



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

Decision

Matter of: DO3 Systems, Inc.
File: B-250438.3
Date: April 19, 1993

Dean M. Dilley, Esq., and James A. King, Esq., Patton, Boggs & Blow, for the protester.
David T. Raiston, Esq., and Roderick B. Williams, Esq., Leonard, Raiston, Stanton & Danks, for the OEI Division of Krueger International, Inc., an interested party.
H. Charles Coburn, Esq., Department of Justice, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency had no obligation to conduct discussions with protester regarding material deficiencies in firm's primary proposal (for post-to-panel systems furniture components) where that proposal was reasonably found to be technically unacceptable and had no reasonable chance for award.

DECISION

DO3 Systems, Inc., a small business concern, protests the award of a contract to the OEI Division of Krueger International, Inc. under request for proposals (RFP) No. 1PI-0003-92, issued by the Department of Justice, Federal Bureau of Prisons, UNICOR, for the manufacture of systems furniture components and related technical services. DO3 primarily contends that the agency improperly evaluated the firm's technical proposal and failed to conduct meaningful discussions with the firm.

We deny the protest.

The RFP, issued on April 24, 1992, contemplated the award of a firm, fixed-price requirements contract for a base year and 4 option years. The RFP initially contemplated a panel-to-panel construction system for systems furniture

components, but it was amended on June 16 (per amendment No. 2, discussed below) to also allow for the agency's consideration of proposals for panel-to-post system components.¹

Amendment No. 2 incorporated the questions and answers of the agency's preproposal conference held with prospective offerors. During that conference, three representatives of DO3 inquired about the agency's initial exclusion of panel-to-post systems from the current procurement. The agency explained that it was seeking a panel-to-panel system similar to its existing system in order to avoid costly replacement of machinery and equipment, and changes in its current tooling, work surfaces and panel cores. Amendment No. 2 also stated various other concerns of the agency in switching from its existing panel-to-panel system to a panel-to-post system, including its need to prevent any adverse affect upon the agency's recent progress toward becoming a self-sufficient systems furniture component manufacturer or upon its existing federal customer market. The agency also stated its concerns about the two different systems in terms of function and appearance, and the costs involved with any need for equipment retooling or the retraining of inmates currently operating UNICOR's existing equipment set up for panel-to-panel type production. At the preproposal conference, DO3 insisted that its panel-to-post system would satisfy the agency's requirements and asked whether it would be helpful to the agency if DO3 submitted information about its panel-to-post manufacturing process. The agency suggested that DO3 include such information in its technical proposal for a comparative evaluation. The above portion of the question and answer session, incorporated into amendment No. 2, concluded with the following statement amending the RFP: "ANSWER: After further evaluating the comments above, a [p]anel-to-[p]ost system will be considered."

The RFP advised offerors that the solicitation's stated technical evaluation factors would "be used by the technical panel in comparatively evaluating proposals from a technical standpoint." Section M of the RFP stated the following evaluation factors for award: (1) capability--worth 35 points--considering the offeror's ability to begin a design project immediately upon request for services;

¹Basically, in a panel-to-panel system, the various workstation panels are connected directly by hinges latched on thin connector strips. The panel-to-post system utilizes intervening posts between the panels. Krueger, the awardee and incumbent contractor, is currently supplying UNICOR with panel-to-panel components, as it had under its previous contract with the agency.

(2) qualification and experience--worth 25 points--considering the qualification and experience of the offeror, primarily management and staff qualifications, education, and experience in product design; (3) past performance--worth 15 points--considering the past performance of the offeror, including the extent to which performance has been satisfactory for prior design projects based on offeror's experience, problem-solving capabilities and effectiveness; (4) price--worth 25 points--wherein the lowest price will receive the highest score, the next to the lowest price will receive the next highest score, and so on. The RFP further provided that any deviation from the RFP's suggested approaches should be substantially supported in the offerors' technical proposals. The RFP stated that award was to be made to "that offeror whose proposal, conforming to this solicitation, is determined to be in the best interests of the government, price and other factors considered."

Two offerors, D03 and Krueger, submitted proposals by July 6, the extended closing date for the receipt of initial proposals. In the cover letter to its offer, D03 explained that it was offering its panel-to-post system components, as permitted by amendment No. 2 to the RFP, despite the fact that its panel-to-post system admittedly did not meet all of the statement of work (SOW) requirements stated in the RFP. This letter noted that although the RFP generally had been amended to state that panel-to-post systems would be considered, several of the solicitation's technical specifications (e.g., various measurements and physical characteristics included in the SOW that had been derived from the agency's existing panel-to-panel system) had not been amended to reflect certain characteristics of D03's panel-to-post system components.² D03's proposal emphasized the alleged benefits of its proposed panel-to-post system over the agency's current panel-to-panel system and, alternatively, generally proposed a panel-to-panel system which met the RFP's specifications if required by the

²By letters of September 21 and September 23, D03 protested the RFP's specifications as allegedly favoring the incumbent contractor's (Krueger's) panel-to-panel system and the agency's failure to provide sufficient information to other offerors regarding UNICOR's existing system. We affirm our decision of September 22 in which we dismissed these contentions as untimely filed since they concern alleged improprieties in the solicitation that were not protested prior to the closing time for the receipt of proposals.
4 C.F.R. § 21.2(a)(1) (1993).

agency. The cover letter to D03's initial proposal stated: "[w]e want to emphasize that, if for any reason our proposal is deemed unacceptable, we are prepared to manufacture components strictly in accordance with your specifications which are written around [panel-to-panel] construction." (Emphasis in original.)

The agency's evaluators had several concerns about D03's initial technical proposal, including the panel-to-post system's failure to comply with certain technical requirements--e.g., the protester's offer of an aluminum rather than steel core, the failure to provide 360 degree accessibility for wire management, and the offer of 1.5-inch incremental adjustments for work surface heights rather than the 1-inch increments specified in the SOW. The evaluators were also concerned with the proposal's lack of information about D03's general, alternate offer of a panel-to-panel system which would comply with the RFP's requirements, the lack of information regarding how the protester intended to cater to a manufacturer rather than an end user, and the firm's failure to adequately explain how it proposed to meet UNICOR's monthly manufacturing requirements or provide training and technical services. D03's capability to perform was questioned since the award of the current requirement would result in a 75 percent increase in annual business sales for D03; in this regard, the evaluators were also concerned about whether D03 proposed ample lead time for production or sufficient additional staff to meet the RFP's requirements.

D03's initial proposal received a technical score of 13.67 (out of the 75 technical points available) and a price score of 25 (out of the 25 points available for price) for a total evaluation score of 38.67; Krueger's proposal (offering a panel-to-panel system) received a perfect technical score of 75 and a price score of 17.349 for a total evaluation score of 92.349.³ The evaluators considered D03's proposal of its panel-to-post system components technically unacceptable. The contracting officer agreed with this determination, but decided that the protester's proposal would be included in the competitive range to give the firm an opportunity to submit a revised proposal to amplify its general, alternate offer of a panel-to-panel system to meet

³The record shows that although D03 received a perfect price score for offering the lowest total price, the evaluators were concerned about the integrity of the firm's total price since technical support services required by the RFP were offered by D03 at additional cost to the agency and were not factored into the firm's proposed "total" price.

the agency's requirements. Thus, the contracting officer included only the portion of DO3's proposal which offered to furnish a panel-to-panel system and excluded the panel-to-post system proposed by the protester.

By letter of August 18, the following written discussion questions were sent to DO3 to be addressed in the firm's best and final offer (BAFO):

- "(1) Small Business - How does your company propose to meet UNICOR's demands as well as satisfying your other customers?
- (2) How does DO3 propose to meet UNICOR's requirement of a panel-to-panel system? (Pricing, etc.)
- (3) Your proposal lacked testimonial from prior customers. Also, no government work was noted.
- (4) Experience of key personnel was not provided.
- (5) Did not show how DO3 would cater to another manufacturer, rather than to an end user?
- (6) How would your company comply to step back (vertical integration) provisions that were required under this solicitation?"¹

BAFOs were submitted by the two firms by August 25. DO3's BAFO offered a substantially lower cost--approximately 8 million dollars lower--than Krueger's BAFO. DO3's BAFO received an overall evaluation score of 51 (including a technical point score of 26 and a price point score of 25); Krueger's BAFO received the same overall evaluation score as its initial proposal (92.349 points). The evaluators found that DO3's BAFO failed to meet the SOW's requirements (e.g., regarding the required incremental measurements) and failed to adequately explain its blanket proposal of providing a panel-to-panel system meeting all of the RFP's specifications. The evaluators found that the firm failed to substantiate its position that its conversion to a panel-to-panel system would be easily accomplished--the agency found that the protester did not adequately explain the proposed process and effect of retooling its current equipment and products to accommodate panel-to-panel systems furniture. The evaluators found that the information

¹The RFP's vertical integration provisions relate to the contractor's offer of technical support to help UNICOR become an independent manufacturer of its own systems furniture components.

provided in the protester's BAFO about the firm's past government work failed to include any panel-to-panel experience and the firm did not provide any of the requested testimonials of DO3's past performance. The evaluators also remained seriously concerned about DO3's capability to meet UNICOR's high volume demand (since the firm did not propose to change its current, limited production approach, and the firm's total past business sales were a fraction of UNICOR's contemplated demand.)

The agency found a large difference between the quality of DO3's and Krueger's offers. Krueger's proposal was considered outstanding and showed Krueger to have exceptional organizational and capability skills. The agency made the following conclusions regarding its review of Krueger's proposal:

"Krueger fully understood the [SOW] and [addressed] the issues clearly, concisely, and with a thorough knowledge of UNICOR's requirements. They are the eighth largest systems furniture [manufacturer] in the U.S. and are more than qualified to execute, coordinate, direct, and support UNICOR's requirements. They have experience in working in a correctional environment and their employees have passed National Security checks within the Federal Prison system as well as the Organized Crime and Drug Enforcement Task Force conferences. To further emphasize [Krueger's] ability to satisfy UNICOR's requirement, is the fact they are the incumbent contractor, and for over the past 2 years has added substantially with the gross revenue of UNICOR."

Finding that the awardee's technical superiority based upon its panel-to-panel system proposal was worth the cost premium, award was made to Krueger on October 1 at an estimated base year contract price of \$35,431,400. This protest followed.

In a negotiated procurement, the contracting agency may select a competitive range which consists of all proposals that have a reasonable chance of being selected for award; that is, it includes those proposals that are technically acceptable as submitted or that are reasonably susceptible of being made acceptable through discussions. Delta Ventures, B-238655, June 25, 1990, 90-1 CPD ¶ 588; Federal Acquisition Regulation (FAR) § 15.609. Since agencies are responsible for defining their needs and for deciding the best method of accommodating them, the evaluation of proposals and the resulting determination of whether an

offer is in the competitive range are matters within the discretion of the contracting agency. Information Sys. & Networks Corp., 69 Comp. Gen. 284 (1990), 90-1 CPD ¶ 203. In reviewing protests against these determinations, our function is not to reevaluate the proposal, but instead to examine the agency's evaluation as a whole to ensure that it has a reasonable basis and is in accord with the evaluation criteria listed in the solicitation. Abt Assocs. Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223. Where an agency reasonably determines that a proposal is technically unacceptable, it is appropriate to exclude that offer from the competitive range irrespective of its lower proposed price. American Technical & Analytical Servs., Inc., B-240144, Oct. 26, 1990, 90-2 CPD ¶ 337.

DO3 protests the agency's evaluation of its technical proposal of a panel-to-post system and the agency's failure to conduct meaningful discussions with the firm regarding all of the deficiencies in the protester's proposal of a panel-to-post system. Based upon our examination of the record, we conclude that UNICOR's evaluation of DO3's proposed panel-to-post system components as technically unacceptable under the RFP's technical evaluation factors was reasonable and that the agency acted properly in not conducting further discussions concerning the panel-to-post system.

The greatest deficiencies in DO3's initial proposal of its panel-to-post system were under the RFP's capability criterion. The RFP defined this criterion as including consideration of the offeror's ability to begin a design project immediately upon request for services. By definition, this criterion involved consideration of an offeror's capability to perform, including, for instance, as was evaluated here, the offeror's compliance with the solicitation's technical specifications and the firm's ability to meet the agency's projected demand.

DO3's panel-to-post proposal failed to comply with material technical specifications of the SOW. The SOW, as amended, required all panel frames to be welded steel of not less than 18 gauge steel members; although DO3's proposal included some use of steel in its panels, the proposal also included, as an example of its product, the use of aluminum without clearly demonstrating its proposal of steel products which comply with the RFP's stated steel requirements. The SOW expressly required that panels "provide a cableway at the top of the panel and may have a cableway at work surface level in addition to the electrical raceway at the bottom of the panel" (despite the fact that one of the solicitation's sample drawings showed only a horizontal cable pathway along

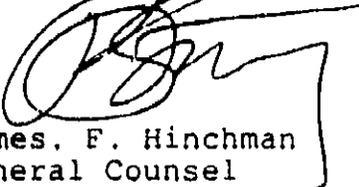
the bottom); DO3's panel-to-post proposal did not provide the required cableway at the top of the panels, in contravention of the agency's wire accessibility requirements. The SOW required that "[a]ll hang-on surfaces shall [have] . . . adjustments in [1-inch] increments"; DO3's panel-to-post proposal offered 1.5-inch increments and failed to comply with the RFP's panel size requirements.

Although the protester states that the RFP provided that offerors could propose deviations from the RFP's suggested approaches, we do not think the above technical requirements of the RFP can reasonably be interpreted as "suggested approaches," as the protester contends. The RFP provided these technical requirements to be met by the contractor based upon the design of UNICOR's existing system, and the discussion included in amendment No. 2 emphasized the agency's concerns that all proposals should be compatible and similar in function and appearance to UNICOR's existing system. In any event, to the extent the protester contends deviations were allowed by the RFP, the solicitation instructed offerors that if any deviations were proposed, they were to be substantially supported in the firm's technical proposal in order to be comparatively evaluated. (DO3 was also reminded at the preproposal conference to include information in its proposal to support its proposed panel-to-post manufacturing process since that system differed from the agency's existing system.) The protester was aware of this requirement for substantiation of its approach, especially in light of the RFP's clear preference for a panel-to-panel system similar to UNICOR's existing system. DO3 failed to provide the required technical support for its deviations from the SOW's technical requirements, leaving the agency without any information to evaluate the express exceptions taken by the protester to the SOW requirements. We think this reasonably resulted in a determination that the proposal of the panel-to-post system was technically unacceptable. See Intown Properties, Inc., B-250392, Jan. 28, 1993, 93-1 CPD ¶ 73.

Although DO3 contends that the agency failed to conduct meaningful discussions with DO3 because UNICOR did not tell DO3 of the deficiencies in its primary panel-to-post proposal, the agency was under no obligation to discuss that aspect of the firm's initial proposal since it was reasonably determined to be technically unacceptable and did

not have a reasonable chance of receiving award without substantial modification. See FAR § 15.610; American Technical & Analytical Servs., Inc., supra.

The protest is denied.⁵



James, F. Hinchman
General Counsel

⁵D03' also protests the agency's failure to refer any questions regarding the firm's capability to the Small Business Administration (SBA) for resolution since a determination of the firm's capability traditionally involves a matter of the firm's responsibility. Referral to the SBA of the agency's comparative determination that D03's capability did not support an award to the firm was not required here since the firm's capability was a stated technical evaluation factor for award under the RFP which required a relative assessment of the competing offerors' abilities. See Electrospace Sys., Inc., 58 Comp. Gen. 415 (1979), 79-1 CPD ¶ 264.