



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Systems & Defense Services International

File: B-254254.2

Date: February 9, 1994

William G. Flood for the protester.
Stephen J. Edelman, for RONCO Consulting Corporation, an interested party.
Jonathan Silverstone, Esq., Agency for International Development, for the agency.
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the awardee received inside information is denied where the protester submits no evidence, and there is none in the record, to support the allegation; the fact that the awardee applied for a visa for one of its employees to visit Mozambique, the country in which the contract would be performed, prior to being awarded the contract provides no basis for finding improper action on the part of agency officials.
2. Protest that agency engaged in technical leveling where best and final offers (BAFO) were requested twice is denied because there is no evidence supporting the protester's speculative assertion and agency reports that it reopened negotiations and requested a second round of BAFOs in order to allow offeror whose proposal had previously been mistakenly rejected back into the competitive range.
3. Protest that award of a contract to a firm that will subcontract part of work to be performed in Mozambique to foreign nationals violates the Buy American Act is denied where the solicitation did not include Buy American Act provisions and the contract is not subject to the Act because the work is to be performed outside the United States.

DECISION

Systems & Defense Services International (SDS) protests award of a contract to RONCO Consulting Corporation by the Agency for International Development (AID) pursuant to

request for proposals (RFP) No. 93-010. The contract requires RONCO to clear mines from roads in Mozambique.

We deny the protest.

The protester alleges several improprieties in the procurement, including: (1) the RFP contained inaccurate and contradictory provisions; (2) RONCO might have had access to insider information; (3) the agency engaged in technical leveling; (4) award to RONCO violates the Buy American Act; and (5) the agency's cost estimate was too low and RONCO will not be able to perform the contract at the award price.¹

The RFP was issued by the Regional Contracts Office of the AID Mission to Swaziland on May 21, 1993, and requested offers for clearing mines along approximately 2,000 kilometers of high priority roads in Mozambique. The designated roads are critical to the delivery of supplies and the movement of people to and from demobilization assembly areas and drought affected areas. The demining program is part of the United Nations's overall peace process and is to be completed in late 1994, with the holding of elections in Mozambique.

The RFP was provided to 11 firms, and 9 offers were received by the June 28 date set for submission of initial proposals. The RFP listed the technical evaluation factors as: (1) institutional experience and capabilities; (2) proposed personnel; and (3) technical approach. The RFP stated that technical merit was considered slightly more important than cost. After evaluation of initial proposals, AID determined that five offers were in the competitive range. Negotiations were conducted with these offerors and a best and final offer (BAFO) received from each in late July.

On July 27, a sixth offeror, U.S. Defense Systems, Inc., filed a protest with our Office alleging that its offer should not have been excluded from the competitive range. U.S. Defense Systems withdrew its protest 1 month later when AID agreed to include the firm in the competitive range, to hold discussions with the firm, and to allow the firm to submit a revised proposal. Consequently, discussions were

¹SDS also protested that face-to-face interviews were not held with offerors even though the RFP stated that such interviews would be held. The agency responded to this allegation in its report. However, SDS did not address the issue in its comments on the agency's report. Therefore, we consider this protest ground to be abandoned and will not consider it further. See Heimann Sys. Co., B-238882, June 1, 1990, 90-1 CPD ¶ 520.

held by telephone and telecopy with all competitive range offerors in September and a second BAFO was requested and received from each. After evaluating BAFOs, the technical evaluation committee found that the two highest-rated offers were "significantly superior" to the offers of the other companies. Of the six BAFOs evaluated, RONCO's offer received the highest score for technical merit, while SDS' offer was rated significantly lower and was the fifth highest. The contracting officer selected RONCO's highest technically rated proposal and awarded the contract to RONCO on September 27. SDS filed its protest in our Office on October 1.

The protester complains that the form of the RFP was not in accord with the Federal Acquisition Regulation, that the RFP contained inaccurate and contradictory provisions, and that the RFP did not contain criteria for determining the amount of any award fee. Under our Bid Protest Regulations, protests alleging improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1993). While SDS was aware of these alleged solicitation deficiencies from reading the RFP (SDS states that it pointed out these deficiencies to the contracting officer during discussions), SDS did not file its protest with our Office until after the contract was awarded to RONCO--well after the closing date for receipt of initial proposals. Therefore, the issues are untimely raised.

The protester next asserts that RONCO might have had access to insider information, because RONCO applied for a visa for one of its employees to visit Mozambique just 11 days before the due date for submission of the second BAFOs, and because AID allowed offerors to send their cost and technical proposals to Mozambique via telecopy. In response, RONCO explains that it applied for a visa for one of its employees to visit Mozambique during this period "in case something broke" regarding this procurement and that the employee was traveling on business to other countries in this part of Africa in any event. The agency reports that it gave no SDS proprietary information to any competitor and that its investigation revealed no instance in which proprietary information was leaked.

The protester has submitted no evidence showing that RONCO had access to any information that was not available to the other offerors or that any proprietary information was released due to the use of telecopy machines. In our opinion, RONCO's applying for a visa was merely the exercise of prudent business judgment on RONCO's part in case in-person interviews were requested by AID. Similarly, the agency's allowing telecopied proposals and revisions

was reasonable in view of the expedited nature of the procurement and the fact that the contracting activity was located in Mozambique. Because there is no evidence in the record that RONCO or any other offeror received proprietary or source selection sensitive information, SDS' mere conjecture or speculation provides no basis for finding improper action on the part of AID officials. See Electra-Motion, Inc., B-229671, Dec. 10, 1987, 87-2 CPD ¶ 581.

The protester next contends that AID engaged in technical leveling. Technical leveling means helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussions, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal. See Sony Corp. of Am., B-224373.2, Mar. 10, 1987, 87-1 CPD ¶ 267. It is unclear from SDS' submissions why the firm believes the agency engaged in this improper practice. It appears, however, that the allegation stems from the fact that AID twice requested BAFOs and held discussions with competitive range offerors each time.

The protester has provided no evidence, and there is none in the record, to support the allegation that technical leveling occurred. As previously stated, AID originally considered only five offers to be in the competitive range and held discussions and requested BAFOs only from those offerors. However, after U.S. Defense Systems protested to our Office alleging that its proposal also should have been included in the competitive range, AID reevaluated that firm's initial offer and decided to include it in the competitive range after all. The agency reports that the only reason for the second BAFO request was to give U.S. Defense Systems an opportunity to submit a BAFO--an opportunity it had been denied when BAFOs were first requested. There is nothing wrong with requesting more than one round of BAFOs where a valid reason exists to do so. See HLJ Mgmt. Group, Inc., B-225843.3, Oct. 20, 1988, 88-2 CPD ¶ 375, aff'd, B-225843.5, Mar. 6, 1989, 89-1 CPD ¶ 237. In essence, all that contracting officials did was take corrective action when, after consulting with AID's attorney, they decided that U.S. Defense Systems's proposal had a reasonable chance of being selected for award. We believe that AID had a valid reason (i.e., correcting a prior mistake) for reopening discussions here. Because there is no evidence that technical leveling occurred, and in view of the fact that SDS' allegation is unsupported and appears to be mere speculation, this ground of protest is denied. See Physio Control Corp.; Medical Research Laboratories, Inc., B-231999.2; B-231999.3, Aug. 10, 1989, 89-2 CPD ¶ 123.

The protester also argues that, since RONCO is subcontracting some of the work to "Third Country Nationals," award to RONCO violates the Buy American Act. The agency reports that, under the terms of Executive Order No. 11223 of May 19, 1965, the Buy American Act is not applicable because the contract will be paid for with foreign assistance funds.

This protest ground is without merit. The Buy American Act by its own terms does not apply to work to be performed outside the United States. 41 U.S.C. § 10a (1988); Anderson Columbia Co., Inc., B-250530, Nov. 20, 1992, 92-2 CPD ¶ 377. Here, the work is to be performed in Mozambique and, therefore, consistent with the Act, the RFP did not include any Buy American Act provisions.²

The protester next argues that AID's cost estimate was too low because the agency is a "novice in this type of activity." Additionally, SDS asserts that RONCO will not be able to perform the contract successfully at the award price. The protester provided no detail or support in its initial protest to show why it believes that the AID's cost estimate was too low or that RONCO will not be able to perform successfully at the award price. Nonetheless, the agency reports that it has had previous experience with demining programs. Furthermore, the contracting officer states that, although he was concerned about the low costs RONCO initially proposed, his concerns were alleviated after discussions with the firm resulted in RONCO revising upward its proposed costs to realistic levels in its BAFO. In its comments, SDS did not rebut the agency's arguments but merely restated its allegation. Under our Bid Protest Regulations, a protester must set forth a detailed statement of the legal and factual grounds of protest. 4 C.F.R. § 21.1(c) (4). SDS has not done so.³

²To the extent that SDS's protest can be construed as contending that Buy American Act provisions should have been included in the RFP, the protest is untimely because the alleged defects were apparent from the face of the RFP and, therefore, the protest had to be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a) (1); Biomarine Inc., B-237232, Dec. 28, 1989, 89-2 CPD ¶ 605.

³In any event, before awarding the contract to RONCO, the contracting officer determined RONCO to be responsible. Absent a showing of possible fraud or bad faith, we do not review affirmative determinations of responsibility. 4 C.F.R. § 21.3(m) (5); Biomarine Inc., supra.

In its comments on the agency's report, SDS asserted for the first time that the evaluation of its technical proposal was deficient because SDS' score in the "recruiting" subfactor was too low. SDS acknowledges that it discovered this basis for protest when it was debriefed by the agency and not from the agency's report on the initial protest bases.

Where a protester initially files a timely protest and later supplements it with a new and independent ground for protest, the later raised allegation must independently satisfy the timeliness requirements of our Bid Protest Regulations, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. AT&T, B-251177; B-251177.2, Mar. 16, 1993, 93-1 CPD ¶ 236. Under our Regulations, protesters are required to raise issues other than alleged solicitation improprieties not later than 10 days after learning of the basis for protest. 4 C.F.R. § 21.2(a)(2). The agency has informed us that SDS was debriefed on October 26 and 27, 1993. Since SDS did not file this protest ground until it filed its comments on December 1--more than a month after it was debriefed concerning the technical scoring of its proposal--the issue is untimely raised.

The protest is denied.

Christine S. Melody
 Robert P. Murphy
 for Acting General Counsel