



Comptroller General
of the United States

359293

Washington, D.C. 20548

Decision

Matter of: Dynamic Science, Incorporated

File: B-253784

Date: September 30, 1993

Ralph A. Rockow for the protester.

John Donaldson, Esq., Department of Transportation, for the agency.

Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that solicitation did not include a necessary Department of Labor wage determination is dismissed as untimely when filed after closing time for receipt of initial proposals.
2. Where, after discussions, protester's technical proposal was evaluated as unacceptable but capable of being made acceptable, and its cost proposal included lowest proposed hours but highest costs of all other proposals, agency properly excluded proposal from competitive range as having no reasonable chance for award.
3. Allegation of bias is denied where the record contains no credible evidence that agency acted with specific intent to injure the protester which resulted in prejudicial agency action.

DECISION

Dynamic Science Incorporated (DSI) protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. DTNH22-92-R-07057, issued by the National Highway Traffic Safety Administration (NHTSA), Department of Transportation. DSI contends that the RFP was flawed; that DSI should have been allowed to submit a best and final offer (BAFO); and that a member of the evaluation team was biased against the protester.

We dismiss the protest in part and deny it in part.

The RFP, issued in June 1992, solicited proposals for support of the agency's National Accident Sampling System (NASS), a system of highway crash statistics compiled and maintained by NHSTA to assist in the evaluation of highway safety trends. The RFP contemplated award of two cost reimbursement contracts to furnish necessary facilities, materials, and personnel to establish and operate each of two NASS Zone Centers and associated Primary Sampling Units (PSU), to continue accident research, maintain quality control, and provide technical guidance in accordance with the statement of work (SOW). Offerors were permitted to submit offers for either or both Centers, but could only be awarded a contract to operate one of them. Performance was to be accomplished in a 3-year base period with two 1-year options.

Under the evaluation scheme, technical considerations were more important than cost considerations. Proposals were evaluated on the basis of five technical factors, listed in descending order of importance as follows: personnel qualifications; project management approach; understanding of technical objectives; project scheduling; and corporate experience. Cost was evaluated on the basis of reasonableness; realism, or level of confidence in the proposed amounts; how well the proposed costs reflected the technical approach; and cost risk. The RFP cautioned offerors to submit proposals on the most favorable basis, since discussions might not be conducted.

Various tasks outlined in the SOW required travel; e.g., Task 3, training program; Tasks 5 and 6, site visits; Task 7, meetings and workshops; and Task 8, development and maintenance of the NASS. With regard to the cost proposals, offerors were required separately to include those costs (including travel and per diem) associated with the specified site visits, training, and other travel. The RFP identified the minimum number of trips required for these activities and included an attachment outlining the number of persons, trips, and days per trip for each task. For example, each offeror was required to include costs necessary to send one instructor from the Zone Center and any inexperienced PSU staff to three non-consecutive, 1-week training sessions (15 days) at a specified site. While experienced staff did not need to take basic training, for travel cost estimating purposes and to account for training "replacement researchers," each offeror was required to include costs for three replacement researchers per PSU over the 5-year contract period.

DSI's initial technical proposal received the lowest technical score and was evaluated as unacceptable, but capable of being made acceptable. DSI's proposed level-of-effort and/or hours for various tasks was underestimated or

found insufficient. The evaluators also found a number of discrepancies in the cost proposal concerning the number of trips proposed for training and other tasks; labor rates; level-of-effort; and lack of cost escalation factors. These matters were identified during discussions to DSI in written technical and cost questions. In general, the evaluators asked DSI either to justify and explain its current proposal or to make necessary adjustments. Similar concerns were raised with all other offerors.

DSI's revised technical proposal again received the lowest overall technical score and continued to be evaluated as unacceptable, with correction potential. The evaluators found that DSI had addressed all cost questions appropriately, with the exception of required travel for instructor basic training. In view of DSI's technical rating in conjunction with the highest cost of all offerors, the evaluators recommended that DSI's proposal be eliminated from the competitive range. In eliminating DSI's proposal, the agency noted that since DSI's proposed labor hours (representing the bulk of costs in the requirements) were lowest of all offers received, further negotiations were not likely to improve DSI's cost position. Upon receiving notice of its elimination from the competitive range, DSI filed this protest. Award of the contracts has been suspended, pending this decision.

DSI first argues that the RFP was flawed because it did not include a wage determination. The RFP incorporated by reference Federal Acquisition Regulation (FAR) § 52.222-41, "Service Contract Act of 1965, as Amended" (41 U.S.C. 351, et seq. (1988)). This clause requires contractors to pay either the minimum wages as specified in any attached Department of Labor wage determination (FAR § 52.222-41(c)(2)(i)) or the minimum wage specified in the Fair Labor Standards Act (FAR § 52.222-41(e)). DSI's challenge to the omission of a wage determination is untimely. Our Bid Protest Regulations specifically require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1) (1993); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. Here, despite having been given the opportunity to comment on the proposed RFP in March 1992, the protester did not raise its challenge until after its proposal had been eliminated from the competitive range, well after the initial closing time. Accordingly, this protest ground is dismissed.

DSI next argues that the agency deliberately attempted to drive up its costs during discussions and then unfairly eliminated its proposal from the competitive range without

providing it an opportunity to submit a BAFO with reduced prices. DSI maintains that its revised proposed costs though high, were realistic.

The evaluation of proposals and the resulting determination as to whether an offer is in the competitive range is a matter within the discretion of the contracting agency, since that agency is responsible for defining its needs and the best method of accommodating them. Thus, our Office will not make an independent determination of the merits of a proposal; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. Information Sys. & Networks Corp., 69 Comp. Gen. 284 (1990), 90-1 CPD ¶ 203; DBA Sys., Inc., B-241048, Jan. 15, 1991, 91-1 CPD ¶ 36. A proposal that is technically unacceptable, but capable of being made acceptable, need not be included in the competitive range when, relative to other acceptable offers, it is determined to have no reasonable chance of being selected for award. Information Sys. & Networks Corp., supra.

Here, DSI's proposal was included in the competitive range during the first round of discussions. However, after making adjustments to its cost proposal, DSI's costs exceeded the low offerors' costs by more than \$3 million in each of the two Zones. While DSI's technical score improved, its proposal remained technically unacceptable and was more than 100 points lower than the next higher scored proposal for Zone 1 and approximately 60 points lower than the next higher scored proposal for Zone 2. In view of DSI's significantly higher cost and continuing technical deficiencies and resulting low score, the agency reasonably determined that the protester had no reasonable chance for award and, accordingly, properly eliminated its proposal from the competitive range.

With regard to DSI's argument that the agency deliberately attempted to drive up its costs in discussions, an agency may not consciously mislead or coerce an offeror into raising its price. Marine Transport Lines, Inc.; Lant Shipping Inc., B-238223.2; B-238223.3, July 30, 1990, 90-2 CPD ¶ 80. Here, the record provides no evidence that DSI was misled or coerced. We have reviewed the RFP's requirements and DSI's proposal and agree that DSI failed to include sufficient travel and other costs in its initial proposal. Among other issues, DSI failed to include escalation factors over the life of the contract and greatly understated travel and training costs. For example, while the RFP required 117 trips for Zone 1 and 99 trips for Zone 2 for researcher basic training, DSI proposed only 20 and 27 trips, respectively.

However, DSI observes that the RFP does not require experienced personnel to take basic training and thus, it argues that the agency improperly required it to propose costs covering additional travel, which in turn raised its overall costs. DSI's conclusion is misplaced; DSI ignores the RFP requirement that, for evaluation purposes and to account for replacement staff, all offerors were required to propose costs for a specified number of training trips. Thus, even assuming that DSI's staff was more experienced the agency could reasonably require DSI to propose costs for the minimum number of trips.¹

Further, the agency did not limit its discussions to DSI's understated costs; the evaluators also identified areas where DSI had overestimated costs on labor rates and travel. Then, with regard to these and other areas where there was no specified minimum, the agency specifically provided DSI the opportunity either to explain and justify the rationale for the proposed costs or to reassess its proposal. Further, DSI was not singled out in cost or technical discussions; the evaluators identified similar cost and technical issues in each of the other proposals and each raised its costs in the revised proposals. Under these circumstances, there is no basis to conclude that DSI was misled into raising its prices. In fact, DSI's comments to the agency report explain that the protester deliberately chose to raise certain of its costs as part of an overall strategy to propose incumbent staff, pay everything the government told it to include "during the build up to the [BAFO] Stage of the contracting process, and then be prepared to cut costs by trimming wages and benefits." Particularly in view of the RFP caution to offerors to propose their best terms, DSI must bear the consequences of its business judgment as expressed in its revised proposal. See Essex Electro Eng'rs, Inc., B-238207; B-238207.2, May 1, 1990, 90-1 CPD ¶ 438. Inclusion in the competitive range after an initial evaluation is no guarantee that a BAFO will be solicited, but means only that, at that point in the process, a proposal is judged as having a reasonable chance of being selected for award. Johnston Communications, B-221346, Feb. 28, 1986, 86-1 CPD ¶ 211.

Finally, DSI contends that one of the evaluators was biased against it in the evaluation. Specifically, DSI alleges that the evaluator, in a 1988 procurement, allegedly advised two of DSI's competitors of the wage rates necessary to beat those offered by DSI. DSI inferred that this evaluator was

¹To the extent DSI is protesting the reasonableness of the requirement for minimum training travel costs, this constitutes an untimely allegation of a solicitation impropriety. 4 C.F.R. § 21.2(a)(1).

responsible for driving up the protester's costs in the current procurement and ensuring its elimination from the competitive range. There must be very strong proof that an agency has a specific intent to injure a protester before we may find bias. Hill's Capitol Sec., Inc., B-250983, Mar. 2, 1993, 93-1 CPD ¶ 190. The protester must produce credible evidence showing that any bias translated into agency action which unfairly affected the protester's competitive position. Id. Here, the record contains no such showing.

According to the agency, the cost evaluation was uniformly applied by the evaluators to all proposals. In this regard, the record establishes that all offerors were asked similar questions regarding understated labor rates, levels-of-effort, and discrepancies in certain required travel costs. Further, the record establishes that DSI received its second highest scores from the allegedly biased evaluator. Since the record shows that the agency reasonably eliminated DSI's proposal from the competitive range, this elimination alone is no evidence of bias. Finally, the protester's attempt to establish bias based on alleged actions on a 1988 procurement is speculative and no basis for sustaining the protest. Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275.

The protest is denied in part and dismissed in part.



for James F. Hinchman
General Counsel