficiency in the award process arguably may have occurred. Merrick Eng'g, Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130, aff'd, B-238706.4, Dec. 3, 1990, 90-2 CPD ¶ 444.

To show prejudice here, CDA must at a minimum show, or it must otherwise be evident from the record, that the evaluators would have deducted more than 3 raw points from Disclosure's numerical score under the "technical qualifications" evaluation factor.[5] Given that this evaluation factor encompassed several elements unrelated to subcontractor use, and given that manual Form 13F processing is expected to account for less than 2 percent of the total effort and that this task will soon become obsolete, there is no reasonable basis upon which to conclude that the TEP, had it been advised by the contract specialist that Disclosure intended to use a subcontractor to key in Form 13F data, would have downgraded Disclosure's proposal[6] by any meaningful amount. Accordingly, we conclude that CDA was not prejudiced by any deficiencies that may have occurred in the evaluation in this regard.

Evaluation of Past Performance

The tasks required by the RFP are currently being performed under two separate contracts--one contract that the SEC awarded to CDA for processing Form 13F, and one contract awarded to Disclosure for processing Forms 3, 4, 5 and 144. In addition to being a prime contractor for processing Form 13F, CDA is a subcontractor under Disclosure's contract, whereby CDA also processes Forms 3, 4, 5, and 144.

CDA argues that the agency improperly evaluated its proposal under the past performance factor. In this regard, CDA contends that the TEP improperly assigned a weakness to its proposal under this area primarily because of a recent backlog of unprocessed forms under CDA's subcontract. Although CDA does not dispute that processing delays occurred, the protester contends that the TEP unreasonably

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[5]As explained above, CDA's and Disclosure's weighted scores differed by 1 point. The weighted scores were based on raw technical scores of 234.3 (Disclosure) and 231 (CDA). Thus, for CDA's proposal to be ranked higher than Disclosure's, its raw score would have to increase by more than 3.3 points.

[6]With respect to Form 13F, since CDA proposed to use "external keyers predominantly to meet the four peak [quarterly filing periods]," any rescoring involving subcontractors could also affect CDA's score.

evaluated its proposal because the delays in processing Form 5 were not entirely CDA's fault; in fact, CDA maintains, since Disclosure was the prime contractor, that firm's proposal also should have been downgraded in the past performance area.

In reviewing a protest challenging an agency's technical evaluation, we examine the record to ensure that the agency's evaluation was reasonable and consistent with the stated evaluation criteria. See Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223. Where a solicitation requires the evaluation of offerors' past performance, an agency has discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the solicitation's requirements. See, e.g., Federal Envtl. Servs., Inc., B-250135.4, May 24, 1993, 93-1 CPD ¶ 398. Based on our review of the record, we find no basis to object to the evaluation of proposals in this area.

Although the evaluators found that CDA had a good performance history overall, the TEP downgraded CDA's proposal under past performance primarily because of problems the SEC had recently experienced in connection with processing Forms 3, 4, 5, and 144. The TEP final evaluation report shows that the evaluators were uniformly critical of CDA's past performance as a subcontractor to Disclosure. The TEP chairman summarized several recent problems in CDA's performance, specifically noting CDA's inaccurate classification of Forms 3 and 4, and incorrectly marking Forms 3, 4, and 5 as "inconsistent," leading to several complaints from filers affected by the errors; "significant problems" in the working relationship between CDA, Disclosure, and the SEC with respect to Forms 3, 4, 5, and 144; persistent delays in the publication of official summaries of securities transactions; and a long-term backlog in CDA's processing Forms 3, 4, and 5.

CDA argues that the TEP unreasonably downgraded its proposal under past performance more severely than it did Disclosure's proposal, and that some of the difficulties noted by the TEP under the prior contract were improperly attributed solely to CDA. These arguments are without merit. The record shows that the evaluators deliberated as to both firms' contribution to the delays and performance problems under the prior contract, and rated both CDA's and Disclosure's proposal consistent with their perception of each firm's responsibility for processing the forms. For instance, the record shows that one evaluator specifically attributed some of the performance problems with Forms 3, 4, 5, and 144 to Disclosure as the prime contractor. Another evaluator downgraded Disclosure's proposal because the firm had displayed an inability to properly manage CDA's subcontract. All three evaluators agreed, however, that both Disclosure and CDA should share some of the responsibility for the performance problems and adjusted both offerors' final scores accordingly.

While CDA argues that it was not responsible for processing one of the forms (Form 5) until October 1994, and explains that the delays associated with

processing that form were primarily due to an unanticipated increase in filings, that is only one of several forms CDA processed as a subcontractor to Disclosure with which the SEC experienced problems; CDA does not deny that performance problems also existed with the other forms. CDA's argument that the TEP downgraded its proposal out of proportion to its blame for the backlogs in processing the forms essentially reflects CDA's disagreement with the individual evaluators' judgment, based on their personal experience with the prior contract, on the degree of responsibility to be placed on CDA and Disclosure for the problems. CDA's disagreement with this aspect of the evaluation does not establish that the evaluation of CDA's proposal was unreasonable. See Sarasota Measurements & Controls, Inc., B-252406.3, July 15, 1994, 94-2 CPD ¶ 32.

Alleged Revisions to Disclosure's Initial Proposal

As explained above, Disclosure signed the contract on May 1. Disclosure returned the signed contract to the SEC with a cover letter dated May 2, stating in relevant part that:

> "We note that Disclosure's offer dated January 12, 1995, has been incorporated [into the contract] by reference. . . . However, given the period of time between the date of that offer, and now, when the selection of the contract has been finalized, we would like to inform the [SEC] that several changes have occurred with regard to our operations. In summary, these changes related to certain personnel who are no longer with the company but for whom equal or more capable staff have been employed, to the exact technical solutions and methodologies to be used, and the use of subcontractors, which have impacted our approach today versus the 1995 proposal.
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> These updates in no way alter the material terms and conditions of our offer, particularly as they relate to the services contemplated, tasks, and prices. We intend to fulfill the requirements indicated in the contract completely, albeit in a different, more capable manner than had been initially proposed. . . ."

According to CDA, this letter is evidence that Disclosure made material changes to its proposal prior to award with respect to its use of subcontractors, and that the SEC improperly conducted discussions with Disclosure by making award on the basis of the revised proposal without giving the other offerors an opportunity to revise their proposals.

Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of its proposal. Federal Acquisition

Regulation § 15.601 (FAC 90-31); Paramax Sys. Corp.; CAE-Link Corp., B-253098.4; B-253098.5, Oct. 27, 1993, 93-2 CPD ¶ 282. If a procuring agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range. See HFS Inc., B-248204.2, Sept. 18, 1992, 92-2 CPD ¶ 188.

As discussed in greater detail below, we disagree with the protester's contention that Disclosure's cover letter made material changes to the firm's proposal with respect to the use of subcontractors. Accordingly, the agency was not required to hold discussions with all the offerors before making award to Disclosure.

Subsequent to the SEC's receipt of Disclosure's May 2 letter, the contracting officer informed Disclosure that "the [SEC] cannot accept changes to an offeror's proposal after proposals are received, unless revisions are invited." The contracting officer explained that Disclosure's proposal had been evaluated and selected for award according to the terms of the RFP and Disclosure's initial proposal, and requested Disclosure to confirm in writing its willingness to accept and perform the contract under the terms of the RFP and in accordance with Disclosure's proposal as submitted.

In a May 29 letter, Disclosure's president responded to the contracting officer's request, assuring the SEC that the firm was committed to performing the contract consistent with the terms of its proposal. Disclosure's president stated that nothing in the May 2 letter diminished the firm's commitment, "nor modified any term or condition" of its proposal.

Disclosure further explained that its statement with respect to the use of subcontractors is consistent with its technical approach as stated in its initial proposal. In this regard, as stated earlier, Disclosure's proposal stated that "Disclosure is considering the use of an outside vendor for keying the 13F filings. . . ." Disclosure reaffirmed that statement in its response to the contracting officer, explaining that the firm was still considering that option. Disclosure's letter further assured the SEC that it had "no other plans, intentions, or agreements to use subcontractors to produce the data required by the contract."

Subsequently, to further assure himself that Disclosure agreed to be bound by the terms of its proposal as it was evaluated and selected for award, the contracting officer held a telephone conference with Disclosure. The record shows that the conference included a representative of Disclosure and SEC's Director of the Office of Filings and Information Services (OFIS) (the division within the SEC responsible for processing the forms covered by the contract). The record contains a document dated June 3 memorializing that telephone conference, in which the contracting officer affirms that based on their inquiry, both he and the OFIS Director were satisfied that Disclosure "had made no changes to its proposal and was

contemplating performance in accordance with the terms of the contract and its proposal."

Contrary to the protester's contentions, the record does not show that Disclosure made any material changes to its initial proposal with respect to the use of subcontractors through the May 2 letter, or through subsequent communications with the SEC. As noted above, Disclosure's proposal stated that the firm was considering the use of a subcontractor for keying in the Form 13F filings; the record indicates that it is not an uncommon practice for the contractor to supplement its work force during the peak periods corresponding to the regulatory quarterly filing deadlines. The May 2 letter, with its general reference to the use of subcontractors, cannot reasonably be read as materially changing the approach set out in Disclosure's proposal. To the extent the May 2 letter raised any uncertainty about Disclosure's intent, the record shows that, in light of the responses to his inquiries, the contracting officer reasonably concluded that the awardee did not make any material changes to its proposal.

The cases relied on by CDA[7] in support of its argument that, the May 2 letter modified the terms of Disclosure's proposal, are inapplicable here. In those cases, the offeror or bidder either took exception to material terms of the solicitation, or conditioned its offer on terms inconsistent with those in the solicitation. Here, as already explained, there is nothing in Disclosure's May 2 letter to the SEC that suggests that the firm took exception to any material term of the solicitation, or that Disclosure conditioned its offer on the SEC's acceptance of changes to its proposal.

Based on our review of the record, we conclude that the contracting officer properly determined that award was made on the basis of Disclosure's proposal as it was evaluated and selected, and that the May 2 letter made no material changes

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[7]Ameriko, Inc., B-266034.2, Mar. 18, 1996, 96-1 CPD ¶ 176 (Ameriko's cover letter to its best and final offer specifically took exception to a material term of the RFP; relying on our decision in Emerald Maint., Inc., 70 Comp. Gen. 355 (1991), 91-1 CPD ¶ 320, the agency properly determined that Ameriko's offer could not be accepted); New Dimension Masonry, Inc., B-258876, Feb. 21, 1995, 95-1 CPD ¶ 102 (bidder included statements in cover letter conditioning the bid); Minuteman Aviation, Inc.--Recon., B-231504.2, Oct. 13, 1988, 88-2 CPD ¶ 348 (cover letter from agency requiring inclusion of a safety proposal in contract was rejected by intended awardee, and thus agency properly rejected bid); Environmental Tectonics Corp., B-225474, Feb. 17, 1987, 87-1 CPD ¶ 175 (agency improperly awarded contract to offeror that failed to delete certain material qualifications from its proposal until after the closing date for receipt of best and final offers).

to the proposal. Accordingly, there is no basis for us to conclude that the SEC conducted improper discussions with Disclosure such that it was required to give the other offerors an opportunity to revise their proposal before making award.[8]

The protest is denied.

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of the United States

[8]CDA also argues that the award was improper because Disclosure's offer had expired. It is not improper for an agency to accept an expired offer without opening negotiations where, as here, acceptance is not prejudicial to the competitive system. See The Fletcher Constr. Co., Ltd., B-248977, Oct. 15, 1992, 92-2 CPD ¶ 246. Since we conclude that Disclosure made no material changes to its proposal, and all offers had expired by the May 1996 award date, the SEC properly allowed Disclosure to waive the expiration of its proposal acceptance period since a waiver under such circumstances is not prejudicial to the competitive system. See Sublette Elec., Inc., B-232586, Nov. 30, 1988, 88-2 CPD ¶ 540.