

DECISION

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

FILE: B-220622.3 **DATE:** April 1, 1986

MATTER OF: Forecasting International Ltd.

DIGEST:

1. Technically unacceptable proposal which is not capable of being made acceptable without major revisions was properly excluded from the competitive range.
2. The contracting agency has no obligation to conduct discussions with an offeror whose technical proposal is so deficient that it is excluded from the competitive range.
3. Protest based on alleged improprieties in a solicitation is untimely and will not be considered on the merits when not filed with GAO or the contracting agency prior to the closing date for receipt of initial proposals.

Forecasting International Ltd. (FI) protests its exclusion from the competitive range and the award of a cost-reimbursement contract to InterAmerica Research Associates, Inc. (IRA), under request for proposals (RFP) No. 003C50060 issued by the Department of Education (DOEd).

We deny the protest in part and dismiss it in part.

In the July 24, 1985, issue of the Commerce Business Daily (CBD), DOEd published a notice of intent of a sole-source procurement to operate the national clearinghouse for bilingual education for a period of 6 months commencing September 30, 1985.^{1/} The announcement stated that the clearinghouse must be fully operational on September 30 so as to prevent disruption of services to users and the maintenance of existing data sets. The notice requested interested firms to respond by submitting notice of interest no later than 45 days from the date of publication.

^{1/} This short-term contract was for the interim between the expiration of the existing contract and the issuance of a solicitation containing revised specifications for the operation of the clearinghouse for 1 year plus 2 option years.

03496 >

The solicitation was issued August 9, 1985, and copies were sent to five firms, including the awardee, that responded to the synopsis by that date. On September 7, 1985, the protester responded to the CBD announcement and was furnished a copy of the solicitation with September 24 as the date for receipt of proposals.

The solicitation provided that award would be made to the responsible offeror who submits a proposal that represents technical merit and cost most favorable to the government with technical considerations of paramount importance. Proposals would be evaluated on the basis of all evaluation factors and subfactors which were listed as:

"APPROACH

60

1. Demonstrates an understanding of the clearinghouse role which is consistent with the objectives, tasks and other requirements of the Work Statement 10
2. Demonstrates technical adequacy of the approach for meeting the needs of the users 10
3. Demonstrates an approach which will provide immediate operations on September 30, 1985 in order that there be no interruptions of services to clients 40

"STAFFING

20

1. Evidence of technical expertise, managerial and supervisory skills and experience of the proposed Project Director consistent with the requirements of the Statement of Work 10
2. The proposed professional staff must demonstrate evidence of collective experience and technical expertise (including consultants) to implement the requirements of the Statement of Work 10

"Management

10

1. Provide evidence that the management plan is consistent with the requirements of the RFP 5
2. Demonstrates that the plans for carrying out the tasks and objectives are cost-effective 5

"Corporate Capabilities

10

1. Provide evidence that the organization has the resources, equipment and facilities necessary to perform the tasks of the RFP

TOTAL 100"

Two firms submitted proposals--the awardee and the protester--and both were forwarded to a technical evaluation panel for evaluation in accordance with the stated evaluation criteria. The panel determined that FI's approach for providing continuous operation of the clearinghouse was a major weakness in its proposal and awarded an average technical rating of 14.6 points out of a possible 40 points for this subfactor. The panel also found FI's proposal to be technically deficient in other areas including staffing and management. As a result, the panel unanimously rated FI's proposal technically unacceptable and not reasonably susceptible of being made acceptable through limited discussions and the proposal received an average technical score of 56.6 out of 100 available points. Based on the panel's evaluation and the solicitation requirement that technical merit was most significant, the contracting officer determined that FI's proposal was technically unacceptable and excluded it from the competitive range. IRA's proposal received an average technical score of 93.6 points and was determined to be in the competitive range. Discussions were held with IRA and a best and final offer was thereafter submitted. Award was made to IRA on September 30, 1985. A debriefing to discuss the deficiencies underlying the rating received by FI was held on November 6, 1985.

By letter dated November 21, 1985, FI filed this protest against award asserting that DOEd improperly limited the competitive range to only one firm and failed to conduct discussions with FI; a responsible offeror with the lower

price. The protester argues that its proposal was at least susceptible of being made acceptable with only minor revisions and, therefore, DOEEd had a legal duty to hold discussions with FI and to permit it to revise its proposal in response to those discussions. The protester contends that a close question of technical acceptability existed and that, under these circumstances, the agency's decision to exclude its proposal was unreasonable.

In its report on the protest, DOEEd stated that the fatal weakness in FI's proposal was its approach for the immediate startup of services on September 30. In its proposal, FI projected that the time needed to switch over operations from the incumbent contractor to its firm was approximately 30 days. Therefore, FI proposed to subcontract with the incumbent contractor (IRA) to provide continuous operation of the clearinghouse from September 30, 1985, through October 31, 1985. The protester, however, did not submit any evidence with its proposal that IRA would be willing to participate in such an arrangement. The agency found that this deficiency in and of itself was of such magnitude that a major revision would be required to make the proposal acceptable. The agency contends that since the protester had not provided any evidence that IRA would be willing to enter into an agreement to operate the clearinghouse for 30 days, it would be unreasonable for the agency to assume that IRA would commit itself to an "arrangement which might jeopardize their competitive position for the award of the entire contract."

Thus, the agency states that FI's proposal could not be made acceptable without a major rewrite of the technical approach factor and that, in any event, the proposal had no reasonable chance of being selected for award given the disparity in evaluation scores between the two proposals. DOEEd asserts that the other deficiencies in FI's proposal, in the areas of staffing and management, would not have necessitated a major revision; but, even if these deficiencies were corrected through negotiations, they would not have made FI's proposal technically acceptable. Consequently, the protester's proposal was excluded from the competitive range and no discussions were held with FI.

It is well established that the determination of the competitive range is a matter primarily within the discretion of the procuring agency, which we will not overturn absent

clear evidence that the determination lacked a reasonable basis. Proffitt and Fowler, B-219917, Nov. 19, 1985, 85-2 C.P.D. ¶ 566 at 4. Moreover, offers which are technically unacceptable as submitted and would require major revisions to be acceptable should not be included in the competitive range. Potomac Scheduling Co. et al., B-213927, Aug. 13, 1984, 84-2 C.P.D. ¶ 162 at 4. However, we will closely scrutinize any determination which results in only one offeror being included in the competitive range. Metric Systems Corp., B-219275, June 13, 1985, 85-1 C.P.D. ¶ 682 at 3.

The single most heavily weighed evaluation criterion, which accounted for 40 percent of the maximum available points, was that the offeror demonstrate "an approach which will provide immediate operations on September 30, 1985, in order that there be no interruptions of services to clients." Although the protester proposed relying on the current contractor to provide the first month's operation, there was no evidence in the proposal that the current contractor had consented to such an arrangement and the protester has not claimed that it had. It therefore appears that the protester could not have produced evidence of such an agreement even if DOEd had asked it to do so.

Correction of this deficiency clearly would require a major rewrite of the proposal and award was required by September 30. In view of the significance of this deficiency, DOEd concluded that correction of other deficiencies through discussions would not make FI's proposal acceptable. From our review of the panel's evaluation sheets and FI's proposal, we agree that a major revision would be necessary to make FI's proposal acceptable and, therefore, conclude that DOEd reasonably excluded the protester from the competitive range.

FI further contends that its proposal offered a significant cost savings to the government since its proposed costs were more than 30 percent lower than IRA's. In its view, such a cost differential warranted further consideration by the agency. The agency challenges FI's assertion that its proposal offered significant cost savings because it views FI's proposed costs as unrealistic. For example, DOEd notes that FI allocated \$30,000 as the proposed cost for contracting with IRA to operate the clearinghouse for 30 days without providing any basis for this figure nor any evidence of negotiations with IRA. In addition, the agency points out that FI did not provide a task-by-task breakout of its proposed costs as required by the solicitation.

The agency reports that although FI's proposed cost was lower than the technically higher ranked offeror, FI's proposal was eliminated from further consideration because it had no reasonable chance of being selected for award. We recognize that a proposal which is rated technically acceptable or capable of being made acceptable may be excluded from the competitive range if the agency determines that the proposal has no real chance of being selected for award. JDR Systems Corp., B-214639, Sept. 19, 1984, 84-2 C.P.D. ¶ 325 at 2. Here, FI's proposal was ranked technically unacceptable and not subject to being made acceptable through limited discussions. Moreover, FI's proposal, as compared to IRA's, was scored much lower than IRA's. Given this wide margin between the two proposals, we have no basis to question DOE's decision to eliminate FI's proposal from further consideration.

Another contention raised by FI is that any deficiencies in its technical proposal are attributable to "inadequacies of the subject solicitation." The protester asserts that the evaluation subfactor "approach," which requires that there should be no disruption of services to users, is a "boon for incumbent contractors" and resulted in its proposal being downgraded. Further, FI states that the requirement for submission of a baseline management plan, task 7 of the statement of work, is inconsistent with section "L" of the solicitation.

To the extent FI is questioning the propriety of the evaluation criteria set forth in the RFP and any alleged inconsistencies in the solicitation, its protest is untimely, since protests based on alleged improprieties in an RFP which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date. 4 C.F.R. § 21.2(a)(1) (1985). See Potomac Scheduling Co. et al., B-213927, supra at 9.

FI also asserts that it was treated unequally in that IRA received its copy of the RFP earlier than FI and, therefore, submitted its proposal earlier. We will not consider this aspect of FI's protest because it is untimely. This basis of protest was first raised in FI's letter of protest filed on October 3, 1985, which we dismissed on October 9, 1985, because the protester failed to timely provide a copy of it to the contracting officer and was raised again in a second letter of protest dated November 4, which was with-

drawn the following day. The contention was reiterated in the present protest filed after the debriefing, and is untimely because more than 10 days elapsed since the protester knew this basis of protest. See 4 C.F.R. § 21.2(a)(2).

In its postconference comments filed on January 16, 1985, FI questioned the estimated cost of the contract awarded to IRA on September 30, 1985. To the extent FI is challenging that aspect of the contract negotiated with IRA, this ground for protest is also untimely. It is apparent from the record that FI knew as early as October 19, 1985, the dollar value of the contract awarded to IRA since it received notice of award to IRA by letter dated October 17, 1985; and, as stated earlier, a debriefing was held on November 6, 1985. Since this basis of protest is now being raised approximately 3 months after the protester knew or should have known the basis of protest, we will not now consider the merits of the allegation. Id.

The protest is denied in part and dismissed in part. In view thereof, FI's claim for proposal preparation costs and the costs of filing the protest is denied. The Analytic Sciences Corp., B-218074.2, Oct. 24, 1985, 85-2 C.P.D. ¶ 455.

for 
Harry R. Van Cleve
General Counsel