

DECISION

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

FILE: B-221346 **DATE:** February 28, 1986
MATTER OF: Johnston Communications

DIGEST:

1. Agency's rejection of a small business offer as technically unacceptable need not be referred to the Small Business Administration since, in rejecting the offer, the agency has not reached the question of the offeror's responsibility.
2. An agency may drop an offer from the competitive range if it becomes clear from discussions that the firm no longer has a reasonable chance for the award.
3. An offeror's view that the contracting agency should know that the firm's proposed items will meet the government's needs is not an adequate substitute for the technical information required by the solicitation and requested during negotiations to establish that what is being offered in fact will be acceptable.

Johnston Communications protests the General Services Administration's (GSA) decision to exclude from the competitive range, as technically unacceptable, the firm's offer under request for proposals (RFP) No. KET-DJ-85-08 for the purchase of telephones and services. Johnston contends that its exclusion involved responsibility matters, so that the issue should have been referred to the Small Business Administration (SBA) under the certificate of competency (COC) procedures before the firm was eliminated from the competition.

We deny the protest.

Initial offers in response to the RFP were due on September 3, 1985. Tab "F," "Equipment Description," which was in RFP section L-31.3.3, required the offeror to provide, for evaluation purposes, a description of the products

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proposed to meet the solicitation's requirements, supported by references to appropriate technical literature, also to be furnished with the offer. Upon technical evaluation, GSA found that Johnston had failed to address under tab "F," or had addressed only marginally, a number of system capabilities. Since the proposal's deficiencies were correctable, however, GSA included it in the competitive range for purpose of negotiations.

By letter of November 4, Johnston was advised that its offer had been judged marginally acceptable but capable of being made technically acceptable. The letter included a list of technical questions and comments that had to be answered satisfactorily for the proposal to be found acceptable and required a revised offer by November 12 for purposes of oral negotiations to be held on November 19. One comment in the letter was that Johnston needed to "[s]upply a completed Tab F with reference location in documents to expedite the completion of the proposal as stated in L-31.3.3."

As its November 12 response to the comment about tab "F," Johnston simply included a list of the names and addresses of companies that, apparently, had used the same items specified in GSA's solicitation. GSA was not satisfied with this submission and discussed the problem with Johnston at the negotiations session on November 19, at which time Johnston was asked to submit the necessary additional information by December 2. Johnston's subsequent submission, however, was found to lack the requested documentation for a number of system features. By letter of December 20, the firm was advised that its offer was rejected as technically unacceptable for failure to furnish necessary information in five specified areas.

Johnston protests that GSA's finding of technical unacceptability focused on areas of offeror responsibility, so that the COC procedures should apply. In this respect, no small business may be precluded from an award because of nonresponsibility without referral of the matter to the SBA for a final determination. 15 U.S.C. § 637 (1982); Reuben Garment International Co., Inc., B-198923, Sept. 11, 1980, 80-2 C.P.D. ¶ 191. GSA responds that the basis for rejecting the offer was technical unacceptability, in that the firm never furnished sufficient information to establish that the

equipment it was offering met GSA's requirements, despite being given two opportunities to do so. Johnston instead only stated, in effect, that the equipment was standard, or that it would comply.

We do not agree with Johnston that GSA could not reject the firm's offer without first involving the SBA. The reason is that it is clear that Johnston was rejected for technical considerations, not as nonresponsible. Responsibility involves a firm's capability to meet its obligations if awarded the contract. DAVSAM International, Inc., B-218201.3, Apr. 22, 1985, 85-1 C.P.D. ¶ 462. The deficiencies in Johnston's offer, however, involved specific and evaluated system requirements. These deficiencies were expressly identified to Johnston, from the initial proposal evaluation, as matters that had to be improved for the proposal to be considered technically acceptable. Where an offer is found deficient when evaluated under the criteria specified in an RFP, the matter is one of technical acceptability, not responsibility. See Systemec, Inc., B-205107, May 28, 1982, 82-1 C.P.D. ¶ 502.

Further, to the extent that a finding of technical unacceptability may be viewed as implying that the firm is not capable of performance, we specifically have held that a proposal from a small business may be rejected as technically unacceptable even when based in part on responsibility-type considerations without referral to the SBA. See Electrospace Systems, Inc., 58 Comp. Gen. 415, 425 (1979), 79-1 C.P.D. ¶ 264; Systemec, Inc., B-205107, supra.

As to the technical evaluation itself, Johnston argues, in large part, that the requirements in issue are "basic and generic." On that basis, Johnston suggests its failure to furnish information, or to furnish information in the format required by the solicitation and GSA during negotiations, should not have resulted in rejection of its offer without the firm being given the opportunity to submit a best and final proposal, especially since the firm's initial offer was "in the running," i.e., in the competitive range.

There is no legal merit to Johnston's argument. Inclusion in the competitive range established after initial evaluation does not guarantee that a best and final offer

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will be solicited, but means only that, at that point in the process, the proposal is judged as having a reasonable chance at being selected for award. Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.609(a) (1984). If, after discussions, the contracting officer determines that the offeror no longer has that chance, the offer may be dropped from the competitive range. FAR, 48 C.F.R. § 15.609(b). That firm then is not included in the call for best and final offers. FAR, 48 C.F.R. § 15.611(a).

Here, Johnston knew from the RFP that it had to furnish technical literature for evaluation purposes; knew that its initial proposal was found only marginally acceptable and was deficient in that precise area; and knew, or certainly should have known, from discussions with GSA, that the information was needed for proposal evaluation and that the offer would not receive further consideration unless Johnston complied with tab "F." We cannot find unreasonable GSA's position that Johnston's own view that the agency should know the firm's offered items would meet the government's needs was not an adequate substitute for requested detailed and complete proposal information to establish that what it is offering in fact would do so. See Falcon Systems, Inc., B-214562, Sept. 10, 1984, 84-2 C.P.D. ¶ 270. In this respect, our Office will not question a contracting agency's judgment that a technical proposal is inadequate unless the offeror shows the agency's decision was unreasonable Westinghouse Electric Corp., B-215554, Sept. 26, 1985, 85-2 C.P.D. ¶ 341.

Accordingly, we will not object to the contracting officer's finding that Johnston's offer was technically unacceptable or his decision to reject the offeror on that basis without first referring the matter to the SBA under the COC procedures. See Electro-Methods, Inc., B-215841, Mar. 11, 1985, 85-1 C.P.D. ¶ 293. The protest is denied.

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General Counsel