19104 Pt-1 Pet.+

DECISION

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

FILE: B-198679 DATE: August 11, 1981

MATTER OF: Dynalectron Corporation

DIGEST:

1. Protest against use of peak workload data in specifications as unduly restrictive of competition and advantageous to incumbent contractor because contracting agency failed to include nonpeak workload data purportedly available from prior contracts and projection of nonpeak workload requirements for option periods is denied. Offerors were directed to base proposals on peakload estimates which appear reasonably related to work required under contract and protester has not shown agency could reasonably provide more precise information.

2. Protest that fixed-price, incentive-type contract proposed by agency is inappropriate due to allegedly inadequate solicitation specifications and fluctuating workloads anticipated under contract is denied. Considering sufficiency of specifications and facts set forth in agency's finding which support determination for contract type selected, GAO cannot challenge agency's use of incentive-type contract.

3. Protest against allegedly inadequate solicitation statement of basis for award and proposal preparation time is denied. RFP clause which provides that technical/management factors are of "paramount importance" sufficiently discloses relative importance of evaluation criteria and clearly states that these factors are more important than cost factors. Determination of date for receipt of proposals is for

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judgment of contracting agency; while regulations on negotiated procurement do not prescribe definite period for proposal preparation, time allotted here comports with 30-day standard required for formally advertised procurements.

Dynalectron Corporation protests against alleged deficiencies in request for proposals (RFP) No. F08606-80-R-0004 issued by the Department of the Air Force for photographic/optical support services for the Eastern Space and Missile Center and the Kennedy Space Center. Dynalectron contends that the RFP unduly restricts competition because the statement of work (SOW) allegedly does not adequately describe the agency's requirements in order to encourage maximum competition--thereby enabling only the incumbent contractor, Technicolor Graphic Services, Inc. (Technicolor), to compete for the award; that the allegedly inadequate specifications make the fixed-price incentive contract proposed inappropriate due to fluctuating workloads expected at the facilities; and that the RFP did not provide sufficient information as to the relative importance of the evaluation criteria or adequate time for the preparation of proposals.

Based on our review of the record, we deny the protest.

RFP

The RFP contemplates the award of a fixed-price incentive (firm target) contract for fiscal year 1981, with two additional fiscal-year-priced options. It specifies a sharing arrangement of 70/30 (Government/contractor) for costs over or under the target cost of $300,000 per fiscal year and a firm ceiling price of 120 percent of target costs. Offerors are to propose a general and administrative expense (G&A) ceiling, and a clause establishing a G&A ceiling is to be included in the resultant contract.

Proposals are to be evaluated in two areas--technical/management and price. The RFP also provides that the Government will consider other salient factors

bearing on the acquisition, including past performance, environmental awareness and energy effectiveness. The RFP states that award will be made to the offeror which the Government determines can best accomplish the necessary work to satisfy the objectives and requirements set forth in the RFP in a manner most advantageous to the Government. "Paramount weight" is to be given the technical/management area which is combined for purposes of the evaluation, and proof of concept and the extent of risk to the Government inherent in the offeror's proposed approach is a "very important" aspect of the technical/management area. The RFP further advises that price is not controlling but will be considered to determine the "credibility and realism of the offeror's technical and management proposals" and that offerors may be penalized for unrealistically low price proposals.

Statement of Work

The SOW covers the following seven technical areas: (1) Operations Planning and Engineering, (2) Field Operations, (3) Film Production, (4) Motion Picture Laboratory, (5) Still Laboratory, (6) Optics Shop, and (7) Supply services. Some estimates of the quantities of film products or tasks which can reasonably be expected during the period of performance are also set forth in the SOW.

Dynalectron asserts that sections 3.6 through 3.12 of the SOW for the seven technical areas provide inadequate, incomplete data about major tasks to be performed. For example, the number of missile launches for which support services will be required is not specified. Moreover, the protester further explains that section 3.6 tells offerors only the relative number of work documents of each category to be expected in fiscal year 1981 without furnishing any projections for the option years and fails to indicate the workhours necessary to perform document changes. Similarly, sections 3.7 through 3.12 are also devoid of historical data or projections for the 2 option years, and the 6-month workload history (concerning the incumbent contractor's recent performance under

a fixed-price contract) for sections 3.9 and 3.10--available to prospective offerors in the agency's reference library--does not overcome this deficiency.

Although peak workload data is available, nonpeak workload data is not supplied. Dynalectron also insists that complete data exists from previously performed long-range planning; that it is neither confidential nor proprietary to the incumbent contractor; and that without this information, offerors other than the incumbent contractor cannot submit a proposal regardless of the type of contract the Air Force may award. These deficiencies, in the protester's opinion, prevent adequate assessment--except on a peak load, "worst case" basis--of the various requirements.

In commenting on the protest, Technicolor states that the long-range planning information to which Dynalectron refers is contained in "Photographic Services Planning Document," provided to the Air Force under the incumbent's contract, and that it is available from the Air Force under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, et seq. (1976). Technicolor explains, however, that this document pertains to such things as departmental functions, workflow, analysis of future equipment needs and facilities floor plans; that it is neither related to nor prepared for staffing purposes; and that it does not contain range launch scheduling by program.

The Air Force argues that even if one or more potential offerors are precluded from competing, this circumstance does not render specifications unduly restrictive of competition if they represent the agency's legitimate needs. The agency insists that the instant specifications do reflect its minimum needs, noting that basically the same SOW was used in 1968 and 1974 procurements of these services in response to which four and two proposals, respectively, were received. The Air Force further asserts that our Office will question an agency's judgment concerning technical specifications only upon a clear

showing of unreasonableness (see Automated Informational Retrieval Systems, Inc., B-193931, June 19, 1979, 79-1 CPD 438) and contends that Dynalectron has not made such a showing.

Finally, the Air Force believes that all information required to prepare a competitive proposal has been provided or is readily available to any interested firm. The RFP's detailed SOW, in addition to information provided in connection with an onsite visit and data contained in five Air Force documents available to Dynalectron in the Air Force's "reference library," is sufficient to permit submission of a competitive proposal. The information supplied in these five documents summarizes data contained in the Technicolor planning document Dynalectron requests.

Our Office has consistently held that the contracting agency has the primary responsibility for drafting specifications which reflect its minimum needs, and we will not question its determination absent evidence that it lacks a reasonable basis. Informatics, Inc., B-190203, March 20, 1978, 78-1 CPD 215. Nevertheless, it is a fundamental principle of Federal procurement law that solicitations must be drafted to inform all offerors in clear and unambiguous terms what is required of them under the contract in order that they can compete on an equal basis. Norfolk Conveyor Division of Jervis B. Webb Company, et al., B-190433, July 7, 1978, 78-2 CPD 16.

The question before us concerns the reasonableness of the Air Force determination of the quantum of information necessary for inclusion in the RFP and the sufficiency of the resultant specifications. Obviously, the more information prospective offerors receive, the greater the likelihood that they will be able to formulate proposals which adequately and accurately address the contracting agency's needs. Dynalectron's concerns, however, primarily focus on a document--described above by Technicolor--that the agency has determined unnecessary to release to offerors and one that the incumbent contractor which generated the information believes is available pursuant to FOIA;

further, Technicolor states that the document does not contain the kind of information the protester seeks.

We have held that the propriety of disclosing the contents of documents prepared under earlier contracts to prospective follow-on contractors is properly for resolution under FOIA and not by our Office. See Field Maintenance Services Corporation, 56 Comp. Gen. 1008, 1110 (1977), 77-2 CPD 235. However, the record does not indicate that the protester ever attempted to obtain the information from the Air Force in accordance with FOIA procedures.

To the extent Dynalectron's protest is directed at Technicolor's advantage in competing for these requirements, we have consistently recognized that a particular offeror may, indeed, by virtue of its prior experience, possess unique advantages and capabilities. Absent preferential treatment of the incumbent or other unfair action by the Government, however, we have held that any advantage thus obtained is not unfair and that the Government is not required to try to equalize competition to compensate for the incumbent's competitive advantage. See, for example, Boston Pneumatics, Inc., 56 Comp. Gen. 689, 691 (1977), 77-1 CPD 416.

Although Dynalectron has supplied for our inspection examples of Air Force and Navy RFP's which allegedly contain more detailed range scheduling data, we cannot conclude that the SOW in question has been shown to contain inaccurate or insufficient information which results in Technicolor having an unfair advantage over any competition especially since offerors were directed to base their proposals on peak load estimates. These estimates are, apparently, reasonably related to reality. Moreover, we must conclude that the protester has not shown that the Air Force reasonably could provide more precise information at the present time. Therefore, the fact that only Technicolor submitted a proposal under the RFP is not legally conclusive. Consequently, we cannot take exception to an award for the remaining base and first option periods.

Insofar as Dynalectron asserts that it is unable to compete due to fluctuating workloads at the facilities, we believe that any uncertainty regarding performance requirements is insufficient to render the RFP specifications inadequate. The RFP requires that offers be based on maximum performance capability, Technicolor states that its proposal was prepared on the peak workload basis required by the RFP and Dynalectron has submitted no evidence to the contrary. Dynalectron's protest on this basis is denied.

Contract Type

The protester contends that the agency's decision as to the type of contract it will award must have a rational basis; that a fixed-price incentive contract requires a reasonably definite design or performance specification which permits development of realistic estimates of the probable performance costs; and that because the SOW does not constitute such a specification and the Air Force cannot reasonably estimate performance costs due to the fluctuating workloads inherent in the services in question, there is no rational basis for such a contract and the RFP should be amended to award some form of cost-type contract.

The contracting agency states that pursuant to the "DOD/NASA Incentive Contracting Guide, Air Force Pamphlet 70-1-5, October 1969," a fixed-price incentive contract is appropriate because there are few technical uncertainties in the Air Force requirements, the exact performance requirements are specified in the SOW, and the workload fluctuations to which Dynalectron refers concern only the frequency and intensity of the tasks rather than uncertainties in the nature of the work to be done. The cost of performance can be reasonably estimated based on information provided, including Department of Labor wage determinations, and considering that the contract is labor intensive. Moreover, the incumbent contractor's contract extension was negotiated on a firm fixed-price basis so the decision to acquire current requirements on a fixed-price incentive basis is reasonable and appropriate. As stated in an Air Force finding which supports the determination for the fixed-price incentive contract selected here:

> "* * * The use of a fixed-price incentive contract is likely to be less costly than other methods because it will give the contractor a strong incentive to cut costs, thereby increasing profit. The use of this type contract also limits the maximum Government liability by establishment of a ceiling price. Prior contracts have been CPIF because the specifications were couched in general terms, creating cost uncertainties which precluded fixed-price contracting. However, a history of small underruns clearly indicates that a contractor can control costs to the extent that we can move to a FPIF type contract. This is expected to give the contractor a greater profit incentive in exchange for greater risk and result in less overall cost to the Government."

Since we have rejected the protester's view that the SOW is inadequate as a basis for competition here, and because we cannot question the rationale of the above finding, we are not in a position to challenge the Air Force's view that a fixed-price incentive contract is now appropriate for these services.

Evaluation Criteria

The protester explains that the RFP statement that "the technical/management area will receive paramount weight" is so vague and indefinite that it does not adequately inform offerors of the importance attached to the area and could mean that the area is assigned 51 percent or any greater amount of the total evaluation weight. While Dynalectron does not believe that the numerical evaluation scheme need be released, it argues that the Air Force could have more precisely disclosed the relative importance of the evaluation criteria.

Contrary to the protester's opinion, the Air Force believes that the RFP clearly advises that

technical and management capability is of paramount importance, leaving no room for offerors to reasonably assume that technical merit and cost are equally important evaluation criteria; and that the RFP need not, as the protester suggests, assign and disclose the numerical weights of each evaluation factor, citing our decision in 52 Comp. Gen. 686 (1973).

We cannot take legal objection to the Air Force's position that it did disclose the relative importance of the evaluation criteria under the authority of the cited case which noted that an offeror has a "right to know * * * whether cost is secondary to quality." Here, in our view, the RFP clearly stated that cost was secondary in importance to noncost criteria.

Proposal Preparation Time

Finally, Dynalectron contends that the RFP did not provide sufficient time for the preparation of proposals because the closing date for receipt of proposals was scheduled only 30 days after the RFP was issued and 21 days after the preproposal conference was held. The protester states that applicable procurement regulations require that a minimum of 30 calendar days should normally be allowed for the submission of proposals. The time set by the Air Force, the protester asserts, further restricted competition because the detailed technical and price proposals required by the RFP could not realistically be prepared in the time provided as is evident from the fact that only two prospective offerors attended the preproposal conference.

We have held that the determination of the date set for receipt of proposals is a matter of judgment vested in the contracting agency which our Office will not disturb unless it appears arbitrary or capricious. 50 Comp. Gen. 565, 572 (1971). Regulations concerning negotiated procurements, unlike the regulations dealing with formal advertising, do not specify a definite period to be allowed for preparing proposals; however, the time allotted here does comport with the 30-day standard set as a general

rule for formally advertised procurements. Defense Acquisition Regulation § 2-202.1, Defense Acquisition Circular No. 76-25, October 31, 1980.

Protest denied.

Milton J. Socolar

Acting Comptroller General
of the United States