



The Comptroller General
of the United States

Washington, D.C. 20548

Arsenoff

Decision

Matter of: Data Preparation, Inc.
File: B-233569
Date: March 24, 1989

DIGEST

1. Notwithstanding agency's characterization of its decision as one involving nonresponsibility, where adequacy of proposed staffing is an evaluation subcriterion and agency decides the proposed staffing is inadequate and rejects the proposal for that reason, the rejection is for reasons of technical unacceptability and not offeror nonresponsibility.

2. Discussions were not meaningful with respect to protester's proposed data entry staffing level where the only question bearing on the agency's specific concern in this regard referred to "resources," a term with a broad meaning in the context of the procurement; this question was, therefore, too general and was not sufficient to satisfy regulatory requirements that agency point out deficiencies in proposals in the competitive range.

3. Agency's findings of nonresponsibility based in part on protester's failure to provide commitments relating to certain equipment and facilities contained in its proposal lack a reasonable basis where direct requests in the commitments were not made during the preaward survey.

DECISION

Data Preparation, Inc. (DPI), protests the award of a fixed-price requirements contract to Appalachian Computer Services, Inc., under request for proposals (RFP) No. C0-34-88, issued by the Immigration and Naturalization Service (INS) for data entry services in support of its Nonimmigrant Information System. The protester alleges that the agency

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did not conduct meaningful discussions with respect to the technical acceptability of its proposal and argues that INS' erroneous characterization of the rejection of its proposal on the basis of nonresponsibility did not relieve the agency from its duty to conduct meaningful discussions.

We sustain the protest.

FACTS

The RFP was issued on June 13, 1988. Award was to be made to the responsible offeror submitting the most advantageous proposal as determined by an evaluation scheme which provided a maximum of 800 points for technical factors and 200 points for price. The technical factors consisted of project management, data collection and data capture. Each of these technical factors included a subfactor entitled "resources." In this regard, the RFP explained that the "extent of available resources and resources to be procured or recruited shall be evaluated closely" and required offerors, among other things, to identify the facilities, equipment, and personnel staffing levels they proposed to use. Additionally, the RFP provided that offerors' contingency plans to cover data capture and collection services in the event of a catastrophe impairing resources would be evaluated under the project management factor. Offerors were also required to submit a fixed price for each category of documents to be processed under the resultant contract.

Initial proposals were received July 21. With respect to staffing the data capture portion of the contract, DPI indicated in its initial proposal that it intended to use 237 data entry operators. The protester's and the awardee's initial proposals were scored as follows:

<u>Offeror</u>	<u>Tech. Score</u>	<u>Price Score</u>	<u>Total Score</u>
Appalachian	779.90	60.00	839.90
DPI	743.00	73.30	816.30

Telephonic discussions were held on August 12 and confirmed by letters dated August 16 requesting best and final offers (BAFOs) by August 23. In pertinent part, the protester was asked to "define in detail the resources that would be dedicated to the data entry services" and was told that its "[c]ontingency plan needed further clarification." DPI did not alter the number of proposed data entry operators in its BAFO; rather, it expanded the resources section of its proposal relating to data capture to indicate that of the

512 data entry operators in its present employ, 237 would be dedicated to the contract and that no additional operators would have to be hired. Further, DPI reiterated that it planned to dedicate 90 workstations at its Birmingham, Alabama, facility to the contract and stated that it had commitments for the short-term delivery of any equipment that was not already in place, and for alternative worksites in support of its contingency plan.

Upon evaluation of the protester's BAFO, INS raised the firm's technical score, found its proposal to be acceptable without need of further modification, and noted that its "[s]taffing plans [were] clearly and completely addressed." Final proposals were scored as follows:

<u>Offeror</u>	<u>Tech. Score</u>	<u>Price Score</u>	<u>Total Score</u>
Appalachian	779.90	181.25	961.75
DPI	752.60	200.00	952.60

Although Appalachian appeared to be in line for award based on its higher score, the contracting officer decided that the technical point differential did not warrant paying Appalachian more, and a tentative decision was made to award the contract to DPI. Due to a lack of familiarity with the firm, however, the contracting officer requested a site visit at its Birmingham facility. The visit was conducted on August 31 by a survey team comprised of two INS technical representatives, one of whom had been a member of the evaluation panel.

The survey team submitted its report to the contracting officer on September 2. The principal conclusion was that DPI had "vastly underestimated the resources required" for the project. In this regard, while the team did not report that DPI did not have the 237 data entry operators it proposed, or that the quality of the workforce was lacking in terms of such factors as experience or training, they questioned the protester's ability to perform the contract because the magnitude of the project required far more than 237 data entry operators and because, during the site visit, DPI stated that it had no plans to hire additional operators. The survey team also questioned DPI's responsibility because it failed to provide evidence of commitments for an additional 30 operator workstations needed to bring its Birmingham complement up to a total of 90 as proposed, it did not provide commitments for sufficient space to accommodate the additional workstations or commitments for alternative worksites or support for its contingency plan.

On September 7, the contracting officer formally determined DPI to be nonresponsible based on some of the findings of the preaward survey team.^{1/} Award was made to Appalachian effective October 1. Following its receipt of notice of the award, DPI requested a debriefing which was held on October 28. This protest followed.

PROTEST AND ANALYSIS

DPI argues that INS has confused the concepts of responsibility and technical acceptability, and maintains that, although the agency states that it determined DPI to be nonresponsible, its proposal was actually rejected because INS, albeit erroneously, determined it to be technically unacceptable. Following this line of reasoning, the protester contends that DPI was never given an opportunity to respond to any reasonably specific question conveying INS' principal concern with its proposal--namely that 237 data entry operators represented a vast underestimation of the personnel resources required to perform the contract--and concludes, therefore, that meaningful discussions were never conducted.

INS' position is that the reasonableness of its nonresponsibility determination is the sole matter in issue, and the agency maintains that matters of technical acceptability and adequacy of discussions are irrelevant since negotiations concluded with the submission of BAFOs. In support of the reasonableness of the principal finding of its preaward survey team, INS relies on mathematical calculations using estimated requirements stated in the RFP to arrive at the conclusion that approximately 330 data entry operators are the minimum number needed to adequately perform the contract.

The concept of technical acceptability is a matter which is distinct from responsibility. Technical acceptability concerns an assessment of whether the offeror's approach and resources set forth in its proposal are adequate to meet the needs of the agency as expressed in the RFP. See Federal Acquisition Regulation (FAR) § 15.608(a). In contrast, responsibility involves an assessment of an offeror's ability to perform in accordance with the terms

^{1/} Other topics covered by the report--such as tape storage and data capture procedures--do not appear to have been factors in the contracting officer's nonresponsibility determination.

of its proposal, and is generally determined by an investigation which is conducted after or aside from the actual competition and which may include the use of preaward surveys. Preaward surveys are not proper vehicles for determining technical acceptability and do not serve as a substitute for negotiations. See KIME Plus, Inc., B-231906, Sept. 13, 1988, 88-1 CPD ¶ 237. Thus, where an agency rejects an offer because it contains elements which, in the agency's estimation, do not adequately meet technical evaluation criteria set forth in the RFP, the agency has made a determination involving the technical acceptability of an offeror's proposed approach, not concerning the responsibility of the offeror, even though the agency may improperly characterize its action as one concerning non-responsibility. See Micronesia Media Distributors, Inc., B-222443, July 16, 1986, 86-2 CPD ¶ 72.

Here, the RFP set forth the adequacy of data entry staffing level as a subfactor to be used in evaluating the technical merit of proposals. Proposal acceptability thus was to be based, in part, on the agency's technical judgment concerning the adequacy of the proposed staffing level. Once a proposal has been found to be acceptable, the ensuing responsibility determination is to reflect the agency's further judgment as to the offeror's ability to perform as it proposed. Here, the INS responsibility determination went beyond that--instead of measuring DPI's ability to comply with its proposal, INS viewed the proposal as inadequate, in effect changing its mind about the technical acceptability of DPI's proposal. (INS has offered no explanation as to why it first determined DPI's BAFO to be acceptable under this subfactor and reached a contrary conclusion 1 week later.) Regardless of how INS characterizes what it did, we think it is clear that the rejection of DPI for inadequate staffing was based on considerations of technical acceptability. See Micronesia Media Distributors, Inc., B-222443, supra. As the protester suggests, then, the appropriate question remaining is whether meaningful discussions were conducted with DPI concerning the number of data entry operators it proposed.

Contracting officers are required to conduct discussions with all competitive range offerors. FAR § 15.610. Although agencies are not obligated to afford offerors all-encompassing discussions, or to discuss every element of a proposal that has received less than the maximum possible score, the discussions must be meaningful, and in general this means that agencies must advise offerors of deficiencies in their proposals to afford them an opportunity to revise their proposals to fully satisfy the government's

requirements. FAR § 15.610(c)(2); Princeton Gamma-Tech, Inc., B-228052.2, Feb. 17, 1988, 88-1 CPD ¶ 175. In this regard, discussions should be as specific as practical considerations will permit in advising offerors of deficiencies in their proposals. Presentations South, Inc., B-229842, Apr. 18, 1988, 88-1 CPD ¶ 374. Where discussions are unnecessarily general, we will sustain a protest and normally recommend reopening negotiations. See SelectTech Services Corp., B-229851, Apr. 18, 1988, 88-1 CPD ¶ 375; Dorsett Electronics Division, LaBarge, Inc., B-178989, Mar. 6, 1974, 74-1 CPD ¶ 120.

The only discussion question presented during the course of this procurement which bears on the concern of INS with the number of operators proposed was the August 16 request to further define the "resources" that would be dedicated to the data entry services. As the protester points out, however, the term "resources," as it was used in the context of this procurement, embraced considerably more than the number of data entry operators contained in an offeror's proposed approach; for example, the term included such topics as facilities and equipment, as well as various other personnel. Yet, the principal deficiency found in DPI's proposal, and the primary reason for its rejection, was the concern that 237 data entry personnel were inadequate by a factor of over 40 percent. Clearly, DPI was never told anything that reasonably could be construed as putting it on notice that the agency was concerned about this staffing level. Since DPI was included in the competitive range, we must conclude that INS did not comply with the FAR requirement to point out this deficiency in DPI's proposal.

We recognize that the contracting officer's determination to reject DPI's proposal cites two additional grounds concerning the number of workstations available and the firm's contingency plan. It is our view, however, that those questions were secondary to the concern about the number of data entry operators, and we doubt whether the DPI proposal would have been rejected solely on the bases of these matters.

Moreover, as far as the preaward survey's conclusions regarding these matters are concerned, while they were properly treated as responsibility questions--they involved DPI's capacity to perform as it proposed--we are concerned whether the agency's findings are reasonably supported.

The agency report concluded that DPI failed to provide evidence of commitments for an additional 30 workstations and adequate space to accommodate them--it proposed to use

90, but its facility at the time of the survey had only 60. The report also stated that DPI did not provide commitments for alternative worksites in support of its contingency plan. The protester has provided this Office with credible evidence that it had such commitments on hand well before the date of the on-site survey, lending credence to its position that it could have provided the evidence to the members of the survey team if they had directly asked for it. In contrast, INS' various accounts of the on-site visit lack consistency and clarity with respect to the questions asked, the responses given, and the context in which the interchanges took place.

For example, the survey team's report indicates that DPI was not serious about the team's concerns over the workstations and where they were to be located because its representative responded to its inquiry by stating that the firm would "get another building if we have to." However, in the account prepared for the agency's conference comments in this matter, this remark is related in the context of a wholly separate discussion concerning contingency plan resources--a circumstance which calls the agency's account of both subjects into question. Also, while it appears that the survey team members believed that they specifically asked about the workstations, their accounts of how they expressed those concerns and the responses they received are often placed in a context of leases for space and, in at least one account, are placed in the context of a lease for a data collection center--a separate and distinct building from where data entry workstations are to be located. Moreover, although the survey team initially reported it was interested in seeing what additional building space DPI had commitments for in order to accommodate more entry workstations, in its arguments during the course of the protest the agency seems to take the position that relocating any functions outside the Birmingham headquarters building would be contrary to the most positively rated feature of DPI's BAFO--that it offered a centralized place of performance.

With respect to contingency plans, it is DPI's position that no specific requests for its outside commitments were ever made. INS states the matter was "discussed." As previously mentioned, from the varying agency accounts placing DPI's allegedly facetious remark about obtaining another building into two different contexts, it appears that no direct requests were ever made. Further, DPI's BAFO was very specific about having commitments from other, named, local firms to use their facilities, yet there is no agency account of the on-site visit which indicates that the protester was questioned about these firms. Moreover, the report of the survey team to the contracting officer only

mentions a perceived lack of adequacy with respect to DPI's own facilities and appears to ignore that part of its contingency plans based on using other firms' facilities.

Thus, it appears to us from the affidavits of all the parties involved in the survey that the scoring team did not make clear and direct requests for evidence of these matters and we are thus unable to conclude that the survey report findings were reasonably supported. See Dyneteria, Inc., B-211525, Dec. 7, 1983, 83-2 CPD ¶ 654; SPM Manufacturing Co., Inc., B-228078.2, Apr. 18, 1988, 88-1 CPD ¶ 370.

CONCLUSION

The protest is sustained because, after a thorough review of the record and careful consideration of the rather unique circumstances of this procurement, we conclude that INS failed to conduct meaningful discussions with the protester with respect to its data entry staffing level and that the findings of the agency's survey team with respect to DPI's workstations and its contingency plan were not supported.

The appropriate remedy would be to reopen negotiations and, following an evaluation, conduct a responsibility investigation if it was then warranted. That remedy is not practical here since performance has continued under Appalachian's contract for almost 6 months. However we do recommend that no options be exercised under the contract. See United Telecontrol Electronics, Inc., B-230246 et al., June 21, 1988, 88-1 CPD ¶ 590. We find that the protester is entitled to recover its proposal preparation costs because the effect of INS' actions was to unreasonably exclude DPI from competition. Id. We also find that DPI is entitled to recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988).



Acting Comptroller General
of the United States