

95367

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

58522

FILE: B-181707

DATE: February 7, 1975

MATTER OF: Dyneteria, Inc.

DIGEST:

1. Under request for proposals (RFP) to furnish mess attendant services permitting offers at less than 100 percent of Government estimated man-hours (where justified by specific documentation that adequate performance can be provided at that level), allegation that offers were not evaluated equally is without merit when record contains no evidence that contracting officer's acceptance of low offer based on performance at 75.5 percent of Government estimate was not made in accordance with all evaluation criteria of RFP.
2. Mere request for best and final offers is sufficient to constitute discussions under 10 U.S.C. § 2304(g).
3. When contracting officer suspected inaccuracy in Government estimated man-hours after receipt of proposals, failure to amend downward Government estimate in accordance with regulations rendered solicitation defective and award improper.

Dyneteria, Inc. (Dyneteria), protests the award of a contract under request for proposals (RFP) N00140-74-R-0756, as amended, to Pan American Services, Inc. (Pan American). The RFP, issued by the Naval Regional Procurement Office, Philadelphia, Pennsylvania, sought offers to provide mess attendant services during the period July 1, 1974, to June 30, 1975, at the Naval Air Station, Willow Grove, Pennsylvania. Five of the 11 offerors responding by June 14, 1974, the amended date for receipt of offers, were determined to be within the competitive range.

On June 19, 1974, the contracting officer sent the five offerors a telegram which stated:

"YOU ARE HEREBY GIVEN THE OPPORTUNITY TO EXAMINE YOUR OFFER UNDER SUBJECT PROPOSAL AND SUBMIT A REVISED OFFER BOTH FROM A TECHNICAL AND PRICING VIEWPOINT. REPLY BY RETURN WIRE TO BE RECEIVED NO LATER THAN 4:00 PM, 24 JUNE 1974. WRITTEN CONFIRMATION ALSO REQUIRED. CLAUSE ENTITLED 'LATE OFFERS AND MODIFICATIONS OR WITHDRAWALS'

IS APPLICABLE TO THIS REQUEST. GOVERNMENT MAY AWARD A CONTRACT BASED ON YOUR REVISED PROPOSAL WITHOUT FURTHER DISCUSSION."

None of the five offerors revised its offered manning. However, there was some slight price adjustment. The following price offers were received from the three low offerors:

	<u>Net Price</u>
Pan American	\$132,371.50
PJK Food Service Corp.	\$135,922.20
Dyneteria, Inc.	\$143,315.12

The RFP required offerors to submit proposed manning charts to show the number of hours offered. In this regard, the clause entitled "SECTION D - EVALUATION AND AWARD FACTORS" (pages 12 and 13 of the RFP) read as follows:

"Evaluation of Offeror's Manning and Prices

"(a) Manning levels offered must be sufficient to perform the required services. For the purpose of evaluating proposals the Government estimates that satisfactory performance during the contract period of 365 days will require a total of 45,934 manning hours (including management/supervision). This estimate is based upon approximately 122 hours on a representative weekday multiplied by 261 weekdays, and 135.5 hours on a representative weekend/holiday multiplied by 104 weekend/holidays. Submission of manning charts whose total hours fall below the total of 45,934 hours for the total of 365 days during the contract period as stated above may result in rejection of the offer unless the offeror clearly substantiates the manning difference with specific documentation demonstrating that the offeror can perform the required services satisfactorily with fewer hours. Such documentation should accompany the offer.

Note: The Government estimates that satisfactory performance on a Saturday or Sunday will require 135.5 man hours per day. (there is a total of 104

such days during the contract period). There are no holidays in this contract period that fall on a Saturday or Sunday).

The Government estimates that satisfactory performance on Mondays through Fridays inclusive and on holidays will require 122 man hours per day. There are a total of 261 days during the contract period. Holidays are defined as New Year's Day, Columbus Day, Veterans Day, Independence Day, Memorial Day, Labor Day, Washington's Birthday, Thanksgiving Day, Christmas Day.

"(b) Further evaluation of the offeror's proposals will be based on the following criteria:

(1) the manning distribution in space/job categories prior to, during, and after meal hours and at peak periods must represent an effective, well planned management approach to the efficient utilization of manpower resources in performing the services required; and

(2) the total manhours offered must be supported by the price offered when compared as follows. The total of all hours offered for the total days during the contract period will be divided into the total offered price (less any evaluated prompt payment discount) to assure that this dollar/hour ratio is at least sufficient to cover the following basic labor expenses:

(i) the basic wage rate;

(ii) if applicable, fringe benefits, (health and welfare, vacation, and holidays) (a factor of 5% of the basic wage rate will be used in this evaluation to cover vacation and holidays); and

(iii) other employee-related expenses as follows:

(A) FICA (including Hospital Insurance) at the rate of 5.35% (this percentage will be applied to the basic wage rate plus the health and welfare benefits, unless the offeror submits satisfactory evidence that these benefits are not paid to employees in cash);

(B) Unemployment Insurance (applied to the basic wage rate) at the rate set forth by the offeror in the provision in Section B of this solicitation entitled 'Offeror's Statement as to Unemployment Insurance Rate and Workman's Compensation Insurance Rate Applicable to his Company'; and

(C) Workman's Compensation Insurance (applied to the basic wage rate) at the rate set forth by the offeror in the provision referred to in (B) above.

Failure of the price offered to thus support the offeror's manning charts may result in rejection of the proposal.

"(c) Award will be made to the responsible offeror whose proposal, meeting the criteria set forth in (a) and (b) above, offers the lowest evaluated total price after application of the evaluation factors for monthly volume variations as provided in Section E.

Note to Offeror: The purpose of the above price-to-hours evaluation is to assure:

(i) that manning levels offered are not unrealistically inflated in hopes of securing a more favorable proposal evaluation; and

(ii) that award is not made at a price so low in relation to basic payroll and related expenses established by law as to jeopardize satisfactory performance.

Nothing in this Section D shall be construed as limiting the contractor's responsibility for fulfilling all of the requirements set forth in this contract."

Dyneteria's protest alleges (1) that the contracting officer did not evaluate all of the proposals equally and in accordance with the factors listed in the RFP and (2) that he failed to conduct adequate negotiations with the offerors.¹

Dyneteria, on the basis of a detailed analysis submitted with its proposal, determined that it could satisfactorily meet the contract's requirements by offering fewer man-hours than the Government estimate. Its offer proposed the use of 37,899 man-hours which was 82.5 percent of the Government estimate. It also submitted a letter referencing a time and motion study which it submitted as justification as required by § D(a) of the RFP for using fewer man-hours than the Government's estimate. This justification was apparently accepted by the contracting officer.

The record also shows that Pan American made a site visit and conducted a thorough survey of the facility. Pan American submitted an offer indicating the use of 34,671 man-hours, or 75.5 percent of the Government's estimate. Pan American also presented written documentation which demonstrated its alleged ability to perform the services satisfactorily at that level.

1. NOTE:

Dyneteria further states that: "After receiving a warning notice from the Contracting Officer on off setting of bid, [with respect to prices to be offered for volume variation] we in fact took the position that a five per cent increase on the upward side and a twenty per cent on the downward side was reasonable price for meal variations." The contracting officer states that he never communicated with Dyneteria or any other offeror with respect to discouraging unbalanced offers for price adjustments for meal volume variation. He states that the RFP, as amended, and the telegram (*supra*) requesting revised offers were the only communications sent to Dyneteria. In the absence of any evidence to the contrary, the contracting officer's statement must be accepted.

The documentation consisted of a letter which stated in pertinent part that "* * * the actual labor used by the present contractor is much less than the manhours submitted by us." Such substantiation was accepted by the contracting officer. Under the circumstances of this case, our Office need not comment on the propriety of this action.

The contracting officer's report states that all evaluation factors set forth in the RFP were applied and followed in making the award to Pan American. Specifically, it was determined in addition to having acceptable documentation for the manning deficiency the total man-hours in Pan American's proposal was supported by the price offered in accordance with the cost formula set forth in section D(b)(2) (supra). In this regard, we note that Pan American's evaluated price of \$132,371.50, when divided by its total number of offered hours (34,671) indicates a dollar/hour ratio of \$3.81 (\$3.8179314); while its calculated basic labor cost was \$3.75². Thus, since Pan American's dollar/hour ratio exceeds its basic labor cost its proposal met the requirement set out in § D(b) of the RFP.

Accordingly, we feel that the contracting officer's evaluation of Pan American's proposal was made in strict accordance with the evaluation criteria set out in § "D" of the RFP.

With regard to Dyneteria's contention relating to the paucity of negotiations for this contract, the contracting officer states that due to the limited time between receipt of offers (June 14, 1974); the date set for receipt of best and final offers (June 24, 1974); and the expiration date of the then existing contract (June 30, 1974), more extensive negotiations under this solicitation were not possible.

2. Basic Wage Rate	\$3.15
Health and Welfare	0.12
Vacation and holidays	0.1575
FICA	0.1913
Unemployment (3.2% ins.)	0.1003
Workman's comp. (1.03%)	<u>0.0340</u>
	\$3.7536

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In this regard our Office has held in a number of circumstances that where offerors have been afforded an opportunity to revise their price proposals required discussions within the contemplation of the negotiation statute 10 U.S.C. § 2304(g) (1970) have been held. 52 Comp. Gen. 161 at 165 (1972), citing 51 Comp. Gen. 479 (1972) and B-172946(1) December 23, 1971. More specifically, in B-172946, supra, the mere request for best and final offers was considered sufficient to meet the requirement of the statute. Accordingly, since best and final offers were solicited in this instance we see no basis to sustain Dyneteria's contention in this regard.

The contracting officer does indicate, however, that in light of the responses received, the Government estimate may have been inaccurate and that had time permitted it should have been revised. He goes on to indicate however that since Dyneteria had independently analyzed the manning requirements "an inaccurate Government estimate did not mislead Dyneteria."

In this regard we note that Armed Services Procurement Regulation (ASPR) § 3-805.4(c) (Defense Procurement Circular #110, May 30, 1973), states that:

"When a proposal considered to be most advantageous to the Government involves a departure from the stated requirements, all offerors shall be given an opportunity to submit new or amended proposals * * * on the basis of the revised requirements, provided this can be done without revealing to the other offerors the solution proposed in the original departure or any information which is entitled to protection under 3-507.1" (Emphasis supplied.)

We also note that paragraph 15(b) of the Naval Supply Systems Command Instruction (NAVSUPINST) 4061.8B, 21 Mar. 1972, states in pertinent part:

"* * * at some point below the Government estimate (e.g. maybe 20% in a given instance) acceptance of one offeror's manning approach might well indicate that the estimates are so grossly inflated that basic procurement fairness would dictate communicating a downward revision to all offerors." (Emphasis supplied.)

While this portion of the instruction is merely a guide and does not mandate an automatic revision of the estimate upon receipt of a proposal exhibiting less than 80 percent of the estimate, we feel that the instant case is, nevertheless, a precise example of a situation contemplated not only by the instruction but also by the regulation. See Matter of Dyneteria, Inc., B-181704, January 16, 1975.

Moreover, while the Navy believes that, in any event, Dyneteria was not prejudiced by any failure to amend the estimate, we do not. Dyneteria and all other offers proposing less than the Government estimate were still required to justify their respective deviations from an estimate which had no basis in reality; but more importantly, other offerors were not apprised of the Government's newly found belief that (1) adequate performance could be accomplished with substantially fewer hours than the Government's estimate and (2) that the Government no longer had much faith in its own estimate.

This second point makes this case different from those situations where justifications for significant manning deviations were accepted but the agency nevertheless still felt that its estimate was reasonable. Matter of ABC Management Services Inc., Tidewater Management Services, Inc., Chemical Technology, Inc., 53 Comp. Gen. 657, 664 (1974); 53 Comp. Gen. 198 (1973), reconsidered in Matter of Dyneteria, Inc., B-178707, May 15, 1974, and Matter of Chemical Technology, Inc., B-178707, June 19, 1974; B-179041(1), October 26, 1973. In those cases, our Office has held that the requirements of ASPR § 3-805.4(c), supra, did not apply. See, in particular, Matter of ABC Management Services, et al., supra, at 663.

Moreover, as we stated in Matter of Dyneteria, Inc., B-181704, supra, the fact that the contracting officer felt that there was little or no time between the receipt of proposals (June 14, 1974), and July 1, the date set for commencement of the contract, does not provide a basis for the failure to amend the Government estimate. The estimate could have been amended at the same time that offerors were requested to submit a best and final offer. If for some reason this was not possible, the incumbent contractor could have been held over so as to allow more time to complete the required negotiation. See Matter of Dyneteria, Inc., B-181704, supra, citing Matter of ABC Food Services, December 17, 1974.

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In sum, we feel that there was no reason why the Government estimate was not revised downward. The failure to do so in this instance rendered the solicitation defective and hence the award made thereunder improper.

Moreover, in view of the failure to amend the Government estimate there is also some doubt as to the reasonableness of the contracting officer's determination to exclude some offerors from a competitive range which was tied to an erroneous estimate.

Accordingly, we recommend that the options remaining under the contract awarded to Pan American not be exercised.


Acting Comptroller General
of the United States