



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Birch & Davis Associates, Inc.--Protest and  
Request for Reconsideration

**File:** B-246120.3; B-246120.4

**Date:** April 20, 1992

Shelton H. Skolnick, Esq., for the protester,  
Maj. Bobby G. Henry, Jr., Esq., Department of the Army, for  
the agency,  
Scott H. Riback, Esq., John M. Melody, Esq., and David  
Ashen, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

### DIGEST

1. Under Bid Protest Regulations, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(j)), comments must be related to the protest issues addressed in the agency's report; submission that only raises new protest grounds based on the information in the report, but that does not refer to original protest issues or report on those issues, does not constitute comments, and there thus is no basis for reconsidering dismissal of original protest for failure to file comments.
2. Agency properly included awardee in competitive range where technical factors were more important than cost, awardee's initial proposal was highest rated technically, and awardee's initial proposal price, although the highest received, was not unreasonably high compared to other offers.
3. Protest that agency improperly failed to advise protester of initial evaluation finding that proposal was too detailed is without merit where, subsequent to that evaluation finding, discussions were reopened, new best and final offers were requested, and new evaluations were conducted, and it is clear that other specified deficiencies, not the inclusion of too much detail, was the ultimate basis for the downgrading of the protester's proposal.
4. Agency properly evaluated awardee's cost proposal where it obtained views of Defense Contract Audit Agency as to reasonableness and realism of awardee's cost elements, discrepancies were discussed and resolved with awardee, and award was made on a fixed-price basis.

S. Riback

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## DECISION

Birch & Davis Associates, Inc. (BD) protests the award of a contract to Decision Science Consortium, Inc. (DSC) under request for proposals (RFP) No. DAHC35-90-R-1016, issued by the Department of the Army to acquire management support services. BD maintains that the Army's evaluations of its and DSC's proposals were flawed in several respects. BD also requests that we reconsider our previous dismissal of several protest issues.

We dismiss the protest in part and deny it in part. We deny the request for reconsideration.

The solicitation contemplated the award of a fixed-price requirements contract for a base year and four 1-year options to perform management support services in connection with the Army's manpower requirements determination program. The RFP specified six labor hour categories and contained an estimate of the man-hours required for each. Offerors were required to propose a burdened hourly rate (which included direct labor costs, overhead expenses, other direct costs, and profit) for each category. The solicitation provided that award would be made to the firm whose proposal represented the best overall value to the government. It specified several technical evaluation criteria (which collectively were more important than cost) and stated that proposed cost would be evaluated for cost realism to ensure that proposed costs were reasonable and realistic and demonstrated an understanding of the nature and scope of the requirement.

Thirteen proposals were received, nine of which were determined (after initial evaluation) to be within the competitive range. The Army then conducted written technical discussions with the nine firms and, based on an evaluation of their responses during this process, eliminated an additional four firms from the competitive range. The agency then solicited best and final offers (BAFO) from the remaining five. After receiving the BAFOs, however, the agency determined that the initial discussions with the nine firms had been inadequate, and thus reopened discussions with all nine competitive range offerors. After receiving and evaluating the discussion responses, the Army retained six firms in the competitive range, conducted further discussions, and again solicited BAFOs. After receiving and evaluating these BAFOs, the agency determined that DSC had submitted the best overall proposal. Accordingly, award was made to DSC.

By letter dated October 9 (docketed as B-246120), BD protested to our Office that the award to DSC was improper, primarily on the grounds that the Army had ignored the RFP evaluation factors and had been predisposed towards making award to DSC. On October 22, BD filed a second letter (B-246120,2) in our Office entitled "Protest Amendment No. 1," elaborating on the arguments in its October 9 letter. The Army responded to both letters in a report filed on December 1. On December 11, BD filed a letter in our Office entitled "Protest Amendment No. 2," setting forth five new protest grounds based upon BD's review of the agency report. We docketed this letter as a new protest (B-246120,3) and requested an agency report responding to it. On January 21, 1992, the Army responded to the new allegations and on January 30, BD filed a letter commenting on the issues addressed in this second report.

On February 12, we dismissed the allegations in BD's October 9 and 22 letters on the ground that the firm had failed to timely file either comments responding to the agency report or a statement requesting that the matter be decided based upon the existing record as required by our Bid Protest Regulations, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(j) (1991)).

#### RECONSIDERATION

BD requests reconsideration of our decision dismissing the issues in its October protest letters. BD believes the numerous references in its December 11 letter to materials contained in the agency report should have been sufficient to allow the letter to constitute comments, despite the fact that the letter did not address the issues raised in its October protest letters or the agency's report on those issues. BD notes in this regard that our Regulations require protesters to timely submit either written comments on the agency report or a written request that the case be decided on the existing record, but do not define what comments are or require that a submission contain particular references or take a particular form to constitute comments.

While the protester is correct that we have not prescribed a particular form or content for comments, 4 C.F.R. § 21.3(j), comments "on the agency report," reasonably construed, can mean only one thing--a submission responding in some way to the agency's reply to the protest arguments. A submission that only raises and discusses new issues based on the information in the report lacks this nexus.

BD's interpretation would undermine the purpose of the comment requirement, which is to permit our Office to determine whether a protester remains interested in pursuing the protest, or certain protest arguments, in the face of the information in the agency's report. See J.T. Constr. Co., Inc.--Recon., B-242845; B-242845.4, Mar. 2, 1992, 92-1 CPD ¶ 245. We have consistently held that, even where a submission clearly constitutes report comments, if it does not address an issue raised in the protest and responded to in the report, the issue has been abandoned and will be dismissed. See, e.g., Moran Constr. Co., B-241474, Jan. 7, 1991, 91-1 CPD ¶ 16.

Since BD's December 11 filing exclusively discussed new arguments based on the information released in the agency's report, and did not refer in any way to BD's original protest grounds or otherwise indicate that BD intended to continue pursuing those grounds (individually or generally), the submission did not constitute report comments and represented an abandonment of the issues initially raised. There thus is no basis for reconsidering the dismissal.

#### PROTEST

BD raised five new protest issues in its December 11 amended protest, which we consider below.

#### Competitive Range

BD first argues that DSC was improperly included in the competitive range because its initial proposal price was unreasonably high. According to BD, the record shows that the Army improperly failed to consider cost when it established the initial competitive range and that, had it done so, DSC would not have been included.

This argument is without merit. The purpose of a competitive range determination in a negotiated procurement is to select those offerors with which the agency will hold written or oral discussions. Federal Acquisition Regulation (FAR) § 15.609(a). When establishing a competitive range, the central question for an agency is whether a particular proposal has a reasonable chance of being selected for award given the proposal's technical standing and cost relative to other proposals; while cost may be the dominant consideration in the establishment of a competitive range among technically comparable proposals, a proposal may only be excluded from the competitive range where its cost indicates that the proposal has no reasonable chance of being selected for award despite the proposal's technical rating. See Everpure, Inc., B-226395.2; 226395.3, Sept. 20, 1988, 88-2 CPD ¶ 264; Kranco, Inc., B-242579, May 1, 1991, 91-1 CPD ¶ 425. Where there is doubt as to whether a given

proposal should be included in the competitive range, that doubt should be resolved in favor of including the proposal, since this is consistent with the overall goal of maximizing competition. FAR § 15.609(a); Kaiserslautern Maintenance Group, B-240067, Oct. 12, 1990, 90-2 CPD ¶ 288.

Under the RFP here, technical factors were more important than cost, and DSC's initial proposal was the highest ranked. At the same time, while DSC's initial proposal was the highest priced (approximately \$10.5 million for the base and option years), it was not so high that it could not be considered to be within the range of the other initial proposals (\$5.1 million to \$10 million). Although the record does not contain a detailed comparison of offerors' costs in connection with the establishment of the competitive range, it is clear from a pre-business clearance memorandum and questions presented to DSC during discussions that the agency considered DSC's proposed cost during its initial evaluation. Thus, the Army properly included DSC's proposal in the competitive range.

#### Discussions

BD argues that the Army improperly failed to discuss a deficiency in its proposal following the initial round of discussions. The evaluation panel noted in its report that BD's proposal was "too detailed" and failed to demonstrate the firm's capability to perform in the manpower standards development area. BD maintains that the agency was required to point out during discussions that its proposal was "too detailed."

While the Army indeed did not advise BD that its proposal was deemed too detailed, the record shows that this finding by the evaluators had little or no effect on BD's technical score. The finding was included in the evaluation report following the first round of BAFOs. This was prior to the reopening of discussions, the reestablishment of the competitive range based on responses to discussion questions, the conduct of further written discussions based on the remaining deficiencies, and the evaluation of the second BAFOs in response to those further discussions. After discussions were reopened, the record shows that the evaluators never again indicated a concern that BD's proposal was too detailed. Rather, the principal deficiencies were identified as "the lack of a proven track record of past experience in actual manpower standards development" (July 31 letter to BD reopening discussions); the "interpretation of the Primary study still lacks the regulatory understanding and familiarity needed" (August 23 evaluation to reestablish competitive range); "the discussion of interfacing the LOI [letter of instruction] with AR 570-5 needs more interpretation" (August 28 oral discussions

and follow-up letter); and "they have paraphrased the LOI instead of interpreting the regulatory guidance" (evaluation of responses to August 28 discussions).

We conclude that, even if the agency still believed BD's proposal was too detailed--although there is nothing that indicates this was the case--it is clear that this was not a principal basis for downgrading the proposal, and that it had no effect on the award decision. BD does not question the agency's other stated concerns.

#### DSC's Noncompliance

BD argues that the DSC's proposal was noncompliant with the solicitation's labor category requirements, and that DSC thus should not have been awarded the contract before all offerors were advised that such a deviation from the RFP was permissible. BD bases this allegation on the contents of a letter transmitting DSC's first BAFO, in which the firm stated that it was able to "selectively restructure the labor categories as defined in our original cost proposal submission."

The record shows that DSC's proposal complied with the RFP's labor category requirements, and that the language quoted by BD related to the "selective restructuring" of the labor category rates, not the categories themselves. DSC at all times proposed personnel in accordance with the specified labor categories, but offered a pricing structure based on company average rates for the various labor categories rather than on actual salaries. The Army, apparently concerned that DSC's initially proposed rates were too high, asked DSC during discussions whether the rates were "provisional." DSC responded in its first BAFO by reducing its rates (and total proposed cost). It also explained that it "used actual salaries in calculating these rates instead of company wide averages used in the initial submission," and stated further that "in all of these calculations we were careful to continue to include all of the persons named in the initial submission as key individuals." In any case, we have reviewed DSC's second BAFO and find that the award was based on rates for the labor categories specified in the RFP.

#### Cost Evaluation

BD argues that the Army improperly failed to evaluate DSC's offered price for cost realism and also failed to conduct a cost or price analysis. According to the protester, the awardee's "drastically reduced" BAFO price (\$6.9 million) indicates that DSC did not submit a realistic cost proposal for either of the BAFOs, and the record does not show that

the agency gave adequate consideration to this fact in making its award.

When a solicitation contemplates the award of a fixed-price contract, a cost realism analysis may be used for the limited purpose of measuring an offeror's understanding of the solicitation's technical requirements. Aydin Vector Div. of Aydin Corp., B-229569, Mar. 11, 1988, 88-1 CPD ¶ 253. The nature and extent of such an analysis within a fixed-price, indefinite quantity contract setting is largely a matter of agency discretion; while an agency need not perform an in-depth cost analysis, it should nonetheless conduct a review of the proposals in order to ensure that the proposed prices are reasonable and take cognizance of the various elements of work called for in the solicitation. See, e.g., Business Info. Mgmt. Corp., B-238875, July 17, 1990, 90-2 CPD ¶ 45. For example, an evaluation of a proposal's cost elements (e.g., labor rates, overhead, general and administrative expenses, and profit) for reasonableness can be adequate where there exists little risk that understated costs could be improperly recovered. See Proprietary Software Sys., B-228395, Feb. 12, 1988, 88-1 CPD ¶ 143.

Here, the Army obtained a detailed review of each offeror's cost proposal from the Defense Contract Audit Agency (DCAA). This review included an assessment of the reasonableness of each offeror's various cost elements as well as the cost elements of its proposed subcontractors. To the extent that DCAA found discrepancies in a given offeror's cost proposal, these were noted in its report to the Army, which in turn brought these concerns to the offeror's attention during discussions. Further, there was vigorous competition for this requirement and, before making its award to DSC, the agency compared the proposed prices to an independent government estimate. See Servrite Int'l Ltd., B-241942.3, June 13, 1991, 91-1 CPD ¶ 567. Although DSC's final price was substantially below the estimate (\$8.9 million), the agency determined during each of the technical evaluations that DSC's proposal was the best technically, and that the firm thus had a good understanding of the solicitation's requirements. We conclude that the Army adequately reviewed the DSC offer for reasonableness and realism.

### Responsibility

Finally, BD argues that the Army failed to verify that DSC was a responsible offeror before making award to it. We decline to consider this allegation. Our Office does not consider challenges to an agency's affirmative responsibility determination except in limited circumstances not present here. 4 C.F.R. § 21.3(m) (5).

The protest is denied in part and dismissed in part. The request for reconsideration is denied.

*Robert P. Murphy*  
for James F. Hinchman  
General Counsel