



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: National Air Survey Center, Corp.
File: B-227767
Date: October 14, 1987

DIGEST

1. Protest that agency provided inadequate information concerning standards by which offers for photographic laboratory services would be evaluated constitutes an alleged solicitation defect which, where filed after closing date for submission of offers, is untimely under General Accounting Office Bid Protest Regulations.
2. Protest that agency improperly evaluated offers because it did not use certain specialized measuring equipment which protester allegedly assumed would be used is denied since the solicitation did not indicate such procedures would be used in judging submissions, agency did not consider those evaluation methods relevant to government's needs, and protester has not shown that evaluation as conducted by agency was unreasonable or arbitrary.
3. Protest allegations raised for the first time in protester's comments on agency report will not be considered where they fail to comply with requirements for timely filing of protest under General Accounting Office Bid Protest Regulations.
4. Allegations that agency improperly excluded protester from competitive range and failed to provide for full and open competition are denied where competition was obtained, and record bears no evidence that determination of competitive range was unreasonable or that agency failed to comply with statutory and regulatory requirements in conducting the procurement.

DECISION

National Air Survey Center, Corp. (NASCC), protests the rejection of its technical proposal under step one of a two-step sealed bid procurement conducted by the United States Information Agency (USIA) under invitation for bids (IFB)

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No. IA2007-S7243033, step one. The protest is dismissed in part and denied in part.

The solicitation was issued on May 18, 1987, for complete photographic laboratory services for use by USIA's Press and Publications Service, Bureau of Programs. The evaluation of technical proposals under step one included a procedure which was designed to typify the nature and quality of services which actually would be required during performance of the contract. Under this procedure, at a specified time and place, USIA provided each offeror with an exposed but undeveloped roll of 35 mm black and white film and an 8 inch by 10 inch color print. Each offeror was to develop the 35 mm film and make a contact print of the negatives, and was to make a variety of photographic products--spelled out in the solicitation--from the color print. The offerors were to return the finished products to the location where they had been received within 48 hours after the time of pick up.

Concerning the evaluation of the sample items, the solicitation stated:

"Each set of sample items will be separately evaluated in accordance with the following criteria:

"B/W prints: Dodge, burn and contrast correct is required for full tonal print.^{1/}

"Color prints: Dodge, burn, and overall color correct is required for quality print.

"Dupes: Must be color corrected to produce exact color balance and density of the original.

"Original Film: B/W hand processed. Processed film must be free from watermarks, scratches, digs, abrasions, fingerprints, uneven development, developer spots, chemical and mechanical fog or any physical damage.

"The samples will be categorized as acceptable or unacceptable based on the above evaluation criteria. Bidders must submit acceptable samples for all items in order to be eligible for the step-two phase Bidders are advised to initially submit samples which are fully and

^{1/} Dodging and burning refer to the control of light during enlarging to lighten or darken selected areas of the print.

clearly responsive without need for additional explanation or information."

The samples submitted by the technically acceptable offerors permitted to submit priced bids under step two would be retained as a standard against which the acceptability of contract performance would be judged.

Without knowledge of which firm had produced any particular sample, each member of an evaluation panel, which consisted of three experts from USIA's Bureau of Programs, independently evaluated the samples submitted by the 16 firms that responded to the solicitation. Of the nine sample items required to be submitted, five of NASCC's samples were determined to be unacceptable. By letter dated July 9, 1987, the agency notified the protester that its samples were unacceptable because the "color prints were found to be muddy and the dupes were too blue" and that for these reasons, the firm was not eligible to participate in step two of the procurement.^{2/}

NASCC states in its initial protest that it "challenges only the accuracy and consistency of the methods and equipment used" by the agency in evaluating the samples. The protester expresses the view that the quality of photographically reproduced items must be evaluated on the basis of "certain standards," and objects that the agency did not provide any information other than "abstract statements" (apparently referring to the evaluation criteria as set forth in the solicitation) concerning the standard by which it would assess the quality of the photographic samples. In other words, the protester states that it assumed that in evaluating the samples for qualities such as "color balance" and "density" the evaluators would use laboratory equipment to take measurements which could be compared with certain objectively-determinable standards.

NASCC also questions whether the agency personnel who conducted the evaluations were qualified to do so, whether the agency properly and fairly used photographic quality testing equipment, and whether the color print and the unprocessed

^{2/} In advising the protester of these reasons for the rejection of its proposal, the contracting officer simply repeated information provided in a memorandum from the evaluation panel. The composite worksheet compiled from the three evaluators' individual worksheets, however, indicates that in addition to the deficiencies enumerated by the contracting officer, the protester failed to provide a required sample 35 mm slide and its black and white film sample was unevenly developed.

35 mm film the agency provided offerors for developing were of the same quality and characteristics for each.

The protester's objections to the methodology used in evaluating proposals can be read as relating to either the adequacy of the solicitation or the conduct of the evaluation itself or to both.

To the extent NASCC alleges that the solicitation was inadequate because it provided no objective standards by which the photographic products would be evaluated, the protest is untimely. The solicitation clearly set forth the criteria by which the sample items would be evaluated, and those criteria did not include the type of standards which the protester now argues should have been used. The agency states, and the protester does not dispute, that prior to submitting its samples, NASCC raised no objection to the evaluation standards or criteria. Under our Bid Protest Regulations, a protest that alleges a solicitation defect apparent prior to the closing date for receipt of offers must be protested prior to the closing date. 4 C.F.R. § 21.2(a)(1) (1987). Since NASCC's objection to the information provided in the solicitation was not raised until after step one proposals were submitted and evaluations were completed, the protest basis is dismissed as untimely. See Lockheed California Co., B-218143, June 12, 1985, 85-1 C.P.D. ¶ 676 at 3.

Concerning the manner in which the samples were evaluated, while NASCC admits that the solicitation did not specifically state the procedure the agency would use to determine the acceptability of samples, the protester states that it "reasonably believed" the agency would use a "Shirley" (a standard industry color guide), densitometry or sensitometry to provide a common basis for judging photographic quality. The protester asserts it should be permitted to resubmit samples in response to a solicitation amended to include objectively-determinable standards of acceptability.

USIA's response to this assertion is essentially two-fold. First, the agency states that the specialized measuring equipment the protester refers to is generally used by photographic laboratories for their own quality control purposes, and that the agency did not use this equipment in the evaluation process because, for purposes of this procurement, its interest is in the product delivered, not with the development process. Second, USIA explains that the evaluation criteria and the method by which samples were judged were designed to reflect the "real world" photo editing and publishing environment where materials are evaluated and accepted for exhibit or publication based on subjective qualitative determinations. The agency further

states that it provided for independent evaluations by three experts to insure fairness in spite of the subjectivity of the determinations, and maintains that the manner in which the photographic samples were evaluated was fully consistent with the evaluation criteria set forth in the solicitation.

Our review of the record reveals nothing that would tend to support the protester's assumptions that the agency would use specialized measurement equipment to evaluate samples. The solicitation clearly states the procedure offerors were to follow and the basis upon which their sample products would be judged, with none of which did NASCC take issue prior to the evaluation of offers. In the absence of a showing that the agency's actions were unreasonable or arbitrary, there is no legal basis for NASCC's objections at this juncture that the agency did not use the methods by which NASCC assumed the samples would be judged. Incidentally, we note that the protester has not established that its sample products the evaluation panel found unacceptable would have been acceptable had the samples been evaluated against the kind of standard the protester believes should have been used.

Similarly the protester's question--raised only after the evaluation of offers--as to whether the working materials the agency provided to the offerors were of equal quality suggests that the agency was either negligent or unfair in conducting the procurement. Since the protester provides no evidence in support of this allegation, we conclude it is only speculation and we will not consider it further.

As to the allegation that the evaluation panel may not have been qualified to conduct a proper evaluation, absent a showing of possible fraud, conflict of interest, or actual bias on the part of the evaluators, our Office will not consider allegations concerning the qualifications of contracting personnel involved in the technical evaluation of offers. See Aqua-Chem, Inc., B-221319, Apr. 3, 1986, 86-1 C.P.D. ¶ 319 at 6.

In its comments on the agency report, NASCC raises several new protest bases. The protester states the agency failed to provide adequate information as to why NASCC's samples were unacceptable and failed to evaluate its samples in accordance with the evaluation criteria set forth in the solicitation. The protester bases the latter allegation on language the agency used in an internal memorandum and in its July 9 letter to the protester, referenced above, describing NASCC's color prints as "muddy," a term which the protester says was not specifically listed as an evaluation criterion and which has no meaning in the color photography industry. NASCC also for the first time in its comments

states that, contrary to the agency's determination, it believes its sample products fully complied with the "essential requirements" of the solicitation, and because its submissions were susceptible of being made acceptable, the agency should have given it an opportunity to revise its submissions, i.e., should have included it in the competitive range and permitted it to resubmit samples. Finally, NASCC argues in its comments on the agency report that the agency failed to obtain full and open competition.

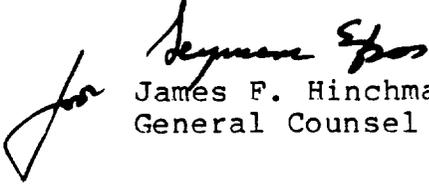
Under our Bid Protest Regulations, a protest must be filed within 10 working days after the protester learns of the basis for protest. 4 C.F.R. § 21.2(a)(2) (1987). With the possible exception of the issue of degree of competition obtained in this procurement and the protester's comparative evaluation rank in relation to that of other offerors, none of these later-raised issues is founded upon information of which the protester was first apprised within 10 working days of the date its comments were received in our Office. These allegations are, therefore, untimely and will not be considered. See Hoffmann Research Associates, B-225357, Feb. 25, 1987, 87-1 C.P.D. ¶ 217 at 5.

Concerning the extent of competition obtained, the record shows that the requirement was synopsisized in the Commerce Business Daily on March 30, 1987, as a result of which 16 firms participated in step one and submitted samples. Of the 16 responses, ten (including the protester's) were found unacceptable, five were determined to be reasonably susceptible of being made acceptable, and one was found acceptable. Of the five firms whose submissions were reasonably susceptible of being made acceptable, and who were asked to resubmit samples, one failed to submit a timely response, two remained unacceptable, and two were found to be acceptable for the step two price competition. In light of these competition results, we do not agree with the protester's view that the agency failed to obtain full and open competition. See Colleague, Inc.--Request for Reconsideration, B-220200.2, Apr. 15, 1986, 86-1 C.P.D. ¶ 363 at 4.

While the protester also disagrees with the agency's determination that its response was not susceptible of being made acceptable, the record indicates that the overall quality of the submissions of offerors found to be susceptible of being made acceptable was superior to that of NASCC. Since the contracting agency is responsible for defining its needs and the best methods of accommodating them, the evaluation of proposals and the determination of competitive range is a matter within the discretion of the procuring agency, and we will not disturb that determination in the absence of clear evidence that it had reasonable basis or is in violation of federal procurement laws or

regulations. Personnel Decisions Research Division,
B-225357.2, Mar. 10, 1987, 87-1 C.P.D. ¶ 270 at 6. Since
NASCC has presented no such evidence, the protest is also
denied on this basis.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel