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

*L. Zubor
Proc. II*

FILE: B-180950

DATE: December 21, 1976

MATTER OF: SBD Computer Services Corporation

DIGEST:

1. Agency determination that proposal which does not reflect prior corporate experience in microfilming area is technically unacceptable is consistent with evaluation criteria and other solicitation provisions which placed offerors on notice that corporate experience, particularly as it related to agency microfilming requirements, and experience of proposed personnel would be evaluated separately. Since proposal was unacceptable, agency was not required to conduct discussions with offeror.
2. Although offeror experience is traditionally matter bearing on responsibility of offeror to perform contract, agency may properly consider such matters in technically evaluating proposals when its needs warrant comparative evaluation of responsibility-type areas. Findings of technical unacceptability based on such evaluations are not responsibility determinations and need not be referred to Small Business Administration.
3. Award of contract to most acceptable offeror on basis of price submitted in response to call for "final pricing" without further discussion, is not contrary to regulatory requirements for holding discussions with offerors in competitive range since request for final price constituted discussions.

SBD Computer Services Corporation (SBD) protests the award of a contract to Zytron Corporation (Zytron) under request for proposals (RFP) 12-76-HEW-OS issued by the Department of Health, Education, and Welfare (HEW) on September 3, 1975. The solicitation invited proposals for the management and operation of a computer output microfilming (COM) facility.

Six offerors submitted proposals by October 3, 1975, the closing date for receipt of initial proposals. SBD's proposal was determined to be technically unacceptable. Nonetheless, all offerors, including SBD, were subsequently sent amendments Nos. 2 and 3 which requested offerors to submit "current, final pricing

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proposals." Only Zytron, SBE and a third offeror responded to these amendments. Without conducting further discussions, HEW awarded a contract to Zytron, the only acceptable offeror, on July 2, 1976.

SBD objects to the determination that its technical proposal was unacceptable and to the agency's refusal to negotiate with the firm. It also contends that the evaluation involved matters bearing on its responsibility and that as a small business it was therefore improperly rejected as nonresponsible without referral of the matter to the Small Business Administration (SBA). Finally, SBD asserts that even if Zytron was properly determined to be the only acceptable offeror, HEW could not have determined that Zytron's price was reasonable and therefore award to Zytron without discussions was contrary to the regulatory provisions permitting an agency to dispense with discussions.

The RFP, which stated that cost was "of less importance than the technical capabilities" of offerors, set forth technical evaluation criteria as follows:

"(a) Understanding of the work to be accomplished and technical approach.

★ ★ ★ ★ ★

"(b) Management Plans

★ ★ ★ ★ ★

"(c) Corporate Experience

The Contractor must identify his corporate experience relating to work called for in this solicitation. Special consideration will be given for experience relating to the current HEW/DMC microfilm environment.

"(d) Personnel Experience

The offeror is required to furnish a resume and vita of the key personnel proposed. The number of man months of experience should be clearly represented by a table with an axis having the names shown whose resume and vita are given and the other axis relating to requirements of this solicitation. Special consideration will be given to current HEW/DMC environment."

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The RFP also stated that the first two criteria were each worth 15 percent while the third and fourth criteria were each worth 35 percent.

SBD's technical proposal was evaluated as follows:

"Technical Approach (15 points) Average Score - 13

The approach presented was very good and satisfactorily defined approach for all aspects of the RFP.

"Management Plan (15 points) Average Score - 9

The plan presented was very good, however, no COM expertise is apparent outside the personal proposed. Because no COM facility has been managed before the proposed implementation becomes a serious concern and seriously weakens the plan.

"Corporate Experience (35 points) Average Score - 3

There is no prior microfilm experience in description of company. Because even related experience could not be described, the firm is unacceptable. The interface of an unexperienced firm into HEW ongoing operations would be totally disruptive and would be unacceptable to HEW COM customers in delays and quality of service.

"Personnel Experience (35 Points) Average Score - 28

The personnel proposed have good experience and qualifications. However, their unexperience in working HEW COM types of operation make the experience marginal at best.

"SBD has been made unacceptable since it is judged that no additional information could produce an acceptable proposal due to the lack of corporate experience a total resubmission would otherwise be necessary." (Emphasis added.)

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HEW's determination that SBD was technically unacceptable was based primarily on the low rating given that firm in the corporate experience area. In support of its contention that this determination was improper, SBD states that its proposal provided resumes of personnel whose experience in the micro-film industry would be difficult for any offeror to match" and that it would have been a simple matter for SBD to remedy HEW's concern in this area by providing "additional experienced personnel." SBD further states that its proposal identifies itself as "a seasoned technical and managerial organization" and that as such it necessarily has COM experience, which it considers to be "a normal adjunct to standard computer output techniques and media." SBD contends that HEW is incorrect in viewing COM as "an independent technical discipline."

We cannot sustain these contentions. The evaluation section of the RFP, set forth in pertinent part above, and another RFP section entitled "CONTENT OF PROPOSALS" plainly indicated that information pertaining to both offeror experience and key personnel was required and would be evaluated. We think it is clear from these RFP provisions that separate and distinct consideration was to be given to each category and that the information provided by offerors for evaluation in one category would not necessarily be relevant to evaluation of the other category. Thus, while the experience of SBD's proposed personnel may have received a relatively high numerical rating, it would not follow that SBD was entitled to a similar rating in the area of corporate experience. Accordingly, we cannot agree that the personnel resumes submitted by SBD, or those additional ones it suggests it could have submitted, are relevant to HEW's evaluation of SBD's corporate experience.

Furthermore, under the corporate experience evaluation criterion, it appears reasonable for HEW to take into account specific prior offeror experience in the COM area, regardless of whether COM is regarded as an "independent discipline." Obviously, HEW believes that specific COM experience is important in the selection of a contractor to operate a COM facility, and the record affords us no basis for concluding that HEW is being arbitrary in this regard.

With respect to HEW's failure to conduct discussions with SBD, Federal Procurement Regulations (FPR) § 1-3.905-1(a) (1964 ed.) requires only that discussions be conducted with responsible offerors submitting proposals within a competitive range, price and other factors considered. A proposal is in the competitive

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range unless it is so technically inferior that meaningful negotiations are precluded. See, e.g., 53 Comp. Gen. 1 (1973); 52 id. 382 (1972); 48 id. 314 (1968). Stated otherwise, where there is no real possibility that a proposal could be improved to the point where it could become acceptable, it is outside the competitive range. SBD's proposal was determined to be unacceptable and therefore outside the competitive range primarily because the proposal did not indicate any prior experience with COM facilities. We fail to see how this deficiency could have been cured through discussions and proposal revision, particularly since SBD does not now assert to have such experience. In any event, we point out that while HEW did not conduct technical discussions with SBD, it did provide SBD with an opportunity to revise its proposal. As indicated below in connection with SBD's final allegation, that opportunity constituted discussions. Although those discussions did not include the pointing out of any specific deficiency, we perceive no resulting prejudice to SBD since (1) as indicated above, the deficiency could not have been cured, and (2) HEW was not required to, and should not have, provided SBD with an opportunity to revise its proposal in the first place.

SBD's contention that its proposal was rejected for reasons related to its responsibility, i.e., its capacity to perform the contract, is based on various decisions of this Office, cited by SBD, in which matters bearing on capacity to perform, including offeror experience, are treated as matters of responsibility. The decisions cited, however, involved either formal advertising, 2-11 52 Comp. Gen. 647 (1972); 52 id. 87 (1972); 36 id. 864 (1959), or a situation in which it appeared that while technical evaluation criteria dealing with capacity were set forth in an RFP, the agency did not expect to receive different technical approaches but only offers indicating that the work to be performed would "conform to the best practices of the industry, and be of a quality acceptable to the Government * * *." 52 Comp. Gen. 47, 53 (1972).

In many other cases, we have recognized that contracting agencies may properly utilize evaluation factors which include experience and other areas that would otherwise be encompassed by offeror responsibility determinations when the needs of those agencies warrant a comparative evaluation of those areas. See 53 Comp. Gen. 388 (1973); 52 id. 854 (1973); Design Concepts, Inc., B-184754, December 24, 1975, 75-2 CPD 410; Home and Family Services, Inc., B-182290, December 20, 1974, 74-2 CPD 366. As we said in Design Concepts, Inc., supra:

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"All evaluation factors, whether relating to traditional concepts of responsibility or to technical approach, are used to make relative assessments of the merits of individual proposals. These relative assessments should not be considered responsibility findings which are made after proposal evaluation has been completed. * * * Given the propriety of an agency's use of the negotiated purchase method in the first place, we cannot object to the relative assessment of offerors' proposals under traditional responsibility factors even if these factors have primary weight in the evaluation process * * *."

Accordingly, we find no impropriety in the use of experience factors as proposal evaluation criteria or in HEW's rejection of the SBD proposal without referring the matter to SBA.

SBD's final contention concerns the propriety of an award to Zytron without discussions. Federal Procurement Regulations (FPR) § 1-3.805-1(a) provides that discussions "shall be conducted with all responsible offerors" in a competitive range, "except that this requirement need not necessarily be applied to:

* * * * *

"(5) Procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price * * *."

SBD argues that HEW has no prior cost experience with the services being procured and that adequate competition did not exist in view of HEW's determination that Zytron was the only acceptable offeror, so that it was improper for award to be made to Zytron without discussions with that firm.

The protest is without merit on this point also. Although technical discussions were not held, offerors were given an opportunity to submit revised cost proposals. We have long regarded actions which provide an offeror an opportunity to revise its initial proposal as constituting discussions. See 51 Comp. Gen. 479 (1972) and 50 Comp. Gen. 246 (1970). Thus, there is no basis for concluding that HEW improperly failed to conduct the discussions required by FPR § 1-3.805-1(a).

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For the reasons stated above, the pretest is denied.


Deputy Comptroller General
of the United States