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

Decision

Matter of: Aquasis Services, Inc.

File: B-240841.3

Date: July 26, 1991

Jesse W. Rigby, Esq., Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, for the protester.
John M. Taffany, Esq., Bailey & Shaw, P.C., for Golden's Kel Lac Uniforms, an interested party.
Thomas H. Eshman II, Esq., Department of the Air Force, for the agency.
Stephen J. Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Second round of discussions did not constitute improper technical leveling or promote technical transfusion of proposals where agency had reasonable basis for holding additional discussions and the discussions did not impart information concerning other proposals.

2. Agency's reversal of initial decision to exclude all but protester's proposal from the competitive range was proper where agency determined that limited further discussions would allow initially excluded offerors to clear up remaining small number of deficiencies, mostly informational, and therefore would enhance competition.

DECISION

Aquasis Services, Inc. (ASI) protests the award of a contract to Golden's Kel Lac Uniforms, Inc. under request for proposals (RFP) No. F41636-90-R-0082, issued by the Department of the Air Force for the fitting and alteration of uniforms. ASI asserts that the Air Force engaged in improper technical leveling or technical transfusion by holding discussions with Kel Lac after that firm initially had been eliminated from the competitive range.

We deny the protest.

The RFP was issued as a small business set-aside and provided for a firm-fixed-price contract, with the possibility of an award fee, for the fitting and alteration of military uniforms

at Lackland Air Force Base, Texas. The agency received seven proposals. In October 1990, based on its initial evaluation, the Air Force sent letters to all seven offerors advising them of deficiencies in their proposals. Five of the offerors submitted revised proposals, of which only ASI's was found technically acceptable as submitted. The Air Force requested and received a best and final offer (BAFO) from ASI. In the course of evaluating ASI's BAFO, the Air Force determined that the firm's cost proposal was unacceptable because it was materially unbalanced, and in December sent a deficiency letter advising ASI of that determination. The letter explicitly stated that discussions were reopened, and provided ASI the opportunity to revise its cost proposal.

The agency determined, following its decision to reopen discussions with ASI, that the original deficiency letters to four other offerors, including Kel Lac, may have been inadequate and may have been the cause of those offerors' inadequately revised proposals. While the letters had directed offerors to the solicitation paragraphs that were related to the deficient portions of their proposals, the letters did not point to specific areas of the proposal that needed improvement. Due to the possible uncertainty caused by these deficiency letters, in light of the need to reopen discussions with ASI, and considering that currently only one offeror, ASI, was in the competitive range, the agency determined it was appropriate to reopen discussions and provide more meaningful information to those other offerors. Accordingly, in December, when the Air Force sent the second deficiency letter reopening discussions with ASI, the agency also sent a second deficiency letter to those four offerors, reopening discussions with them as well. Three of the offerors receiving the December deficiency letters--ASI, Kel Lac, and B&J Management--submitted revised proposals that the Air Force found technically acceptable. In February 1991, the agency awarded the contract to Kel Lac as the low, technically acceptable offeror.

ASI protested the award to our Office, arguing, among other things, that the agency improperly evaluated ASI's cost proposal as other than low. We denied that protest in our decision, Aquasis Servs., Inc., B-240841.2, June 24, 1991, 91-1 CPD ¶ ___, concluding that the cost evaluation was proper. In the course of those proceedings, ASI learned for the first time that the agency had held a second round of discussions with Kel Lac and other offerors, as detailed above, and filed this protest. ASI now contends that the Air Force's discussions with Kel Lac after it already had been eliminated from the competitive range were improper, and that in holding such discussions the agency engaged in improper technical leveling or technical transfusion.

Technical leveling in discussions arises when, as the result of successive rounds of discussions, the agency helps to bring one proposal up to the level of the other proposals by pointing out inherent weaknesses caused by the offeror's own lack of diligence, competence, or inventiveness. Warren Elec. Constr. Corp., B-236173.4; B-236173.5, July 16, 1990, 90-2 CPD ¶ 34. Technical leveling is prohibited by Federal Acquisition Regulation (FAR) § 15.610(d)(1). Id. Technical transfusion, also prohibited, occurs when the government discloses technical information pertaining to one proposal that results in the improvement of a competing proposal. FAR § 15.610(d)(2); see also Price Waterhouse, B-222562, Aug. 18, 1986, 86-2 ¶ 190.

On the other hand, there is nothing improper per se in an agency's revising the competitive range after negotiations. See Cotton & Co., B-210849, Oct. 12, 1983, 83-2 CPD ¶ 451. An agency properly may reverse its initial decision to exclude a proposal from the competitive range where it reasonably concludes that additional negotiations can clear up deficiencies and render a proposal acceptable without the offeror's writing a new proposal. See Ultrasystems Defense, Inc., B-235351, Aug. 31, 1989, 89-2 CPD ¶ 198.

Based on the record, we find that the agency's reopening of discussions with the other offerors, including Kel Lac, was based on a reasonable determination that those offerors' proposals were susceptible of being made acceptable and resulted in neither technical leveling nor transfusion. In the case of Kel Lac, the record shows that agency evaluators initially were concerned that Kel Lac's proposal failed adequately to address one of several elements encompassed by evaluation criterion 2(a), which concerned generally the contractor's capacity to meet delivery requirements. Specifically, the agency was concerned about the manner in which Kel Lac had addressed that portion of the criterion regarding the development of employee schedules and the establishment of standard operating procedures in accordance with the RFP's statement of work (SOW). The October letter to Kel Lac, however, merely stated that the firm's proposal failed adequately to address RFP evaluation criterion 2(a), without referring to the particular deficient area within that criterion.

The second round of letters remedied the lack of specificity in the initial discussions. The December letter to Kel Lac specifically advised that its technical proposal did not adequately address "the development of employee schedules or the establishment of standard operating procedures in accordance with the SOW"; that is, it now pointed Kel Lac to the portion of its proposal which the agency perceived to be deficient. In response to this more specific letter, the

firm provided more detailed information on how it proposed to set employee schedules and establish and implement standard operating procedures. Based on this additional response, the evaluators were able to determine that Kel Lac's proposal was in fact acceptable. (Aquasis does not argue that this conclusion was incorrect.)

Where, as we have found here, the primary purpose of discussions is to ascertain what the offeror is proposing to furnish rather than to raise the offeror's technical proposal to the level found in the protester's proposal, technical leveling has not occurred. See Ultrasystems Defense, Inc., B-235351, supra. Similarly, as the additional discussions held with Kel Lac consisted entirely of requests for information concerning Kel Lac's own proposal, and did not impart to Kel Lac any information concerning other proposals, reopening discussions did not result in technical transfusion. See Price Waterhouse, B-222562, supra.

ASI also challenges the reopening of discussions to the extent that it reflects an intention by the Air Force to treat all offerors the same. In this regard, ASI claims that the problems with its cost proposal in fact were minor, and should have been resolved informally through clarifications rather than by reopening discussions, which was necessary only to resolve the other offerors' proposal deficiencies. In effect, the protester argues that since there was no need to conduct discussions with ASI, there was no basis to conduct discussions with the other offerors.

Again, ASI's position is without merit. Discussions occur when an offeror is given the opportunity to revise or modify its proposal (other than as a result of a minor clerical mistake) or when information requested from and provided by an offeror is essential to determining the acceptability of the firm's proposal. See Keystone Eng'g Co., B-228026, Nov. 5, 1987, 87-2 CPD ¶ 449. ASI does not argue, and the record does not indicate, that the need for revision of ASI's proposal was due to a clerical error, and it is clear from the record that the revisions the agency was requesting, in view of the agency's determination that the proposal as submitted was unacceptable, were essential to determining that the proposal was acceptable. Further, the record shows that ASI in fact submitted a revised cost proposal in December that eliminated the agency's concerns about materially unbalanced pricing. Allowing ASI to revise its proposal for the purpose of eliminating its unacceptable, materially unbalanced price structure, therefore, constituted discussions, not clarifications. See Keystone Eng'g Co., B-228026, supra (where agency was concerned that proposal was materially unbalanced, and permitted the offeror to revise its proposal to eliminate such concerns, agency's action constituted

discussions, not clarifications, which required reopening discussions with other offerors as well).

More fundamentally, as a general rule, agencies should endeavor to broaden the competitive range, not narrow it as ASI urges here, see Cotton & Co., B-210849, supra; in this connection, FAR § 15.609(a) provides that where doubt exists as to whether a proposal is in the competitive range, the proposal should be included. As indicated above, this holds true even where a proposal initially has been excluded from the range. See Ultrasystems Defense, Inc., B-235351, supra. Further, had discussions not been reopened with Kel Lac and the other offerors, the result would have been a competitive range consisting only of ASI. Avoiding this result in itself was a proper basis for reopening discussions with Kel Lac under the circumstances. As we stated in our decision Comten-Comress, B-183379, June 30, 1975, 75-1 CPD ¶ 400:

> "[D]terminations by contracting agencies that leave only one proposal within the competitive range are closely scrutinized by our Office. If there is a close question of acceptability . . . if the informational deficiency could be reasonably corrected by relatively limited discussions, then inclusion of the proposal in the competitive range and discussions are in order."

See also National Assoc. of State Directors of Special Educ., Inc., B-233296, Feb. 22, 1989, 89-1 CPD ¶ 189 (where elimination of proposal from competitive range would result in competitive range of one, inclusion in competitive range, in interest of increased competition, may be proper even if proposal had serious deficiencies which under other circumstances would have justified rejection of the proposal).

The protest is denied.

James F. Hinchman
General Counsel