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DECISION

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

FILE: B-198319 DATE: December 17, 1980

MATTER OF: Hittman Associates, Inc. DLG05666

DIGEST:

1. Protest based primarily on manner in which proposals were evaluated and competitive range determined need not be filed before closing date for receipt of initial proposals, since alleged improprieties occurred after that date.

2. In quick reaction work order procurement, competitive range may be relative one. Proposal which is technically acceptable or capable of being made acceptable need not be considered for negotiation if, in light of all proposals received, it does not stand real chance for award.

3. In quick reaction work order procurement, establishment of competitive range for small businesses only is proper when (1) 25 percent set-aside was announced in solicitation and (2) small business proposals have real chance for award when compared with each other and preference is taken into account.

4. When evaluation is in accord with stated criteria, all offerors are treated alike, and evaluation reflects reasoned judgment of evaluators, protest will be denied. Although disclosure of an agency's additional considerations, including number of quick reaction work order contracts to be awarded and relative competitiveness of potential contractors, would have given offerors better understanding of selection process, notice of these factors and opportunity to amend would not have helped any firm to improve its proposal.

[Protest of Proposal Evaluation]

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5. When Source Evaluation Board follows procedures outlined in agency handbook--which requires more than mere determination that proposals are either "acceptable" or "not acceptable"--protest that Board usurped its authority will be denied.

Hittman Associates, Inc. protests its exclusion from the competitive range by the Department of Energy under a solicitation for Quick Reaction Work Order master contracts for planning, analytical, technical, and other required services.

Hittman argues that all technically qualified offerors--which it is conceded to be--should have been selected, rather than only those determined by DOE to have been "best qualified."

DOE has completed negotiations, but has withheld awards pending our decision. For the reasons outlined below, we are denying the protest.

Background:

Under request for proposals No. DE-RP01-79-AD10163, DOE will make multiple awards of master contracts encompassing three broad areas of work: Support for Program Planning and Monitoring; DOE Staff Support; and Special Tasks. DOE intends to award both a firm-fixed-price and a cost-plus-fixed-fee contract to selected offerors in each work area. In the solicitation, the agency stated that 25 percent of the awards in the first two areas and 100 percent of the awards in the third area would be reserved for small businesses.

After award, when specific, urgent needs arise in one of the stated areas of work, DOE will solicit three or more master contractors, who will be required to submit cost and technical proposals for the specific task. This second competition--generally on the basis of price--will result in modification of the successful contractor's master contract to include the specific task.

Basis of Protest and DOE Responses:

Hittman was one of 90 firms submitting timely proposals; since it is not a small business, it competed only for work areas one and two. In its protest, the firm lists 15 reasons

why it believes DOE's conduct of this procurement arbitrarily limited competition. These reasons for the most part involve (1) determination of the competitive range; (2) evaluation criteria; and (3) source selection procedures.)

1. Competitive Range

As noted above, Hittman believes all qualified offerors should have been included in the competitive range, and that "preselection" of only the best qualified for negotiation was contrary to the general rule that the competitive range should include all responsible offerors whose proposals are either technically acceptable or capable of being made acceptable.

Hittman believes our opinion in B-196489, February 15, 1980, a letter to Chairman John D. Dingell of the Energy and Power Subcommittee, House Interstate and Foreign Commerce Committee, in which we discussed quick reaction work order contracting, supports this view, since in it we cited an earlier case in which we had approved a prequalification scheme only "after it was modified to provide that all qualified firms in particular skill areas would receive master agreements." See Department of Agriculture's Use of Master Agreements, 56 Comp. Gen. 78 (1976), 76-2 CPD 390.

DOE, however, contends that if a technically acceptable proposal is so much lower in quality than other proposals that it stands no real possibility of award, meaningful negotiations are not possible. Since this was the case with Hittman, DOE indicates, the firm was not included in the competitive range.

Hittman also objects to the fact that when DOE determined that not enough small businesses were initially ranked highly enough to qualify for 25 percent of the awards in work areas one and two, the Source Evaluation Board decided to augment the competitive range by further extending it for small businesses only. This modification of the method of establishing the competitive range was improper, prejudicial, and inconsistent with normal procurement rules and practices, Hittman states.

DOE responds that the Board took this step only after considering various alternatives which would have included

a significant number of large businesses determined to have little or no chance of award. However, DOE continues, the small businesses had a real chance for award when their proposals were compared with other small business proposals and when the 25 percent preference was taken into account. Thus, DOE maintains, they could not properly have been excluded from the competitive range; similarly-rated large businesses, which did not enjoy the preference, had no real chance, so their exclusion was proper. This procedure did not prejudice Hittman, DOE concludes, since it was not included in the initially-established competitive range.

2. Evaluation Criteria

Hittman further contends that in establishing the competitive range, DOE used evaluation criteria other than those listed in the solicitation, without giving offerors notice or an opportunity to amend their proposals. Specifically, Hittman alleges that Source Evaluation Board members considered the number of master contracts which they believed were likely to be awarded in determining the competitive range, and made their own individual evaluations of the ability of each contractor to vigorously participate in work order competitions. In the request for proposals, Hittman states, there was no indication that any specific limit would "arbitrarily" be placed on the number of selected contractors as part of the evaluation process or that Board members would attempt to anticipate the subsequent competitiveness of each master contractor.

Hittman implies that if the evaluation criteria listed in the solicitation--experience, personnel, project management, and personnel management and corporate resources--had been strictly followed, there would have been no question of the capability of the team composed of Hittman and its subcontractor, Arthur Young Company. Instead, Hittman argues, the listed criteria were ignored and two undisclosed criteria were substituted.

DOE responds that it should have been apparent to Hittman from the solicitation that awards were to be made on a "best qualified" basis, and that no standard for determining the number of awards was set forth in the solicitation. DOE argues that any protest as to the limited number of awards (and presumably the limited number of firms in the competitive range) is therefore untimely.

DOE also argues, however, that there was no need to list the number of firms to be considered for award as an evaluation

factor, since this information would not have helped offerors to improve their proposals. The factors which ultimately determined the number of selections, DOE continues, included aggregate capacity of offerors to handle normal and peak workloads, potential attrition, anticipated rates of unacceptable work order proposals, and "other matters which bear on maintaining a viable competitive environment for work order competitions." These were not within the control of offerors, DOE points out.

DOE further states that while a competitive group of master contractors was an objective of the procurement, the technical and cost criteria stated in the solicitation were the sole means of achieving this objective.

3. Source Selection Procedures

Hittman also contends that DOE's Source Evaluation Board usurped the responsibilities of the Source Selection Official and the contracting officer, as outlined in the Source Evaluation Board Handbook. The Board's proper function, Hittman asserts, was simply to determine which proposals were technically acceptable and to present that information to the selecting officials.

Hittman additionally argues that Board members lacked sufficient information from proposals as submitted to enable them to rank prospective contractors. For example, Hittman states, the Board could not possibly have considered the relative qualifications of its 53 specific technical personnel in identified disciplines as compared with those listed by some other, probably larger organization. Such evaluations necessarily had to be subjective, Hittman concludes.

DOE's position, on the other hand, is that judgments as to the probable number of awards, in the context of quick reaction work order contracting, were properly made by the Source Evaluation Board as part of its overall responsibility for establishing the competitive range.

DOE also states that the information furnished by offerors was suitable for ranking of proposals. The Board found a wide range of corporate experience and facilities, proposed management approaches, and experience in energy-related activities among offerors, DOE states.

4. Additional Bases of Protest

Hittman also objects to DOE's consideration of the need to provide incentives to competition by limiting the number of

master contractors and thus increasing the dollar volume of work order awards which each can anticipate. The risks and rewards of competition, Hittman states, are those of contractors, and there was no need for DOE to inject itself into this process.

In addition, Hittman believes that DOE may have favored larger contractors with larger staffs, and indicates that the likelihood of organizational conflicts of interest will be far less with smaller firms such as itself.

Finally, Hittman takes issue with DOE's position that part or all of its protest is untimely because it deals with matters apparent from the solicitation but was not filed before the closing date for receipt of initial proposals. Hittman states that it had every reason to expect that the normal source selection procedures outlined in DOE's own Handbook and in the solicitation would be followed. Since the protested actions occurred after the closing date, Hittman concludes, "it is patently obvious that the protest could not have been submitted at any earlier time."

GAO Analysis:

At the outset, we note that Hittman's protest is based primarily on the manner in which proposals were evaluated and the competitive range was determined. Since these were not apparent from the solicitation itself, and in some cases became known to Hittman only when discussed in DOE's report to our Office, we consider the protest timely.

We also note that our Office has found quick reaction work order contracting to be reasonable and not unduly restrictive of competition per se. B-196489, supra. It is true that as a general rule, we approve prequalification only when all offerors meeting a certain level of acceptability are permitted to participate; otherwise, such schemes are inconsistent with the requirement for full and free competition.

Quick reaction work order contracting, however, differs from the prequalification schemes discussed in our most recent decision on this subject, Office of Federal Procurement Policy's films production contracting system; John Bransby Productions, Ltd., B-198360, December 9, 1980, 80-2 CPD ___, in which we approved a prequalification system for film and videotape productions because all firms might attempt to qualify (but recommended that particular procurements be synopsized in the Commerce Business Daily).

Unlike OFPP's random lists of offerors, quick reaction work order contracts are not intended to be used automatically or as a substitute for the normal procurement process. Rather, they are used only in urgent situations, with strict procedural safeguards. When a DOE program office identifies a specific requirement, it must determine in writing that the cost will be $250,000 or less; that the task falls within the area of work covered by a master contract; that the work order will result in a discrete deliverable; and most importantly, that the services are urgently required, due to circumstances beyond the control of the program office. In addition, the program office must certify with a contracting officer concurring that the Government will be adversely affected if a quick reaction work order is not issued. B-196489, supra.

In connection with our opinion to Chairman Dingell, DOE acknowledged that it had previously met urgent requirements by awarding sole-source or level-of-effort contracts, authorizing pre-contract costs, entering into letter contracts, or ratifying informal commitments by unauthorized personnel. We therefore concluded that the quick reaction work order system of contracting (although it needed modification in certain aspects not relevant here) was less restrictive than other methods used by DOE to meet urgent needs. Id.

We also reviewed the solicitation for the instant procurement and found that in selecting contractors, DOE would emphasize experience and require cost realism. We stated:

> " * * * It appears that DOE, in using these evaluation procedures, will award master contracts to all qualified offerors, although the competitive range in some cases may be a narrow one." Id.

In this context, "qualified" is a relative term. The solicitation indicates this: "Evaluation is conducted to determine the offeror's * * * comparative ranking with competing offerors." In addition, DOE's Source Evaluation Board Handbook directs each member to rate and rank proposals after considering them individually in light of each evaluation criterion but before the competitive range is established. The Handbook states that a proposal is in the competitive range unless there is no real possibility, taking into account other more acceptable proposals, that it can be improved to the point where it becomes the most acceptable. According to the Handbook,

> "There is no purpose in considering a proposal to be in the competitive range simply because

> it could be improved to the point where it would be acceptable to the Government if better proposals were not submitted when, in fact, such better proposals have been received. * * *" Procurement Regulations Handbook, Source Evaluation Board, DOE/PR-0027 § 405c (June 30, 1979).

Although it is an exception to the general rule cited by Hittman, the concept of a relative competitive range is neither new nor improper. In 52 Comp. Gen. 382, 387 (1972), a case involving a proposal determined to be technically unacceptable because it fell below a predetermined point score, we objected generally to the use of such a cutoff, but stated that in view of the offeror's "low score in comparison to the array of scores achieved by the other offerors," we did not find the agency's decision to exclude it from negotiations improper.

Similarly, in Peter J. T. Nelsen, B-194728, October 29, 1979, 79-2 CPD 302, we upheld a determination that an offeror was not within the competitive range when it received a point score of 72, compared with other technical proposals rated 78.4 and 87.2; it was also the highest priced. We stated that a proposal need not be considered to be within the competitive range if, in light of the competition for that procurement, the offeror did not have a reasonable chance of being selected for the final award.

Even in a procurement where the competitive range consisted of one firm, we considered that selection within the discretion of the agency when, in its judgment, meaningful discussions could not be held with other offerors because their proposals could not be brought up to the level of the superior one. The protester's proposal was found to be "acceptable" or "marginally acceptable" in each individual technical rating category, but corporate past experience concededly could not have been improved through discussions, and proposed cost savings might not have been realized. Art Anderson Associates, B-193054, January 29, 1980, 80-1 CPD 77.

In view of the foregoing, we do not agree with Hittman's contention that all technically qualified offerors necessarily should have been included in the competitive range. Rather, we believe, it was within DOE's discretion to select those it found best qualified.

As for extension of the competitive range for small business proposals, in our opinion to Chairman Dingell we discussed

DOE policies with regard to small business under quick reaction work order contracting. DOE had stated that it would give special recognition of the needs of small businesses in solicitations, and that it generally would set aside a minimum percentage of awards for such firms. DOE also stated that its Director of Small and Disadvantaged Business Utilization would screen work orders for the purpose of adding small businesses to the firms solicited whenever possible. B-196489, supra.

In this case, the Source Evaluation Board report indicates that the 25 percent partial set-aside was DOE's response to a Small Business Administration appeal that 100 percent of this procurement be set aside for small business concerns. The determination to reserve this portion of work areas one and two, and all of work area three, was made by DOE's Deputy Secretary and was announced in the solicitation. However, for the Source Evaluation Board to be able to implement this policy, a corresponding number of small business firms obviously had to be included in the competitive range.

Since DOE had authority to set aside 100 percent of the procurement for small businesses, we cannot question its setting aside a lesser amount or conclude that it was unreasonable for the Source Evaluation Board, in effect, to establish a second competitive range for small firms which it determined had a real chance for award. Rather, as we noted in our opinion to Chairman Dingell, it appears that the agency is taking steps to insure that it meets its statutory obligation to place a fair proportion of total Federal purchases and contracts with small business concerns. Id., citing 41 U.S.C. § 225(b) (1976) and Federal Procurement Regulations § 1-1.702 (1964 ed. amend. 192).

On the issue of evaluation criteria, we have carefully examined the Source Evaluation Board report to determine whether (1) evaluation was in accord with the stated criteria; (2) all proposals were subject to the same detailed technical evaluation; and (3) that the evaluation reflected the reasoned judgment of the evaluators. See Peter J.T. Nelson, supra. For this procurement, 130 proposals were received on or before the closing date (two additional proposals, received late, were returned without being considered). These were first evaluated and point-scored by a technical evaluation committee. Source Evaluation Board members then individually evaluated and scored all proposals before meeting to develop consensus scores, based on the composite scores from the technical evaluation committee and on their own individual evaluations.

Each proposal could receive up to 1,000 points under the four criteria listed in the request for proposals. Maximum points for these were: Experience, 350; Personnel, 300; Project Management, 200; and Personnel Management and Corporate Resources, 150. There were three subfactors under each criterion; in general, the most important of these dealt with general experience or suitability, and the less important with specific experience or ability in DOE programs and functions or in programs with comparable requirements.

Upon reviewing the evaluation sheets, we find that Hittman and all other offerors were considered in light of the criteria listed in the solicitation, and that each of the subfactors on which they were graded could reasonably have been included under the four listed criteria. In view of the broad general nature of the work covered by the solicitation, there was no "technical approach" which could have been evaluated in the sense that the Government was seeking the "best" solution. Rather, offerors were evaluated in terms of their capability and capacity to perform the work covered by the solicitation. Each received a narrative summary of strengths and weaknesses, as well as a point score.

The "undisclosed" criteria which Hittman alleges were employed--anticipated number of awards and competitiveness--did not come in for consideration until Board members attempted to determine how many of the offerors should be included in the competitive range. In quick reaction work order contracting, the exact number of awards is not determined until the time of source selection and depends, as DOE points out, on factors such as aggregate capacity of all offerors.

The number of awards likely to be made, we believe, was a necessary consideration since if, for example, it was determined that the work orders to be issued over the term of the master contracts would require only a dozen firms in each work area, negotiation with 90 offerors would have been an undue burden on both the agency and the lower-ranked offerors who were not ultimately selected.

Competition for work order solicitations also was a valid concern, since our Office had previously criticized DOE for having made sole-source awards of work orders under earlier master contracts. See B-196984, supra.

While Hittman and other offerors might have better understood the selection process if these considerations had been spelled out in the request for proposals, notice and an opportunity to amend would not have helped any firm to improve its proposal. Moroever, these "criteria" were applied uniformly to all offerors.

Nor does it appear that the Source Evaluation Board overstepped its authority or made subjective decisions, as alleged by Hittman. For example, as DOE points out, the Board took the extra step of checking with the Source Selection Official before defining the actual competitive range. In all other respects, the Board appears to have followed the procedures outlined in the Handbook, which states that:

> " * * * The Board will not recommend the selection of a contractor, but will report its findings and conclusions and answer all questions raised by the Source Selection Official and assist him with any special analyses or other requirements for clarifying matters related to the final selection." Procurement Regulations Handbook, supra at § 103a.

This appears to require more than a mere designation of proposals as "acceptable" or "not acceptable," as Hittman would have the Board do. We have no reason to doubt that final selection will be made by the Source Selection Official.

As for other bases of protest, there is no indication that DOE favored larger contractors than Hittman; on the contrary, if any group was favored, although justifiably, it was small business concerns. All offerors will be required to make complete disclosure statements regarding potential conflicts of interest as a condition precendent to award; these statements will be updated and cross-referenced during selection of contractors for work orders, and final determinations of whether a conflict exists will be made when specific tasks are identified.

In the final analysis, then, Hittman's protest is that it believes it is as well or better qualified than other offerors, and that its proposal should have been included in the competitive range.

Hittman initially received technical scores of 621 and 656 in work areas one and two, respectively; these scores were increased slightly following a determination by the Board that

the relative values assigned to subcriteria under Personnel Management and Corporate Resources should be changed to reflect their relatively equal importance as specified in the solicitation. Hittman's final technical scores were 625.6 and 660.6

Among the 12 offerors initially selected for the competitive range in each work area, technical scores ranged from 952 to 683.6 in work area one and from 988 to 674.6 in work area two. Thus, Hittman was below the cut-off point for large businesses in both areas of work.

It is not our function to reevaluate proposals. We have repeatedly emphasized that decisions as to their relative merits are the primary responsibility of the contracting agency, and will not be disturbed unless shown to be arbitrary or in violation of procurement statutes and regulations. Mere disagreement between a protester and evaluators does not mean that evaluations were unreasonable. National Motors Corporation, et al., B-189933, June 7, 1978, 78-1 CPD 416.

In this case, we find the selection of offerors for negotiation represented the reasoned judgment of DOE evaluators, and violated neither statute nor regulation.

The protest is denied.

Milton J. Socolar

For the Comptroller General
of the United States