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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Low & Associates, Inc.

File: B-297444.2

Date: April 13, 2006

Daniel S. Koch, Esq., and Bibi M. Berry, Esq., Paley Rothman Goldstein Rosenberg Eig & Cooper, for the protester.

Sandra M. Wozniak, National Science Foundation, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency is required to perform its evaluation and make its source selection decision on the basis of the criteria and requirements stated in the solicitation, and may not alter or relax those criteria and requirements without amending the solicitation and permitting all contractors an opportunity to compete on an equal basis.

DECISION

Low & Associates, Inc. (LAI) protests the National Science Foundation's (NSF) award of a contract to Dynamic Research Corporation (DRC) to provide visual information support services pursuant to solicitation No. DCCA 050054. LAI protests, among other things, that the agency waived material solicitation requirements.¹

We sustain the protest.

¹ Although this procurement was conducted as a federal supply schedule (FSS) purchase under Federal Acquisition Regulation (FAR) Part 8, the terms used in the solicitation itself, as well as those employed by the agency in conducting the procurement, frequently reflect terms that are used in negotiated procurements conducted under FAR Part 15. Accordingly, in summarizing various agency actions under the procurement, our decision incorporates certain terms, as used by the agency, that are consistent with FAR Part 15 procurements.

BACKGROUND

In May 2005, the agency issued request for quotations (RFQ) No. DCCA 050054 to obtain visual information support services for a base-year period and four 1-year option periods.² The requirements being sought reflected a combination of requirements previously performed under two expiring contracts. LAI was the incumbent for one of these expiring contracts; DRC was the incumbent for the other.

Section M of the solicitation advised offerors that award would be based on the quotation that “offers the best value to the National Science Foundation based on technical merit, past performance, and cost,” and further established that technical merit was more important than cost/price, which was more important than past performance. RFQ at 30. With regard to technical merit, the solicitation established two subfactors: qualifications of proposed personnel and technical approach. RFQ at 30-31. With regard to the qualifications of proposed personnel, contractors were directed to “include resumes and certification of availability” for all personnel proposed and were advised that the agency would assess specified qualifications of the proposed personnel.³ RFQ at 27, 30.

Section L of the solicitation directed offerors to submit a “combined technical and cost quotation for services as required and described in the SOW [statement of work].” RFQ at 27. Under the heading “Level of Effort,” the SOW stated:

[i]t is envisioned that, over a period of 12 months, the office will require two full-time graphic artists (4,160 hours), 1 graphic artist/ animator (2080 [hours]), two full-time web page designers/page developers (4,160 hours) and the equivalent of two full-time image research assistants (4,160 hours). . . .

It is expected that at least six of the seven contract staff personnel (two graphics designers/scientific illustrators, two web

² The solicitation elaborated that, “[NSF] requires the services of a contractor possessing demonstrated high-level expertise in creation of original graphics depicting science and engineering subjects, and in devising visually exciting page designs and other ways to display those subjects on the web and in other contexts.” RFQ at 5.

³ The solicitation identified various qualifications that would be assessed for each position. RFQ at 30-31.

designer[s]/page developers, one graphic artist/ animator and one image researcher) will be located on site.

RFQ at 11-12.

In short, the solicitation provided that the agency sought quotations for specifically identified personnel to fill a total of seven personnel positions—two graphic artists, one graphic artist/animator, two web page designers/developers, and two image research assistants—and stated that the personnel filling all of these positions, except for one of the two image researcher positions, were expected to be located on-site at NSF's facility in Arlington, Virginia.

In June 2005, LAI and DRC each submitted quotations responding to the solicitation.⁴ DRC's proposal, under the heading "Staff Location," clearly stated that one of the two web page designer/developer positions would be filled by a combination of two individuals working "from their office in New York,"⁵ elaborating that "[the [deleted] principals'] office in New York provides access to cutting-edge multimedia resources with no draw on the NSF space." AR, Tab 8, DRC Proposal (June 20, 2005), at 6.

In evaluating DRC's submission, it is clear the agency evaluators understood that DRC was planning for the [deleted] principals to perform one of the web page designer/developer positions off-site. Specifically, two of the agency evaluators listed this aspect of DRC's proposed approach under the heading "Minor Weaknesses," stating "2 top personnel off site" and "[deleted] principals are located in NY." AR, Tab 31, Evaluator Worksheets, at 2, 11. Nonetheless, in evaluating the qualifications of DRC's proposed personnel, the agency specifically identified the overall qualifications of DRC's web page designers/developers as constituting a "significant strength." AR, Tab 31, Agency Evaluation Worksheets, at 8, 13, 20, 26, 29, 33.

The agency summarized the qualifications of DRC's proposed personnel, stating: "[A]ll candidates proposed by DRC are highly qualified with recent and relevant experience." AR, Tab 28, Selection Statement, Sept. 27, 2005, at 3. The final ratings

⁴ A quotation was also submitted by a third offeror. That quotation, and the agency's evaluation of it, has no relevance to LAI's protest and is not further discussed in this decision.

⁵ DRC proposed to fill one of the web page designer/developer positions by combining the time of two "principals in the firm of [deleted] [a DRC subcontractor]." AR, Tab 8, DRC Proposal (June 20, 2005), at 6.

with regard to the technical factor, average point scores, and evaluated costs were as follows:⁶

	DRC	LAI
Technical Merit ⁷ (maximum 100 pts.)	Very Good ([deleted] pts.)	Good ([deleted] pts.)
--Qualifications of Personnel (maximum 60 pts.)	[deleted] pts.	[deleted] pts.
--Technical Approach (maximum 40 pts.)	[deleted] pts.	[deleted] pts.
Evaluated Cost/Price	\$5,193,281	[\$deleted]

AR, Technical Evaluation Documents, Tabs 25, 28, 33.

Based on the evaluation, the contracting officer concluded that the evaluated superiority of DRC's quotation under the technical merit factor outweighed LAI's cost/price advantage and, on that basis, selected DRC for award; a contract was awarded to DRC on September 28. During a debriefing conducted with LAI on October 4, the agency advised LAI that proposed personnel had been, in the agency's words, a "Major Discriminator" in the source selection decision. AR, Tab 29, Agency's Debriefing Notes, at 3.

On October 14, LAI filed a protest with this Office asserting that although NSF had selected DRC's quotation on the basis of the evaluated superiority of DRC's proposed personnel, a majority of the individuals DRC had proposed were not performing under the contract. Further LAI protested that the agency had apparently relaxed, for DRC, the mandatory solicitation requirements regarding on-site performance for six of the seven required positions. Protest, Oct. 14, 2005, at 4, 6.⁸

⁶ With regard to past performance, the contracting officer concluded: "The Past Performance results offered no clear basis for distinguishing between the offerors and were not a discriminator." AR, Tab 28, Selection Statement, at 5.

⁷ In evaluating quotations under the technical merit factor, the agency employed an evaluation system that applied the following adjectival ratings and associated numerical scores: Excellent (91-100), Very Good (71-90), Good (51-70), Fair (31-50) and Poor (0-30). AR, Tab 17, Technical Evaluation Rating Guidelines, at 3.

⁸ Because LAI's protest was filed more than 5 days after the debriefing and more than 10 days after contract award, the agency was not required to suspend contract performance.

By letter to our Office dated November 7, the agency stated that it was taking corrective action in response to LAI's October 14 protest, explaining:

After reviewing the protest and in light of the issues raised, it is the decision of NSF to voluntarily take corrective action by reevaluating all offerors' proposals and to make award based on the new evaluations. . . . As the agency anticipates that this reevaluation will address the concerns raised in the protest, we request the protest be dismissed.

Letter from NSF to GAO (Nov. 7, 2005). Based on the agency's pending corrective action, this Office dismissed LAI's October 14 protest. Low & Assocs., Inc., B-297444, Nov. 15, 2005. In that decision, we noted that, following completion of the agency's corrective action, LAI could again seek review of any previously-raised issues that were not resolved by the agency's corrective action. Id.

Thereafter, the agency reevaluated DRC's and LAI's quotations. The overall effect of that reevaluation was to increase DRC's technical scores, decrease LAI's technical scores, and slightly decrease DRC's evaluated cost/price.⁹ In reevaluating DRC's proposed personnel, the agency again characterized DRC's proposed webpage designers/developers as constituting the first of only two "Significant Strengths." AR, Tab 18, Technical Evaluation Report, at 4.¹⁰ Following reevaluation, the final ratings were as follows:

	DRC	LAI
Technical Merit (maximum 100 pts.)	Very Good ([deleted] pts.)	Good ([deleted] pts.)
--Qualifications of Personnel (maximum 60 pts.)	[deleted] pts.	[deleted] pts.
--Technical Approach (maximum 40 pts.)	[deleted] pts.	[deleted] pts.
Evaluated Cost/Price	\$5,160,961	#[deleted]

AR, Tab 18, Technical Evaluation Report, at 3-7; AR, Tab19, Business Report, at 2.

⁹ With regard to past performance, both DRC and LAI received ratings of "Excellent," and the source selection official again concluded that "Past Performance offered no clear basis for distinguishing between these two offeror[s] and therefore was not a discriminator in my decision-making." AR, Tab 21, Selection Statement, Dec. 22, 2005, at 9.

¹⁰ DRC's proposed artists/illustrators were referred to as constituting the other "Significant Strength."

Based on this reevaluation, the agency again selected DRC for award on December 22, 2005. On January 3, 2006, LAI filed this protest.

DISCUSSION

LAI again protests, among other things, that DRC submitted its quotation relying on personnel whom DRC did not intend to perform under the contract and/or who failed to comply with the solicitation requirements regarding on-site performance.

Following submission of LAI's January 2006 protest, this Office requested that the agency identify each individual who was performing under the contract, identify the date that performance began, and state whether performance was on-site or off-site. The agency responded by acknowledging that, of the seven positions for which the solicitation required that specific personnel be proposed and certifications of availability be submitted, only three positions were filled with the personnel DRC had proposed. Further, with regard to the personnel DRC proposed to perform the two web page designers/developer positions under this contract, none of the proposed personnel has ever performed on-site.¹¹ Agency Response to GAO Request for Information, Mar. 1, 2006, at 3. In pursuing this protest, LAI has asserted that, had it been permitted to similarly propose off-site web page designers/developers, it could have proposed more highly qualified personnel. Declaration of LAI Vice-President, Mar. 28, 2006 at 3.

In a competitive procurement, a proposal that fails to conform to one or more of the solicitation's material requirements is technically unacceptable and cannot form the basis for an award. See Farmland Nat'l Beef, B-286607, B-286607.2, Jan. 24, 2001, 2001 CPD, ¶ 31 at 8. Similarly, an agency may not make an award, then immediately modify or waive material requirements included in the solicitation which formed the basis of the competition; rather, awards must be based on the requirements and criteria disclosed in the solicitation. See, e.g., Universal Yacht Servs., Inc., B-287071, B-287071.2, Apr. 4, 2001, 2001 CPD ¶ 74.

¹¹ As noted above, DRC proposed to fill one of the web page designer/developer positions with a combination of personnel located in New York City. The individual proposed to fill the other web page designer/developer position is located in the area, but has never worked on-site at NSF.

As noted above, the solicitation expressly provided:

It is expected that at least six of the seven contract staff personnel (two graphics designers/scientific illustrators, two web designer[s]/page developers, one graphic artist/ animator and one image researcher) will be located on site.

RFQ at 11-12.

Nonetheless, in responding to LAI's protest, the agency references another portion of the solicitation, under the heading "Web Site Page and Feature Design," which stated: "fulfilling these needs will require the contractor to supply two full-time design and page-development personnel, at least one of whom must work on-site at NSF." RFQ at 7. Relying on the statement that "at least one" of the web page designer/developers must work on-site, the agency maintains that the solicitation contained "contradictory language" regarding the number of web page designers/developers required to work on-site. We disagree.

When faced with a potential inconsistency between solicitation terms, this Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of the provisions of the solicitation. Fox Dev. Corp., B-287118.2, Aug. 3, 2001, 2001 CPD ¶ 140 at 2; Dr. Carole J. Barry, B-271248, June 28, 1996, 96-1 CPD 292 at 4. In this regard, a specific solicitation provision must properly prevail over a more general one. SeaSpace, B-239295, July 13, 1990, 90-2 CPD ¶ 33 at 3-5 (agency's reading of general solicitation requirement in a manner that was inconsistent with a more specific requirement resulted in contract award that effectively waived the specific solicitation requirement to the competitive disadvantage of another offeror).

Here, the solicitation's general provision that "at least one" of the two web page designers/developers must work on-site at NSF is entirely consistent with the more specific provision that lists the particular positions that will be required and specifically identifies those for which on-site performance is necessary, including the positions of "two web page designer/developers." RFQ at 11-12. Accordingly, we do not view these provisions as containing "contradictory language" as the agency asserts; rather, it is clear the solicitation required that both web page designer/developer positions be performed by on-site personnel.

As discussed above, DRC clearly stated in its quotation that it did not intend to comply with the on-site requirement for at least one of the web page designer/developer positions, and the record establishes that the agency clearly recognized this aspect of DRC's quotation; yet, the agency evaluated the personnel proposed to fill these positions as constituting a "Significant Strength." Further, in performing the contract, none of the personnel DRC proposed to perform either of the two web page designer/developer positions has ever performed on-site. Finally,

as noted above, LAI maintains that, had it been permitted to similarly propose off-site personnel to fill these positions, it could have proposed more qualified personnel.

On this record, it is clear that the agency permitted DRC to propose to perform the contract requirements on a basis that was materially different than that required by the solicitation. That is, the agency effectively relaxed the solicitation's stated requirements for on-site performance without providing an opportunity for the other competing firms to submit quotations on a similar basis. See SeaSpace, supra. It is also clear that the agency's relaxation of this requirement was detrimental to, and prejudiced, LAI's competitive position.

The protest is sustained.

RECOMMENDATION

Based on the record, it appears that the solicitation's stated requirements for on-site performance may not reflect the agency's actual needs. Accordingly, we recommend that the agency review its needs. In the event the agency determines that on-site performance is required as stated in the solicitation, DRC's contract should be terminated and award made to a contractor whose quotation complied with the solicitation requirements. In the event the agency determines that the solicitation's requirements for on-site performance are not necessary, the agency should amend the solicitation to reflect its actual requirements, reopen negotiations with all competitive range offerors, and award a contract on the basis of the quotation offering the best value to the government, consistent with the amended solicitation. If a contractor other than DRC is selected for award, the agency should terminate DRC's contract and award to that contractor. We also recommend that the agency reimburse the protester for its costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2005). LAI's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel