



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Detyens Shipyards, Inc.
File: B-244918; B-244918.2
Date: December 3, 1991

Karen D. Powell, Esq., and James P. Gallatin, Jr., Esq., Popham, Haik, Schnobrich & Kaufman, Ltd., for the protester. Daniel R. Weckstein, Esq., Vandeventer, Black, Meredith & Martin, for Norfolk Shipbuilding & Drydock Corp., an interested party.

Rhonda Russ, Esq., Naval Sea Systems Command, for the agency.

Jennifer Westfall-McGrail, Esq., Ralph O. White, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Although an agency may use traditional responsibility criteria, such as the availability of necessary facilities, as technical evaluation factors where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business offer as unacceptable under such factors was improper where the agency's decision did not reflect a relative assessment of offers but instead effectively constituted a finding of nonresponsibility.

DECISION

Detyens Shipyards, Inc. protests the rejection of its proposal as technically unacceptable under request for proposals (RFP) No. N62789-91-R-0004, issued by the Department of the Navy for the overhaul and repair of a drydock. The protester contends that the Navy incorrectly viewed information orally communicated to the contracting officer's representative by a Detyens' representative after submission of best and final offers (BAFO) as a modification to its proposal.

We sustain the protest.

The RFP contemplated the award of a firm, fixed-price contract for the repair and overhaul of ARDM-4 SHIPPINGPORT, a medium auxiliary repair drydock used primarily for the overhaul of nuclear attack submarines. The solicitation, as amended, provided that the overhaul work would be commenced

on September 27, 1991, and completed by March 9, 1992. The RFP enumerated eight factors to be considered in the evaluation of technical proposals and advised offerors that a proposal found to be unacceptable in any one of the eight categories could be determined to be technically unacceptable overall.

One of the eight technical evaluation factors in the RFP assessed the availability and suitability of the offerors' facilities for performing this work. Specifically, the facilities required here included the use of a large drydock to accommodate the overhaul and repair of the ARDM-4. Thus, offerors were instructed to discuss the availability of their proposed drydock, and to indicate whether or not the drydock was certified in accordance with Military Standard 1625. The RFP further provided that proposals would be evaluated for technical acceptability under each evaluation factor and that award would be made to the lowest-priced, technically acceptable offeror.

Four proposals were received by the April 25, 1991, due date. In its proposal, Detyens specified that while it did not own a drydock large enough to accommodate the ARDM-4, it intended to subcontract with Jacksonville Shipyards, Inc. for the use of Jacksonville's drydock, which met the solicitation's certification requirements. Detyens also represented that it was a small business.

After two rounds of discussions, the evaluators determined that all four proposals were technically acceptable and requested BAFOs. On June 24, the four offerors submitted BAFOs and proposed the following prices:

Robert E. Derecktor of Rhode Island, Inc.	\$7,211,021.
Detyens	7,759,803.
Norfolk Shipbuilding & Drydock Corp.	8,345,330
Bethlehem Steel Corp.	8,943,622

Based on the results of a pre-award survey, the agency determined that Derecktor, the lowest-priced, technically acceptable offeror, was nonresponsible. Since Derecktor had also certified itself as a small business, the contracting officer referred the nonresponsibility determination to the cognizant Small Business Administration (SBA) regional office for consideration under Certificate of Competency (COC) procedures. While awaiting the SBA determination regarding Derecktor, the contracting officer requested a pre-award survey of Detyens, the second-low, technically acceptable offeror.

On July 15, 1991, pending completion of the pre-award survey on Detyens, a Detyens employee telephoned the contracting officer's representative to provide information regarding

the sale of Jacksonville's drydock. Details of the conversation are in dispute. According to the Navy, the Detyens employee stated that the Jacksonville drydock specified in Detyens's proposal had been sold and was no longer available for use during the SHIPPINGPORT overhaul. The Navy also claims that the employee asked whether Detyens could substitute another drydock. Detyens, on the other hand, denies that its employee stated that the drydock had been sold, or that it would be unavailable for performing the overhaul work. It also denies that the employee asked whether Detyens could substitute another drydock. Rather, Detyens contends that the employee merely asked about the procedure for substituting another drydock subcontractor in the event such substitution became necessary.

On July 18, the contracting officer's representative notified the chairman of the technical evaluation team of the July 15 telephone call, and stated that the drydock specified in Detyens's proposal had been sold and was no longer available for use during the overhaul availability period. She also stated that Detyens did not have arrangements for the use of any other drydock.

Based on this information, the chairman of the evaluation panel determined that Detyens no longer met the solicitation's requirements since it lacked the facilities to perform the required drydocking. Subsequently, the contracting officer decided not to delay contract award by reopening negotiations to permit Detyens to modify its proposal, and on July 19, notified Detyens that due to the unavailability of the drydock specified in its technical proposal, its offer had been excluded from the competitive range.¹ On July 24, Detyens protested to our Office, arguing that it had only inquired about substituting a drydock if that became necessary.

On July 26, the SBA notified the contracting officer that it was denying Derecktor's request for a COC. On July 31, pursuant to a determination by the head of the contracting activity that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for our decision,² the contracting

¹The agency notes that although it did not specifically inform Detyens that its proposal had been determined to be technically unacceptable, this was the basis for its exclusion from the competitive range.

²In a supplemental protest filed with our Office on August 15, Detyens objected to the agency's decision to award in the face of a protest, contending that the determination was not properly executed since the official

officer awarded a contract to the next low, technically acceptable offeror, Norfolk Shipbuilding.

Detyens contends that the Navy improperly considered as a proposal modification its employee's telephone call communicating information regarding the sale of the Jacksonville drydock and requesting advice as to the proper procedures for substituting another drydock in the event this became necessary. The protester contends that the phone call should not have been treated as a modification since the employee did not state that the drydock had been sold or that it would be unavailable and since, in any event, the Federal Acquisition Regulation (FAR) does not permit late modification of proposals via telephone call.

In our view, the dispositive issue in this case is whether, even assuming that the Detyens employee told the contracting officer representative that the drydock would be unavailable (or that she reasonably concluded, based on information that he told her, that it would be), it was proper for the agency to reject Detyens's proposal as technically unacceptable based on this information. As a general matter, whether an offeror has the facilities necessary for contract performance, or the ability to obtain them, is a matter of responsibility. FAR § 9.104-1(f). While traditional responsibility factors may be used as technical evaluation criteria in a negotiated procurement, the factors may be used only if the agency's needs warrant a comparative evaluation of those areas. Cleqq Indus., Inc., B-242204.3, Aug. 14, 1991, 70 Comp. Gen. _____, 91-2 CPD ¶ 145; Sanford & Sons Co., 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266. An agency, however, may not find a proposal from a small business to be unacceptable on the basis of such factors when the agency does not make a relative assessment of competing proposals, since in effect it would actually be determining the responsibility of the small business offeror without making the required referral to the SBA, which has the ultimate authority to determine the responsibility of a small business concern. Cleqq Indus., Inc., supra.

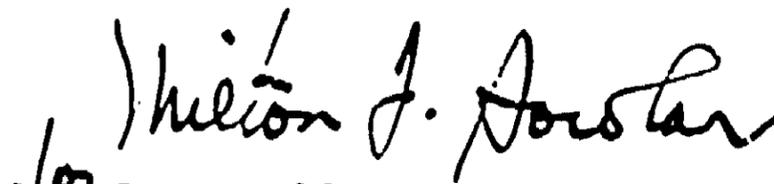
Here, the Navy did not perform a comparative evaluation of proposals. It simply determined whether each offer was or was not acceptable under each technical evaluation factor.

who signed it, Vice Admiral Kenneth C. Malley, is not the head of the contracting activity. In response, the agency stated that Vice Admiral Malley is the Commander of the Naval Sea Systems Command, and is, in fact, the head of the procuring activity. In commenting on the agency report, the protester did not take issue with the agency's response; we therefore consider it to have abandoned this issue. Arjay Elecs. Corp., B-243080, July 1, 1991, 91-2 CPD ¶ 3.

Thus, with respect to drydocks, the Navy determined only whether the drydocks proposed were acceptable or unacceptable. In short, proposals were found acceptable on a "go/no go" basis, and Detyens's proposal was determined to be technically unacceptable overall based solely on a determination that it lacked adequate facilities. Under these circumstances, the determination that Detyens lacked adequate facilities--i.e., had no available drydock with which to perform the repairs--was a determination that Detyens was not a responsible contractor. Thus, the decision to exclude Detyens from the competition without a referral to the SBA was improper. Accordingly, we sustain the protest.

Ordinarily, we would recommend that the matter of Detyens's responsibility be referred to the SBA for possible issuance of a COC, and that Norfolk Shipbuilding's contract be terminated if the COC were issued. However, we view such a recommendation as impracticable because a significant portion of the overhaul work has already been accomplished and because the Navy's post-overhaul operational commitments require that the work be completed on schedule, which would be impossible if the contract were terminated and reawarded. We therefore find that Detyens is entitled to the costs of preparing its proposal and to the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. §§ 21.6(d) (1), (2) (1991).

The protest is sustained.


for Comptroller General
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