Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: National Academy of Conciliators

File: B-241529

Date: February 19, 1991

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William T. Woods, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency conducted inadequate discussions is denied where one of the concerns identified by the agency but not discussed was relatively minor and the other related to an aspect of the proposal the agency regarded as satisfactory and that could be improved significantly only through use of approaches contained in other proposals.

DECISION

The National Academy of Conciliators (NAC) protests the award by the Defense Supply Service--Washington of a contract to Philip J. Harter under request for proposals (RFP) No. MDA 903-90-R-0074 for a study effort entitled: "Actual and Potential Use of the Alternative Dispute Resolution (ADR) Concept." NAC contends that the award to Harter was improper primarily based on its belief that the agency failed to conduct meaningful discussions with NAC. We deny the protest.

The solicitation required offerors to propose methods for analyzing contract disputes and the use of ADR as a means of resolving them. Section M of the solicitation provided that technical superiority would be more important than cost in selecting the successful offeror, and listed evaluation factors and subfactors and their relative importance. The RFP provided for a firm, fixed-price contract.

The agency received nine proposals in response to the RFP. After an initial technical evaluation, the protester's proposal ranked third behind the proposals of Harter and another firm. The agency's technical advisor suggested including only the two highest rated proposals in the

competitive range--the only ones that received evaluation scores of 700 or more on a 1000-point scale--but the contracting officer decided upon a competitive range that included four additional proposals, including NAC's, that received initial scores between 600 and 700 points.

The agency conducted discussions with each of the offerors in the competitive range. With respect to NAC, the agency requested the firm to respond to the following questions:

> "1. Can you explain in what form you plan to bring to bear hands-on competence with widely recognized analytical capability for cause and effect relationships as they occur in the execution of major programs?
>
> "2. Can you explain the form of your report, in order to be useful to the three areas as listed in the RFP: (a) a practical guide for program managers, (b) a basis for policy development within the DOD, and (c) a teaching supplement."

NAC addressed each of these questions in a letter to the agency. In response to the agency's later request for best and final offers (BAFO), NAC advised the agency that its BAFO consisted of its technical proposal as revised by its subsequent letter and its cost proposed as initially submitted.

As a result of the agency's evaluation of the responses to discussion questions and the BAFOs, the evaluation scores for five of the six offerors in the competitive range improved by 20 to 60 points. The agency downgraded one proposal by 15 points. NAC's proposal received an additional 35 points, but now ranked fourth. The two offerors rated highest initially maintained the same relative rankings. The evaluation panel advised the contracting officer that these two proposals remained superior to the others and recommended that an award be made to either of them. The panel suggested that price be the determinative factor on the basis that either offeror could be expected to deliver "an equally excellent product." The agency awarded the contract to Harter, whose proposed price was marginally lower than that of the other firm. Both of these firms had proposed prices lower than NAC's, which was the fourth lowest price.

NAC filed its protest here after learning in an agency debriefing that the evaluators had expressed concerns about NAC's technical proposal that were not reflected in either of the two questions asked of the firm during discussions. These concerns related to various aspects of NAC's proposed three-phase approach to the work required.

Briefly stated, NAC had proposed in Phase I to review existing literature on ADR as well as "archival data" on government contracts. In addition, NAC planned to use a questionnaire to obtain the views of a sample of officials knowledgeable about government contract matters. In Phase II, NAC proposed a "quantitative statistical analysis" of 500 contract disputes to identify and measure the role played in these disputes by various "dispute generators" identified in the RFP. In Phase III, NAC planned to select 5 of these 500 cases for in-depth review. Although some of the evaluators had expressed concern that the Phase I questionnaire could be burdensome and that the purpose of the 500-case study in Phase II was unclear, the agency's discussion questions did not relate to these concerns.

The agency acknowledges these additional concerns of the evaluators and does not contest NAC's assertion that the agency failed to raise them during discussions. The agency contends, however, that for various reasons it was not required to discuss these concerns.

With respect to the Phase I questionnaire, the agency contends that asking NAC to respond to discussion questions would have been of limited value because the questionnaire had not yet been developed. In addition, the agency suggests that discussions about the questionnaire were unnecessary because the evaluators had not deducted any points based on concerns about the questionnaire. With respect to the Phase II 500-case study, the agency argues that discussions were not needed because the agency "fully comprehend[ed] the importance of Phase II." Additionally, the agency contends that neither of the possible courses of action open to NAC regarding Phase II--explaining it or eliminating it--would have resulted in a significant increase in the firm's evaluation score. Finally, the agency says that suggesting to NAC that it make greater use of in-depth case analysis could have resulted in an improper disclosure of the awardee's technical approach.

The Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4)(B) (1988), as implemented in Federal Acquisition Regulation § 15.610(b), requires that written or oral discussions be held with all responsible offerors whose proposals are in the competitive range. For competitive range discussions to be meaningful, agencies must point out deficiencies in proposals unless doing so would result in technical transfusion or technical leveling. Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd on reconsideration, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333.

Although agencies are not obligated to afford offerors all-encompassing discussions, they still generally must lead offerors into the areas of their proposals that require amplification. Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. Discussions should be as specific as practical considerations will permit in advising offerors of the deficiencies in their proposals. Tracor Marine, Inc., B-207285, June 6, 1983, 83-1 CPD ¶ 604.

The record in this case is unclear as to whether evaluation points were deducted because of evaluator concern over NAC's Phase I questionnaire. It appears, however, that this was a relatively minor concern in the overall evaluation. Only two members of the four-member evaluation panel expressed any concern about the potentially burdensome nature of the questionnaire, and for them, the clearly predominant concern involved their perception that the protester's proposal did not demonstrate adequate relevant experience. Thus, even if evaluation points were deducted because of concerns about the questionnaire--and we note that NAC points out that it did not receive a perfect score under the technical approach evaluation factor--it does not appear that the evaluation panel viewed this aspect of the proposal as a significant weakness. There is no requirement that an agency discuss every aspect of an acceptable proposal in the competitive range that receives less than the maximum possible score. Litton Systems, Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115.

With respect to the Phase II 500-case survey, the protester has focused on observations by the evaluation panel concerning the size of the survey and its usefulness. What NAC overlooks, however, is that the evaluators accepted NAC's Phase II survey as a perfectly valid technique for collecting data; in fact, the agency regarded NAC's proposal as satisfactory and scored it relatively high. The reason the proposal did not score higher is not that the agency perceived any deficiencies in the proposal, but rather that the agency did not believe that NAC's quantitative, statistical approach would be as effective as the face-to-face interview techniques proposed by other offerors.

The agency believed that it should not "recommend a completely different focus for data collection for a satisfactory proposal. . . ." Rather, the agency believed that it should limit its discussion questions to areas in which the approach proposed by NAC was deficient and could be improved. No deficiencies concerning Phase II were identified. The agency

believed that to suggest to NAC that it could improve its proposal by making greater use of the data collection techniques proposed by others would run the risk of an improper technical transfusion. See Federal Acquisition Regulation § 15.610(d)(2). We cannot say that the agency's position in this regard was unreasonable.

Because we find no merit to the protester's contention that the agency failed to hold meaningful discussions, the protest is denied.

for James F. Hinchman
General Counsel