

**Matter of:** EnviroSol, Inc.  
**File:** B-254223  
**Date:** December 2, 1993

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**DIGEST**

Agency may not, consistent with statutory requirement to make award on the basis of evaluation criteria contained in the solicitation, reject a technically acceptable proposal from a small business because of concern that the price is unreasonably low when the solicitation contains no technical evaluation criterion to which that concern is related; under such circumstances the matter involves the small business's responsibility and is subject to referral to the Small Business Administration for a determination under certificate of competency procedures.

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**DECISION**

EnviroSol, Inc. protests the award to Moheat Environmental Services under request for proposals (RFP) No. DLA200-93-R-0061, issued by the Defense Logistics Agency (DLA), Defense Reutilization and Marketing Service, Battle Creek, Michigan, for the removal, recycling, and disposal of hazardous property at various locations in Texas. EnviroSol alleges that DLA conducted misleading discussions and improperly determined EnviroSol to be nonresponsible.

We sustain the protest.<sup>1</sup>

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<sup>1</sup>Because we recommend that DLA amend the solicitation and request revised proposals, our discussion is necessarily general.

DLA issued the RFP on March 8, 1993, as a 100 percent small business set-aside, contemplating the award of a firm, fixed-price requirements contract for a term of 1 year with an option for an additional 18 months. There were 68 contract line item numbers (CLIN) of waste disposal items, for which estimated quantities were stated, for both the base and option periods.

The RFP provided for the evaluation of technical proposals to determine the technical acceptability of the offerors' proposals for such limited matters as a management plan; a treatment, storage and disposal facility plan; and transporter licensing requirements. All technically acceptable proposals were then evaluated to determine the best value to the government, considering only price and past performance. Price was said to be of greater importance than past performance. The RFP stated the following with regard to the price evaluation:

"Each price will be evaluated for reasonableness. Price reasonableness is a comparison of the proposed price with the prices proposed by other offerors, the [g]overnment's estimate, past prices, current market conditions, and other relevant measures. The [g]overnment will request offerors submitting line item prices that are extremely high or low, compared with the [g]overnment analysis, demonstrate that they understand the requirement, have valid business reasons for the price, and that the price is not a mistake.

"Price evaluations are matters of judgment and will not be based upon the absolute standard of low price. Price evaluations will be based on an assessment of which offer presents the optimal combination of low price and price reasonableness. For that reason, the [g]overnment may make award to other than the offeror proposing the lowest price."

The RFP stated the following in pertinent part with regard to evaluation of past performance:

"(1) The [g]overnment will evaluate the quality of the offeror's past performance. The assessment of the offeror's past performance will be used as a means of evaluating the relative capability of the offeror and the other competitors. Thus, an offeror with an exceptional record of past performance may receive a more favorable evaluation than another whose record is

acceptable, even though both may have acceptable technical proposals.

"(4) Past performance will not be scored, but the [g]overnment's conclusions about overall quality of the offeror's past performance will be a factor in determining the relative merits of the offeror's proposal and in selecting the offeror whose proposal is considered most advantageous to the [g]overnment.

"(5) By past performance, the [g]overnment means the offeror's adherence to contract schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the offeror's business-like concern for the interest of the customer. [The agency] will also consider an offeror's performance on same or similar contracts in terms of waste quantities, variety of pick-up locations and waste streams, and disposal timeframes."

DLA received initial proposals from 13 offerors by the closing date of April 7. DLA determined that a number of these proposals were technically acceptable and in the competitive range, including those of Envirosol and Moheat.

Envirosol proposed the lowest total price; however, the proposed total prices of all competitive range offerors were relatively close to one another and all approximated the government estimate. DLA analyzed the prices by comparing them with the incumbent contract prices and by examining every CLIN price for signs of possible price unbalancing. DLA particularly analyzed the prices for 18 CLINs, which accounted for more than 70 percent of both the total price and the total amount of work required during the contract. For the 18 CLINs, DLA prepared a government price objective range with a "high objective" and "low objective" unit price for each CLIN, as well as an intermediate "target objective" unit price.

DLA also evaluated the past performance of each offeror, which included soliciting evaluations from the offerors' prior customers. DLA was unable to fully evaluate Envirosol's past performance because most of the references provided by Envirosol denied knowledge of the firm.

DLA conducted discussions with all competitive range offerors, which included issuing letters dated May 7,

addressing various aspects of each offeror's proposal and requesting each offeror to submit proposal revisions. On the subject of price, each letter contained the following statement with regard to the 18 CLINs that DLA's evaluation focused on: "[o]ur analysis indicates that the following CLINs may have the potential for unit price reductions." The letters to Moheat and Envirosol also identified CLIN prices that were considered possibly unbalanced; the letter listed the CLINs for which the unit prices were suspected of being too high and the CLINs for which the prices were suspected of being too low; for example, the letter sent to Envirosol identified 9 CLINs as possibly being "priced unbalancing high" and 4 CLINs as possibly being "priced unbalancing low."

Envirosol's best and final offer (BAFO) in response to the DLA discussions explained that the reason its references initially had not recalled Envirosol was because "Envirosol" is a new firm name. DLA then recontacted the firm's references and received satisfactory prior performance assessments. Nevertheless, DLA determined that Envirosol lacked experience on projects similar in complexity to the RFP work and rated Envirosol "marginal" for past performance. The other competitive range offerors were found to have previous experience on the same or similar contracts with DLA, and received "acceptable" or higher ratings for past performance.

With regard to price, Envirosol, in its BAFO, reduced its unit prices for all 18 CLINs specifically identified by DLA in the May 7 letter, and also reduced the unit prices for every CLIN that DLA had identified in that letter as possibly being "unbalanced high" and increased the unit prices for every CLIN which DLA had identified as possibly being "unbalanced low." Envirosol's total BAFO price was 19 percent lower than its initial proposal price. DLA evaluated Envirosol's total price as balanced, but unreasonably low as compared to the incumbent contract price, which DLA found indicated that Envirosol might not completely understand the complexity of the requirement.

In contrast, the other competitive range offerors responded to DLA's identical price discussions on the 18 CLINs by largely keeping their unit prices unchanged or increasing them. Although DLA identified for Moheat 5 CLINs that were possibly "unbalanced high" and one that was possibly "unbalanced low," Moheat's BAFO retained or increased its initial unit prices and offered no unit price decreases. The total BAFO prices of the competitive range offerors, other than Envirosol, significantly increased (10 to 24 percent) over their initial offers, although they

were still relatively close to one other and were determined by DLA to be reasonable.<sup>2</sup>

The source selection official (SSO), relying upon the contracting officer's determination that Envirosol's price was unreasonably low and that its past performance was "marginal," determined that "it would not be in the best interest of the [g]overnment to award to Envirosol where the probability of success would be poor." The SSO determined that Moheat, although not the next lowest-priced offeror, offered a higher probability of success with an insignificant difference in price, and selected Moheat for award on the basis that it represented the best value to the government.

Envirosol protests that DLA, before eliminating Envirosol from award consideration, should have asked the SBA to evaluate the firm for a possible Certificate of Competency (COC) because the reasons it was not selected were related to its responsibility. The Small Business Act provides that a procuring agency may not preclude a small business concern from being awarded a government contract by reason of any element of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, without submitting the matter to the SBA for a COC; where the SBA issues a COC to a small business concern, the procuring agency must accept it as conclusive. 15 U.S.C. § 637(b)(7) (1988).

A determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to successfully perform the contract at its offered price. See Monpole S.A., Inc., B-254137, Nov. 4, 1993, 93-2 CPD ¶ \_\_\_\_; Ball Tech. Prods. Group, B-224394, Oct. 17, 1986, 86-2 CPD ¶ 465. As part of the technical evaluation, an agency may assess the reasonableness of a low price to evaluate an offeror's understanding of the solicitation requirements, so long as the RFP provides for evaluation of offeror understanding as part of the technical evaluation. See PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381; Family Realty, B-247772, July 6, 1992, 92-2 CPD ¶ 6; Binghamton Simulator Co., Inc., B-244839, Nov. 5, 1991, 91-2 CPD ¶ 429. In this case, there was no technical evaluation criterion or proposal requirement addressing the offerors' understanding of requirements. The solicitation did not

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<sup>2</sup>The competitive range offerors' CLIN prices were widely variant. DLA made no specific determinations regarding the reasonableness of individual CLIN prices after receipt of BAFOS.

provide for a relative ranking of technical merit: all technically acceptable proposals were to be further considered only with respect to price and past performance. Under the announced technical evaluation criteria, Envirosol's proposal was technically acceptable.

That being so, the agency's concern about the reasonableness of Envirosol's price could not be considered other than as a responsibility matter without violating the procurement statutes.<sup>3</sup> Thus, under this RFP the agency's concern should have been treated as a matter of the offeror's responsibility: whether Envirosol was capable of performing at its proposed price. See Ball Tech. Prods. Group, supra; Corporate Health Examiners, Inc., B-220399.2, June 16, 1986, 86-1 CPD ¶ 552.

Since Envirosol is a small business, the matter should have been referred to the SBA. See PHE/Maser, Inc., 70 Comp. Gen. 689 (1991), 91-2 CPD ¶ 210 (where the rejection of a proposal for a variety of reasons, all of which were related to the offeror's responsibility, including a determination that the offeror lacked the capacity to successfully perform at its offered price, was required to be referred to the SBA for a possible COC). The fact that the agency did not label Envirosol's proposal unacceptable does not change this result. Id.

We sustain the protest.<sup>4</sup> As it appears from the record that DLA contemplated measuring offeror understanding as a technical evaluation matter rather than as an element of responsibility, we recommend that DLA amend the solicitation to specifically provide for an evaluation factor concerning offeror understanding. The agency should then request revised proposals and evaluate them. If award to an offeror other than Moheat is appropriate, Moheat's contract should be terminated for convenience. Alternatively, if DLA

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<sup>3</sup>The Competition in Contracting Act of 1984 requires military agencies to include in solicitations a statement of all significant factors and subfactors to be used in evaluating offers and to make award "to the source whose proposal is most advantageous to the United States, considering only . . . the . . . factors included in the solicitation." 10 U.S.C. § 2305 (Supp. IV 1992). This RFP stated that both low price and price reasonableness would be considered, but did not identify offeror understanding as a technical evaluation factor.

<sup>4</sup>The record also suggests that Envirosol may have been misled into lowering its price. However, that firm now states that it can successfully perform the contract at its offered price so we need not consider this issue further.

prefer to consider price reasonableness as a matter of responsibility, the agency should refer the question of Envirosol's responsibility to the SBA. We find the protester is entitled to recover the reasonable costs of filing and pursuing these protests, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1993). The protester should submit its certified claim for protest costs directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Comptroller General  
of the United States