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

Decision

Matter of: Corporate Jets, Inc.

File: B-246876.2

Date: May 26, 1992

William M. Rosen, Esq., Dickstein, Shapiro & Morin, for the protester.
Ruth Y. Morrel, Esq., for DynCorp, an interested party.
Dennis F. Hoffman, Esq., and Charles A. Walden, Esq., Department of Justice, for the agency.
Daniel I. Gordon, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's proposal should have been rejected as technically unacceptable is denied where the record shows that no prejudice resulted from the agency's waiver of an experience requirement under the solicitation.

2. Protest that agency waived option to award without discussions which was provided for in solicitation by stating, in amendment, that several issues were to be addressed during negotiations is denied where language of the amendment made clear that agency continued to reserve the right to award without discussions.

DECISION

Corporate Jets, Inc. protests the award to DynCorp of a contract for aviation maintenance services under request for proposals (RFP) No. DEA-92-R-0003, issued by the Department of Justice, Drug Enforcement Administration (DEA). Corporate Jets contends that award to DynCorp was improper because no discussions were held and because DynCorp's proposal failed to comply with certain mandatory requirements.

We deny the protest.

The RFP, which provides for the award of a time and materials contract, was issued by DEA on October 11, 1991, to acquire aviation maintenance services to be performed primarily at DEA's Addison, Texas facility over a 10-month period. Corporate Jets was the incumbent under the predecessor contract.

Based on its review of the initial proposals received, the agency's technical evaluators assigned the highest technical score to DynCorp's proposal, which also offered the lowest cost. As a result, and because the RFP notified offerors that the government might award a contract on the basis of initial proposals received, without discussions, the agency determined to award a contract to DynCorp. DynCorp's proposed cost was $8,676,191, while Corporate Jets' cost, which was fourth-low among the technically acceptable offers, was almost $900,000 higher.

Corporate Jets contends that award to DynCorp was improper because DynCorp's proposal does not comply with RFP requirements concerning qualifications of the site manager and the number of hours to be worked during the 10 months of the contract, and because the agency had allegedly amended the RFP to prohibit award without discussions.[1]

In discussing the qualifications and responsibilities of personnel, the RFP states that the contractor would be responsible for selecting personnel who are well qualified to perform the required services and that selection would be based on the qualifications, duties, and responsibilities described in the RFP. Concerning the site manager's qualifications, the RFP stated:

> "The incumbent shall have a minimum of ten (10) years experience as a manager of a business with gross sales of $5 million or better and/or a division of a corporation with gross sales of $5 million or better (preferably in an aviation environment) and the control of one hundred plus (100+) people that work in a technical capacity. A BSME or BS in business is highly desirable, but not a direct requirement."

The resume of DynCorp's proposed site manager indicates that he supervised between 20 and 350 people during his 20 years of military service, which involved work in the area of aircraft maintenance; he then served as a DynCorp department manager from 1978 to 1985 with direct responsibility for an aircraft servicing program involving equipment "in excess of $120 million"; he worked from 1985 through 1988 in a position with an annual budget of approximately $8 million and with direct responsibility for more than 170 employees,

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[1]In its initial protest to our Office, Corporate Jets also raised other grounds of protest. The agency report responded to those additional issues and, in its comments, the protester withdrew all allegations except those addressed in this decision.

and he was a site manager from 1988 through 1990 in a position with an annual budget of approximately $55 million and with direct responsibility for more than 370 employees.

Corporate Jets contends that DynCorp's proposed site manager fails to meet the RFP's requirements for that position. First, according to the protester, the proposed site manager was never the manager of a corporation or of any division of a corporation, but instead merely held a low or mid-level management position. Second, DynCorp's proposed site manager is alleged not to have managed any unit with gross sales of at least $5 million, but instead merely supervised a budget of that magnitude.

In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is unacceptable and generally may not form the basis for award. Martin Marietta Corp., 69 Comp. Gen. 214 (1990), 90-1 CPD ¶ 132. An exception is recognized where no prejudice to a party to the protest has been shown. See, e.g., Integral Systems, Inc., 70 Comp. Gen. 105 (1990), 90-2 CPD ¶ 419; Andersen Consulting, GSBCA No. 10833-P, 91-1 BCA ¶ 23,474, aff'd, 959 F.2d 929 (Fed. Cir. 1992).

The RFP in this procurement set forth a requirement that the proposed site manager have a minimum of 10 years experience as a manager of at least 100 people in a business or corporate division with annual gross sales of at least $5 million. In the context of this procurement for aircraft maintenance services, the contracting officer apparently considered the distinctions between sales, budget, and program size, and value of the aircraft being serviced irrelevant insofar as those factors serve as indicia of the scope of a manager's experience. The contracting officer seems to have concluded that DynCorp's proposed site manager's resume reflected experience sufficiently comparable to that specified in the RFP so as to establish that the individual's qualifications satisfied the agency's needs; accordingly, the contracting officer determined that the proposed site manager complied with the RFP's requirements.

However reasonable the contracting officer's view may have been, the result was that the agency accepted a proposal that did not completely comply with the RFP requirements: DynCorp's proposed site manager's resume does not indicate that he ever managed a corporate division with gross sales of $5 million. Nonetheless, irrespective of the propriety of the contracting officer's accepting experience equivalent to that required by the solicitation, the protester has not claimed, and on the existing record cannot demonstrate, that the agency's action prejudiced Corporate Jets. Prejudice is

an essential element of any protest. Lucas Place, Ltd.--Recon., B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ 180.

Prejudice to Corporate Jets could be established if, had the firm known what the agency's actual needs were--i.e., had the RFP been amended to provide that a different measure or type of experience would be acceptable--the protester would have submitted a different offer that would have had a reasonable possibility of award. RGI, Inc., B-243387.2; B-243387.3, Dec. 23, 1991, 91-2 CPD ¶ 572; Tektronix, Inc., B-244958, B-244958.2, Dec. 5, 1991, 91-2 CPD ¶ 516. Here, however, it is simply implausible to assume that any individual Corporate Jets might propose under a relaxed experience requirement for site manager would in any significant way affect the nearly $900,000 difference in proposed cost between the two proposals. Consequently, we deny this basis of the protest.

The second noncompliance allegation raised by the protester concerns the number of labor hours proposed by DynCorp. The RFP states that the government's estimate of the number of labor hours covered by the 10-month contract was 1,733. That number was the result of a simple calculation: since the standard year is assumed to contain 2,080 labor hours (52 weeks times 40 hours), the agency divided 2,080 by 12 to reach a figure of 173.3 hours per month and then multiplied that figure by 10 to reach an estimate of 1,733 labor hours during the 10 months of the contract. However, the RFP also explicitly allows offerors to base their offers on a different number of labor hours "as long as hours proposed represent full time manhours for a [10] month effort."

The determination of the technical acceptability of proposals is the responsibility of the contracting agency in the exercise of its discretion. Since it is the contracting agency that must bear the burden of any difficulties incurred because of a defective evaluation, it is not our position to question that determination unless the protester demonstrates that it was clearly unreasonable. ESC Corp., B-232037, Nov. 23, 1988, 88-2 CPD ¶ 507.

Corporate Jets alleges that DynCorp proposed fewer hours than would amount to 10 months of full-time labor hours. DynCorp's proposal, however, explains that it was based on fewer than 1,733 hours being worked because of Federal holidays and vacation (the cost of which was included in DynCorp's fringe benefit overhead pool). The protester points to no reason for the contracting officer to have challenged DynCorp's explanation and to have concluded that DynCorp was not proposing full-time labor hours for the entire 10 months of the contract, and we find no basis to question this determination.

Aside from the issues related to the DynCorp proposal's compliance with the RFP requirements, Corporate Jets contends that award without discussions was improper, because, according to the protester, the RFP had been amended to prohibit award without discussions. Corporate Jets bases this contention on the fact that, in several responses to offerors' questions, amendment 1 stated, "To be addressed during negotiations." The three questions for which the agency provided that response were the following:

> "The wage determinations don't cover all the skills required. Will a revised wage determination include additional skills?
>
> "How much time will be allowed to obtain clearances for personnel? . . . Will employees be permitted to work on an interim basis until clearances are obtained?
>
> "What types of loads on purchased materials will be allowed?"

While the protester appears to concede that the agency would otherwise have been free to make award without discussions, it insists that these references to discussions committed the agency to conducting discussions and requesting best and final offers prior to source selection.

We disagree. Section L of the RFP states that the agency "may award a contract on the basis of initial offers received, without discussions." Amendment 1 states that it was issued for the purpose of extending the date for receipt of offers by 48 hours. While it contains answers to several questions received, the amendment also specifically states: "Due to the urgent nature of the requirement it is requested that any further questions be addressed during the negotiations, if held by the government." In light of this explicit repetition of the RFP's earlier reservation of the government's right to award a contract without holding discussions, the agency's references to addressing the three questions quoted above during negotiations cannot reasonably be read as a revocation of the RFP provision that award might be made without discussions.

The protest is denied.

for James F. Hinchman
General Counsel