

DECISION



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

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FILE: B-185339

DATE: May 28, 1976

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MATTER OF: Field Maintenance Services Corporation

DIGEST:

1. Allegations that solicitation evaluation criteria were improper and restrictive of competition are untimely filed and therefore not for consideration on merits where not filed prior to closing date for receipt of proposals. Significant issue exception to timeliness standards is not applicable.
2. Where protester, apparent small business, was not evaluated as offeror whose proposal was most advantageous to Government, agency was not required to follow Certificate of Competency procedure upon rejection of protester's proposal.
3. Where record shows that evaluation of proposals was in accordance with established evaluation criteria and was based on reasoned judgment of evaluators, protest based on offeror's disagreement with evaluation is denied since determination of relative merits of proposals is responsibility of contracting agency which will not be disturbed unless shown to be arbitrary.
4. Agency is not required to ignore relative advantage offered by one firm in particular evaluation area, or to equalize competition merely because firm's advantageous position resulted from previous contract awards. An offeror should not be downgraded solely because its proposed employees have not been hired prior to receipt of award; rather, evaluators should consider offeror's ability to hire employees in event of award.

Field Maintenance Services Corporation protests the awards by the Air Force to Dynalectron Corporation and Lear Siegler, Inc. under request for proposals F34601-75-R-2610, issued February 10, 1975, by the Tinker Air Force Base, Oklahoma. The contracts call for the contractor to provide field team services for the maintenance and modification of Air Force weapon systems on a world-wide basis. The basic contracts call for the issuance of orders on either a time and materials or a fixed-price basis.

Many of the objections made by the protester pertain to the manner in which the solicitation was structured, with particular emphasis to the inclusion of evaluation criteria for management capabilities and experience. It is alleged that the tasks contemplated by the solicitation were relatively rudimentary in scope, and therefore the procurement was improperly subjected to the source selection procedures of Air Force Regulation 70-15, AFLC supplements, and various other instructions.

The protester contends that the referenced evaluation criteria were unnecessary, and their inclusion in the solicitation was unduly restrictive of competition since the effect of their inclusion was to perpetuate the incumbency of the two firms receiving awards. In this regard, the protester points out that the two firms have been recipients of contracts for this work for 25 and 13 consecutive years, respectively. Rather than requiring the submission of a technical proposal to be evaluated on the foregoing criteria, the protester charges that the matters of management capability and experience should have been ascertained by preaward survey prior to issuance of the RFP, thereby obviating the necessity for the submission of technical proposals with voluminous data. The procurement should have been restricted to those firms whose qualifications had already been ascertained, and an award made to the lowest-priced offeror thereunder. Instead of following this procedure, the protester complains that the subject awards were improperly made to higher-priced offerors.

It is further contended that the Air Force failed to follow the Certificate of Competency requirements of Armed Services Procurement Regulation (ASPR) 1-705.4 when it was determined that the protester's proposal was inferior to that of the successful offerors on the evaluation criteria of management capabilities and experience.

Moreover, the protester takes exception to the findings of Air Force evaluators concerning deficiencies in the protester's commitments from its direct labor force and middle management personnel, and that the protester's management and production procedures had not been proven in sustained operations. Objection is also taken to the finding that the protester's pricing was unrealistically low. In this regard, it is contended that the Air Force's independent Government cost estimate was in error.

In addition, the protester objects to the failure of the Air Force to equalize or discount the competitive advantage enjoyed by the successful offerors due to the possession of strong labor

forces which have been cultivated through many years of incumbency. The protester contends that it was unfairly penalized during the evaluation for submitting a computerized list of prospective employees that would have been hired in the event of an award, whereas the incumbents enjoyed the competitive advantage of a strong workforce already under employment.

Finally, the protester objects to the superior rating which Lear Siegler received under the evaluation criteria of management capabilities. In support of its contention, the protester has submitted a copy of Lear Siegler, Inc.'s Restated 1975 Financial Report to its shareholders, dated October 31, 1975, in which the company's chairman and president restated earnings to reflect the discovery of accounting errors which resulted in the overstatement of certain receivables and inventories at the Oklahoma City-based Management Services Division which provides maintenance, repair, modification, etc. to aircraft and other land, air and marine vehicles. The protester submits that the Air Force awarded Lear Siegler its current contract notwithstanding its cognizance of the apparent overbilling.

As indicated, the subject RFP apprised offerors that any contract resulting therefrom was to be awarded under the source selection procedures set forth in Air Force Regulation 70-15, Air Force Manual 70-6, and AFLC supplements thereto. It further advised that any such award would be made to that contractor whose proposal was determined to be the most advantageous to the Government, price and other factors considered.

The RFP set forth the following evaluation criteria in descending order of importance: management capabilities, direct labor, and experience.

Offerors were also required to submit, inter alia, a direct hourly rate for the labor to be incurred for orders to be issued on a time and materials basis, and in addition to direct labor rates, the contractor was to be reimbursed for the actual cost of direct materials.

The source selection decision document advises that the cost/price proposals were not to be scored, but were evaluated only for realism and reasonableness. In this connection, although the prospective contract contained some fixed price provisions, the Air Force concluded that performance was to be measured principally against time and material orders since, historically, approximately 90 percent of the orders have been

time and materials. It was explained that incurred hours could be influenced by the qualifications and experience of the workforce, production, planning, and other managerial actions. Therefore, the source selection authority considered each firm's management proposal to be the primary indicator of cost to the Government.

To aid in the evaluation of submitted rates, the source selection authority resorted to an independent Government estimate developed from historical data and estimates. This Government estimate was weighted to give appropriate consideration to the many variables imposed by the solicitation's requirement for the submission of rates for 10 skill categories, 4 geographic area, 6 manning levels, straight time, overtime, double-time, etc.

Six firms submitted proposals in response to the solicitation. The evaluation of Dynalectron's proposal indicated it had no deficiencies; that it demonstrated operational capability, reliability and significant strengths throughout; that it had 24 years of experience in providing the services required; that the price proposal compared favorably to the Government estimate and was competitive and realistic. Accordingly, it was determined that in view of its strong management proposal and competitive rate structure, the proposal should result in an overall lower cost to the Government.

Lear Siegler's proposal was considered to be strong in all areas, and its price proposal was determined to be similarly competitive and realistic, thus indicating the probability of an ultimate overall lower cost to the Government.

All of the other proposals, including the protester's, were considered to possess various deficiencies notwithstanding the conduct of written or oral discussions with each offeror.

With regard to the protester's proposal, it was considered, in spite of the deficiencies and clarifications resolved during discussions, to present a high risk due to the proposed organization not presently being functional. The evaluators felt that firm employment commitments from the proposed direct labor force or middle management class were lacking. It was further concluded that management and production procedures had not been proven under sustained operations, presenting the risk of a "paper organization."

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Moreover, the protester's price proposal was considered to be unrealistically low in comparison with the Government estimate, particularly in the areas of overseas labor rates and overhead. It was felt that projected overhead costs had been understated in amounts for indirect staffing, and sufficient costs had not been included for planned positions. Accordingly, it was determined that the protester's approach in both the management and pricing areas were considered to present an unacceptably high risk to the Government.

Consequently, awards were executed on October 1, 1975, with Dynallectron and Lear Siegler.

Concerning the protester's objections to the format of the RFP, the requirement for the submission of a technical proposal with sufficient data to permit an evaluation under the listed criteria, the allegation that the procurement should not have subjected to the source selection process, and the contention that the evaluation criteria in the RFP were unduly restrictive of competition, attention is directed to our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975). Section 20.2 (b)(1) therein requires that protests based upon alleged improprieties in a solicitation must be filed prior to the closing date for receipt of proposals in order to be timely filed and eligible for our consideration. Since these particular allegations were not raised until more than a month after award, they are clearly untimely.

While the protester does not contend they were timely filed, it argues that they comprise an exception to the untimely provisions set forth in section 20.2(c) which provides that where the Comptroller General determines that a protest raises significant procurement issues, he may consider a protest notwithstanding its untimely filing.

The significant issue exception to the timely filing requirement must be exercised sparingly if our timeliness standards are not to become meaningless. Comten, B-185394, February 24, 1976, 76-1 CPD 130. Thus, we have held that an issue is of widespread interest and therefore significant if it goes "to the heart of the competitive procurement process." Williamette-Western Corporation. et. al., 54 Comp. Gen. 375, 376 (1974), 74-2 CPD 259. We do not believe the objections raised here meet this standard. The requirement for the submission of a technical proposal to be evaluated under criteria listed in the RFP represents an attempt by the procuring activity

to determine the capabilities of the offerors for this procurement. As such, we do not consider the allegations raised by the protester as being of widespread interest and going to the heart of the procurement process so as to justify consideration on the merits notwithstanding their untimeliness.

With regard to the contention that the Air Force was remiss in failing to seek a Certificate of Competency from the SBA after determining that the protester's proposal was ineligible for award, this procedure is required only in instances in which it is determined by the contracting officer that a prospective contractor (i. e. one contemplated for award) is nonresponsible as to capacity or credit. Inasmuch as the protester's proposal was considered substantially inferior to those of the two successful offerors, responsibility determinations were made only for those two firms and, therefore, there was no determination as to either the protester's responsibility or lack thereof. Under these circumstances, the provisions of ASPR 1-705.4 are not applicable in the instant case, and the Air Force was not required to seek a Certificate of Competency on the protester. B-177822, July 16, 1973; 46 Comp. Gen. 893 (1967).

Concerning the evaluation of its proposal, the protester objects to the evaluators' finding that its management and production procedures had not been proven under sustained operations since it was performing a similar task for the U.S. Army in the Republic of South Korea under a similar contract. The Air Force advises, however, that the protester's effort in Korea involved a 12-man team effort which clearly did not establish a management staff or capability to perform the work contemplated under the instant RFP which required manning levels and responsibilities ranging from 250 to more than 1,500 personnel. Thus, it appears that the current levels of effort were separate and distinct from those under the protester's Army contract.

The determination that the protester's direct labor force and middle management were not firmly committed was based on the submission by the protester of a computerized list of prospective employees to whom job offers were to be extended in the event of an award. It was determined that only two or three "middle management" employees were on the payroll at the time of proposal evaluation.

With regard to these latter findings, the protester explains that unlike Dynalectron and Lear Siegler, which already possessed a fully committed workforce in sufficient numbers due to their contract incumbency, the protester was unable to extend firm employment offers until such time as it actually received an award. The protester further contends that this competitive advantage of the incumbent firms should have been discounted so as to equalize competition among the various offerors.

Concerning the evaluation of the protester's proposal under the technical factors listed in the RFP, it is clear that the Air Force and the protester disagree as to the validity of the evaluation. However, it is not our function to evaluate proposals to determine which should have been selected for award. TGI Construction Corporation, et. al., 54 Comp. Gen. 775 (1975), 75-1 CPD 167; Techplan Corporation, B-180795, September 16, 1974, 74-2 CPD 169; Decision Sciences Corporation, B-182558, March 24, 1975, 75-1 CPD 175. The overall determination of the relative merits of proposals is the responsibility of the contracting agency, since it must bear the major burden for any difficulties incurred by reason of a defective evaluation. Training Corporation of America, B-181539, December 13, 1974, 74-2 CPD 337. Accordingly, we have consistently held that procuring officials enjoy a reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award, and that such determinations are entitled to great weight and must not be disturbed unless shown to be arbitrary or in violation of the procurement statutes and regulations. METIS Corporation, 54 Comp. Gen. 612, 614-15 (1975), 75-1 CPD 44; Riggins & Williamson Machine Company, Inc., 54 Comp. Gen. 783 (1975), 75-1 CPD 168.

Here, the Air Force has documented the findings to which the protester takes exception. We have carefully reviewed the record, and must conclude that the Air Force evaluated proposals on the basis of the reasoned judgment of its source selection personnel in accordance with the established evaluation criteria. The fact that the protester is not in accord with that judgment does not render it invalid. See Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404.

Concerning the protester's submission that the Air Force should, in the evaluation process, have eliminated the competitive advantage accruing to Dynalectron and Lear Siegler in the area of direct labor force due to their contractual incumbency, we must point out that the solicitation provided for the award of a

contract or contracts on the basis of the proposal(s) most advantageous to the Government, price and other factors considered. In this regard, we have recognized that while the resources of competing offerors may vary widely, the Government is not required to equalize competition on a particular procurement by discounting competitive advantages accruing to firms by reason of their own particular circumstances. These circumstances may include the award of prior contracts. Houston Films, Inc., supra.

Although the protester did submit lower hourly rates than did the two successful offerors, the prospective contractor was to be reimbursed at the hourly rate quoted for as many hours as would be necessary to perform each order issued under the contract. Accordingly, the ultimate cost of the contract to the Government was undeterminable, and would be contingent largely upon the relative effectiveness of a firm's management capabilities.

Furthermore, in assessing the realism of proposed labor rates, we have not objected to an agency's resort to an independent Government estimate consisting of a composite labor rate based upon a weighted mix of historical rates developed by the agency. See Dynalectron Corporation; Lockheed Electronics Company, Inc., January 15, 1975, 54 Comp. Gen. 562, 75-1 CPD 17. In the instant case, our review of the record gives no indication that such estimate was arbitrary.

We have, however, objected to the practice of "downgrading" a proposal merely because proposed or "contingent" employees to be used in performance of an anticipated contract have not been hired prior to receipt of the award. See B-177280(1), July 16, 1973. Therefore, while the protester's proposed labor force and middle management may not have been "firmly committed", we do not believe that the proposal should have been downgraded solely for that reason. It is not clear in this case whether and to what extent the evaluators considered the protester's ability to hire employees to perform the required services in the event of an award.

However, in view of the other deficiencies in the protester's proposal, we are unable to take exception to the agency conclusion that the protester's proposal was not advantageous to the Government, price and other factors considered.

With regard to the matter of Lear Siegler's restated annual report, the Air Force advises that it was unaware of the information therein during the evaluation of Lear Siegler's proposal.

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We note that the contracts were awarded October 1, 1975, while the restated annual report was dated October 31, 1975. This would appear to corroborate the Air Force's statement. While we are unable to determine what impact this information might have had on the evaluation of Lear Siegler's proposal if the evaluators had been privy thereto, the record clearly shows they were unaware of the matter at the time of evaluation.

In view thereof, the protest must be denied.

Deputy

Ray K. Miller
Comptroller General
of the United States