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

Decision

Matter of: Paragon Dynamics, Incorporated

File: B-251280

Date: March 19, 1993

Ronald E. Giroux for the protester.
Harriet J. Halper, Esq., and Mary C. Bell, Esq., Department of the Navy, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under small business set-aside procurement, where an agency rejects a proposal as technically unacceptable on the basis of factors not related to responsibility as well as responsibility-related ones, agency is not required to refer the matter to the Small Business Administration under its certificate of competency procedures.

DECISION

Paragon Dynamics, Incorporated (PDI) protests the Naval Research Laboratory's award of a contract to Technology-USA for software development and technical support of real-time experiments under request for proposals (RFP) No. N00014-92-R-AB17. The RFP was issued as a total small business set-aside and included a 10-percent evaluation preference for small disadvantaged business (SDB) concerns. Paragon contends that the Navy's evaluation of proposals and award decision were improper because the agency failed to apply the SDB preference factor to the awardee's price, and because its rejection of Paragon's proposal as technically unacceptable constituted a finding of nonresponsibility that should have been referred to the Small Business Administration under its certificate of competency procedures. We deny the protest.

The RFP was issued on July 9, 1992, for technical and programming support for the Naval Research Laboratory at the Navy's Pomonkey field site. The requirement is described

generally in the Statement of Work (SOW) as modifying and upgrading software, interface subroutines, and set-up programs to maintain the operational requirements for 9-meter and 30-meter antennas at the site. The SOW described the various tasks that would be performed under the contract and specified programming requirements for the Navy's Hewlett Packard real-time operating system.

Offerors were required to submit separate technical and price proposals. The technical proposal was to be a comprehensive statement of the offeror's understanding of the work required and the offeror's approach to meeting the contract objectives, and was to be presented in sufficient detail to demonstrate the offeror's understanding of the requirements, qualifications, experience and resources. The RFP listed mandatory personnel qualifications to be met by the software development engineer, specifying minimum education requirements and minimum levels of experience with various specific systems and types of programs.

Award was to be made to the lowest priced, responsible offeror whose proposal was determined to be technically acceptable. In order to receive a rating of "technically acceptable," offers had to meet all of the specifications in sections B [Supplies/Services and Prices] and C [the SOW], as well as the specified delivery schedule and quantity requirements. Offerors were advised that the agency intended to evaluate proposals and award a contract without conducting discussions, and that each offer should contain the offeror's best terms from a cost or price and technical standpoint.

Three firms, including PDI and Technology-USA, submitted proposals by the closing date of August 10. A technical evaluation panel reviewed the proposals and issued its evaluation findings in a summary on September 24. Only Technology-USA's proposal was found technically acceptable. The panel found PDI's proposal technically unacceptable, stating in its evaluation memorandum that:

> "PDI did not propose a Software Development Engineer with the hands-on experience as stated in the Personnel Qualifications in the RFP. PDI did not indicate experience in the Real-Time Executive system as specified in the SOW. PDI did not indicate any company experience in the RTE system as called for in the RFP."

In addition to these criticisms, the contracting officer's technical representative states in the agency report that the panel did not find that the protester had demonstrated

in its proposal an adequate understanding of the work because its proposed approach was essentially a recitation of the RFP's statement of work, with little or no demonstration of the firm's comprehension of the technical requirements of the project.

The contract specialist reviewed the panel's evaluations and concurred with its findings, recommending award to Technology-USA as the only technically acceptable offeror. On September 30, the contracting officer awarded the contract to Technology-USA without conducting discussions.

On November 2, notice of the award was sent to the two unsuccessful offerors. The notice did not state that PDI's offer was technically unacceptable; it named the successful offeror and disclosed the ceiling price for which the contract had been awarded, but gave no specific information regarding the basis for the award. PDI, noting that Technology-USA was not an SDB, determined that its own price would be lower than the award price if the 10-percent SDB preference were applied, and concluded that the evaluation was improper on this basis. This protest followed.

The Navy's protest report disclosed that PDI's proposal was rejected as technically unacceptable. The agency argues that PDI, as a technically unacceptable offeror, is not an "interested party" under our Bid Protest Regulations to challenge the legal status of the awardee in these circumstances, since the firm would be ineligible for award in the event the protest were sustained.

In response, PDI argues that the question of its personnel's experience, which was the primary basis for the finding of technical unacceptability, was really a matter of responsibility and that the firm therefore should have been permitted to demonstrate its acceptability through the Small Business Administration's certificate of competency (COC) procedures.

While traditional responsibility factors may be used as technical evaluation criteria in a negotiated procurement, see, e.g., Pacific Computer Corp., B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292, the factors may be used only if special circumstances warrant a comparative evaluation of those areas. Flight Int'l Group, Inc., 69 Comp. Gen. 741 (1990), 90-2 CPD ¶ 257; Sanford and Sons Co., 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266. As the protester correctly asserts, the Small Business Act prohibits agencies from finding that a small business is nonresponsible under the guise of an assessment of the technical evaluation factors and thereby avoid referring the matter to the Small Business Administration (SBA), which has the ultimate authority to determine the responsibility of a small business concern.

See 52 Comp. Gen. 47 (1972); Antenna Prods. Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297. However, where an agency rejects a proposal as technically unacceptable on the basis of factors not related to responsibility as well as responsibility-related ones, referral to the SBA is not required. Department of the Navy--Recon., B-244918.3, July 6, 1992, 92-2 CPD ¶ 199; Service Co. of Louis Rogers, Inc., B-248995.2, Nov. 16, 1992, 92-2 CPD ¶ 347.

Thus, our decision rests on whether the Navy's rejection of PDI's proposal as technically unacceptable was based solely on evaluation factors that were responsibility-related.[1] We conclude that it was not.

A serious concern of the evaluation panel was the apparent failure on the part of PDI's proposed software development engineer to meet the minimum experience and capability requirements, which is a responsibility-related factor. However, the record also shows that the Navy considered PDI's proposal deficient in demonstrating an understanding of the required work, and that its proposal did not meaningfully describe the firm's approach to the requirement but instead simply repeated the RFP's statement of work. The agency report cites, as one example of PDI's apparent lack of understanding, the fact that since the RFP erroneously referred to a "DIS-formatted disk in Wordperfect," apparently due to a typographical error, instead of DOS formatted disk, PDI's proposal repeated the error and offered to supply materials on "DIS-formatted" diskettes. In addition, the agency found that in the few instances where PDI's description of its approach went beyond a simple recitation of the RFP's statement of work, its reference to the real-time systems used by the lab which the contractor was required to support did not demonstrate the requisite level of understanding of the real-time systems; to the contrary, the proposal raised further doubt in the evaluator's minds regarding PDI's approach to this important aspect of the requirement. The agency found that PDI's statement of proposed work failed to show the requisite level of understanding because it generally consisted of little more than a repetition of the requirements as they were stated in the RFP. A mere promise to comply with technical requirements in this manner, without offering sufficient detail to establish the offeror's technical approach and understanding is insufficient to establish that the offeror meets the agency's

[1]The protester has not challenged the basis of the agency's technical evaluation, alleging only that PDI's elimination from the competition without a referral to SBA was improper.

technical requirements as expressed in the RFP. See Inter-Con Sec. Sys., Inc., B-235248; B-235248.2, Aug. 17, 1989, 89-2 CPD ¶ 148.

We think that these concerns, in addition to the responsibility-related matters of experience, contributed significantly to the agency's conclusion that PDI's proposal was technically unacceptable. An offeror in a negotiated procurement generally must demonstrate within the four corners of its proposal that it is capable of performing the work upon terms most favorable to the government. See ImageMatrix, Inc., B-243367, July 16, 1991, 91-2 CPD ¶ 61. Where, as here, offerors are cautioned that technical proposals should be comprehensive statements demonstrating the offeror's understanding and method of approach and must be specific, detailed and complete, we think it is reasonable for the agency to find an offeror's technical approach unacceptable based on the firm's failure to demonstrate a thorough understanding of the contract objectives and requirements in its proposal. In these circumstances, the SBA's COC procedures were inapplicable, and we have no legal basis to object to the agency's rejection of PDI's proposal as technically unacceptable. This portion of the protest is denied.[2]

PDI also challenges the manner in which the firm was notified of the award, contending that agency officials intentionally failed to issue a preaward notice as required under Federal Acquisition Regulation (FAR) § 15.1001 when award is made to a small business concern, and delayed issuing the postaward notice until approximately 1 month after the contract had been awarded. However, we see no prejudice to the protester in these circumstances. An agency's failure to provide written notice to unsuccessful offerors of its intent to award a small business set-aside contract constitutes harmless procedural error where the protester does not question the awardee's size status. See Antenna Prods. Corp., B-236933, Jan. 22, 1990, 90-1 CPD ¶ 82. Similarly, while agencies are required to provide prompt notice of the rejection of proposals, we generally view tardiness in notifying unsuccessful offerors as merely a procedural defect. See Adams Corp. Solutions, B-241097, Jan. 9, 1991, 91-1 CPD ¶ 24.

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[2]PDI's initial basis of protest, that the SDB preference should have been applied to Technology-USA's price for evaluation purposes, is clearly rendered academic. Since Technology-USA submitted the only acceptable offer, there was no SDB firm in whose favor the preference would apply.

Although PDI asserts that contracting officials acted in bad faith, the facts simply do not establish that this is the case. The actions that the agency officials took in connection with issuing the notice were consistent with their determination that only Technology-USA had submitted an acceptable offer. A finding of bad faith requires evidence that contracting officials had an intent to injure the protester. While the notice arguably was somewhat delayed and provided incomplete information, these deficiencies do not establish the existence of bad faith. The Taylor Group, Inc., 70 Comp. Gen. 343 (1991), 91-1 CPD ¶ 306; Harris Corp., RF Communications, Div., B-220387, Nov. 14, 1985, 85-2 CPD ¶ 556.

The protest is denied.

Robert P. Murphy

for James F. Hinchman
General Counsel