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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eureka Software Solutions, Inc.

File: B-250629

Date: February 8, 1993

Lee Ann Myers and Monty G. Myers for the protester.
Roger D. Mingo for R.D. Mingo and Associates, an interested party.
Anthony Martoccia, Department of Transportation, for the agency.
Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Elimination of technically acceptable, lower cost initial proposal from the competitive range without discussions, leaving a competitive range of one, was unreasonable where the record shows that weaknesses in the lower cost proposal could have been easily addressed during discussions.

DECISION

Eureka Software Solutions, Inc. (ESSI) protests the award of a contract to R.D. Mingo and Associates (Mingo) under request for proposals (RFP) No. DTFH61-92-R-00124, issued by the Federal Highway Administration, Department of Transportation, for the improvement and refinement of a computer program entitled Nationwide Pavement Cost Model (NAPCOM).¹ ESSI essentially contends that the agency improperly excluded its lower cost, technically acceptable offer from the competitive range and only conducted discussions with Mingo.

We sustain the protest.

¹Briefly, NAPCOM is a sophisticated computer model that simulates the life cycle of the United States roadway network and allows users to estimate future needs and conditions as well as to allocate costs associated with reconstruction and repair.

The RFP, issued June 11, 1992, contemplated the award of a cost-plus-fixed-fee contract for a 14-month period. The RFP stated that award would be made to the offeror whose proposal was the most advantageous to the government, considering the following evaluation factors: (1) technical, (2) cost, and (3) past performance. The RFP stated that of these three factors, technical and cost were the most important, but the technical factor was more important than the cost factor. The technical factor included consideration of the offeror's demonstration of technical competency, the offeror's demonstration of capability to perform and manage the work, and responsiveness to technical requirements. Cost was to be assessed for cost realism and to determine the offeror's probable cost to meet the contract requirements.

The agency received three offers by July 13, 1992, the closing date for receipt of initial proposals. The initial technical and cost proposals were evaluated as follows:²

Offeror	Technical Score	Price Proposed
Mingo	9.0	\$101,184
ESSI	7.4	94,414
Transtec, Inc.	5.9	99,308

The proposals of Mingo and ESSI were found to be technically acceptable; nonetheless, on August 18, 1992, the protester's proposal was excluded from the competitive range prior to discussions. During the agency's evaluation, the only major weakness found in ESSI's proposal as reflected in the evaluation report was as follows:

"ESSI's proposal is responsive to the technical requirements set forth in the RFP. The proposal is adequate and the work proposed is consistent with the RFP with one major exception. It is the panel's unanimous opinion that ESSI is proposing to do more work than it has included staff-hours to actually accomplish. The sheer number of and complexity of areas of proposed improvements contributes greatly to serious doubts that sufficient staff-hours are included."

²Under the agency's evaluation plan, a 10-point maximum scoring system was used. A score of 9-10 was considered "excellent" ("[c]riteria met in a superior manner"); a score of 7-8 was considered "good" ("[s]atisfies the criteria"); and a score of 5-6 was considered "fair."

In her determination, eliminating ESSI from the competitive range, the contracting officer stated that while the percentage difference between Mingo's and ESSI's proposed costs was 7.17 percent, the percentage difference between the technical scores was 21.62 percent.³ In addition, the contracting officer noted that additional labor hours would be needed for the protester, potentially increasing its total cost to \$124,463.⁴ The contracting officer therefore concluded that ESSI "had no reasonable chance of receiving the award," and excluded that firm from the competition without discussions.

Discussions were conducted only with Mingo on August 19, 1992, and Mingo's best and final offer (BAFO) was received on August 25. The BAFO was determined to be technically acceptable; the technical panel rescored the BAFO, increasing Mingo's score from 9.0 to 9.1, due to the incorporation of additional labor hours. The contract was awarded to Mingo on September 15, 1992. This protest followed.

The protester contends that it submitted a "good proposal [with a] good team," and had clearly stated in its proposal that while it "had proposed many options, [it expected to finalize during discussions] the most appropriate set (of options) to be undertaken during the contract (and that the) final costs [would] depend upon the ultimate level of effort negotiated." ESSI contends that, at the very least, it should have been given the opportunity and benefit of discussions concerning any weaknesses in its proposal, including staffing levels.⁵ We agree.

³As noted, these percentages were based on evaluation of initial proposals without the benefit of discussions or revised proposals.

⁴The agency's cost/price analysis did not result in any questioning of Mingo's or ESSI's proposed costs. However, the agency established a "negotiation objective" of \$124,463 for ESSI "if the [agency] intended to negotiate" with ESSI because of the agency's belief that the proposed number of labor hours for ESSI would have to be increased. The "negotiation objective" established for Mingo was \$105,906. The independent government cost estimate was \$166,320.

⁵The protester also generally alleges a bias in favor of Mingo by the agency. Since we are sustaining the protest on another ground, we do not reach this issue.

The Competition in Contracting Act of 1984 requires that if an agency conducts discussions, it do so with all responsible offerors in the competitive range. 41 U.S.C. § 253b(d)(2) (1988). The Federal Acquisition Regulation (FAR) provides that the competitive range must include all proposals that have a reasonable chance of being selected for award and that any doubt as to whether a proposal is in the competitive range should be resolved by inclusion. FAR § 15.609(a). While the determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency, we closely scrutinize any evaluation that results in only one offeror being included in the competitive range, in view of the importance of achieving full and open competition in government procurement. Coopers & Lybrand, 66 Comp. Gen. 216 (1987), 87-1 CPD ¶ 100; Besserman Corp., 69 Comp. Gen. 252 (1990), 90-1 CPD ¶ 191. If there is a close question of acceptability; if there is an opportunity for significant cost savings; if the inadequacies of the solicitation contributed to the technical deficiency of the proposals; or if the informational deficiency reasonably could be corrected by relatively limited discussions, then inclusion of the proposal in the competitive range and discussions are in order. Besserman Corp., *supra*.

Here, the record does not support the agency's conclusion--based solely on the evaluation of initial proposals without the benefit of discussions--that ESSi did not have a reasonable chance for award at the time the agency excluded the firm from competition. While it is true that the proposal of Mingo was found to have numerous strengths, ESSi's proposal was also evaluated as "good" and as containing several strengths and only one major weakness that could have been easily addressed in discussions. Specifically, the protester states, and the record shows, that discussions could have resolved staffing uncertainties in ESSi's proposal and also refined the areas of improvement from among the options for improvement that ESSi had proposed, which would have reduced the need for additional staffing, leaving ESSi as the low offeror. Indeed, the agency does not even argue that discussions could not have significantly improved ESSi's proposal.

The purpose of the competitive range is to select those offerors, having a reasonable chance for award, with which the agency will negotiate. FAR § 15.609. Here, the record shows that ESSi's technically acceptable offer could have been improved through discussions, which potentially could have resulted in a higher technical score for ESSi at a lower cost than Mingo. Under the circumstances, we view the agency's exclusion of ESSi from the competitive range as a premature cost/technical tradeoff, which should have been

made at the conclusion of negotiations to determine which offer represents the best value to the government. We therefore sustain the protest.

Suspension of contract performance was not required in this case under the Competition in Contracting Act because the protest was filed with our Office more than 10 calendar days after the award was made. Since the contract has been substantially performed, termination is not a feasible remedy. However, because the agency's improper actions deprived the protester of a fair opportunity to compete for the award, ESSI is entitled to recover its proposal preparation costs. 4 C.F.R. § 21.6(d) (1992). ESSI is also entitled to the costs of filing and pursuing its protest. Id.

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