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Comptroller General
of the United States

138198

Washington, D.C. 20548

Decision

Matter of: Gutierrez-Palmenberg, Inc.

File: B-255797.3; B-255797.4; B-255797.5

Date: August 11, 1994

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Robert G. Fryling, Esq., and John J. Monsees, Esq., Blank, Rome, Comisky & McCauley, for Systematic Management Services, Inc., an interested party.
Ronald E. Cone, and Wendy E. Ojeda, Esq., Department of Energy, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency conducted meaningful discussions where, prior to oral presentation, agency provided protester with a written list of items that sufficiently alerted the protester to specific areas of its proposal considered weak or requiring further explanation; agency was not required to identify every aspect of the protester's proposal which received less than the maximum score.

2. Where weaknesses in a proposal are introduced in an offeror's best and final offer, agencies are not obligated to reopen discussions with that offeror to afford the firm an opportunity to cure those weaknesses.

3. General Accounting Office reviews procurements conducted competitively under section 8(a) of the Small Business Act, since award decisions are not purely discretionary and are subject to Federal Acquisition Regulation.

4. Agency may properly make award under section 8(a) of the Small Business Act to a small business concern which has completed its period of participation in the 8(a) program where the solicitation was issued as a competitive section 8(a) set-aside, the awardee was an 8(a) program participant eligible for award on the date set in the solicitation for receipt of initial proposals, and the awardee had submitted its initial proposal by that date.

DECISION

Gutierrez-Palmenberg, Inc. (GPI) protests the award of a contract to Systematic Management Services, Inc. (SMS) under request for proposals (RFP) No. DE-RP05-930R22081, issued by the Department of Energy (DOE) for technical services in support of DOE's environmental restoration program. The RFP was issued as a competitive, small disadvantaged business set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988 and Supp. V 1993).[1] The protester contends that the agency failed to conduct meaningful discussions with the firm. GPI also argues that the award was improper because SMS had completed its period of participation in the 8(a) program prior to award.

We deny the protest.

BACKGROUND

The RFP, issued on March 25, 1993, contemplated the award of a cost-plus-fixed-fee, 5-year contract. Offerors were required to submit separate technical/management and cost proposals. Section M of the RFP explained that technical proposals would be point scored using the following evaluation factors: (1) technical comprehension and approach; (2) personnel; (3) planning and organization; (4) experience; and (5) corporate commitment.[2] Cost would be evaluated for reasonableness and probable cost to the government. Award was to be made to the offeror whose proposal represented the best value to the government.

Of the 450 firms requesting the RFP, 19 firms, including the protester and the awardee, submitted proposals by the time set on May 18 for receipt of initial proposals. A source evaluation board (SEB) evaluated proposals, DOE conducted

[1]Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to provide for performance through subcontracts designed to assist "developing" small business concerns which are owned and controlled by designated disadvantaged individuals. See 13 C.F.R. Part 124 (1994); New Life Group, Inc., B-247080.2, May 22, 1992, 92-1 CPD ¶ 463.

[2]The RFP explained that factor Nos. 1 and 2 were the most significant and were of equal value. Evaluation factor Nos. 3 and 4 were of equal value and less important than factors Nos. 1 and 2. Evaluation factor No. 5 was of least importance. Within each evaluation factor, the RFP listed several subfactors of equal weight.

discussions with the firms whose proposals were included in the competitive range, including GPI, and requested best and final offers (BAFO) from those offerors. Based on the evaluation of BAFOs, SMS' proposal received the highest technical point score and proposed the lowest evaluated cost, and DOE awarded the contract to that firm. This protest to our Office followed.

ANALYSIS

Meaningful Discussions

The protester argues that the agency failed to conduct meaningful discussions with GPI. In this connection, GPI argues that DOE significantly downgraded its proposal based on weaknesses the SEB identified in GPI's BAFO which should have been apparent in its initial proposal, but were not pointed out to GPI during discussions. As a result, GPI asserts that it was improperly denied the opportunity to cure defects in its initial proposal which DOE failed to discover until after BAFOs.[3]

Contracting officers must balance a number of competing interests in selecting matters for discussion based on the facts of each acquisition. Federal Acquisition Regulation (FAR) § 15.610; Matrix Int'l Logistics, Inc., B-249285.2, Dec. 30, 1992, 92-2 CPD ¶ 452. They must point out weaknesses that, unless corrected, would prevent an offeror from having a reasonable chance for award. Department of the Navy--Recon., B-250158.4, May 28, 1993, 93-1 CPD ¶ 422. On the other hand, agencies are admonished by the FAR to protect the integrity of the procurement process by balancing the need for meaningful discussions against actions that result in technical leveling (FAR § 15.610(d)), technical transfusion (FAR § 15.610(e)(1)), or auctions (FAR § 15.610(e)(2)). Thus, agencies are not required to afford offerors all-encompassing discussions. They need only lead offerors generally into the areas of their proposals that require amplification. TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573. Where a proposal is considered to be acceptable and in the competitive range, an agency is not required to discuss every aspect of the proposal that receives less than the maximum score.

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[3]Initially, GPI also argued DOE improperly applied unannounced evaluation criteria to GPI's proposal, and that the evaluators disregarded GPI's experience with non-DOE contracts. The protester did not rebut the agency's response to these allegations. Accordingly, we consider GPI to have abandoned these protest bases. See Ross Aviation, Inc., B-236952, Jan. 22, 1990, 90-1 CPD ¶ 83.

Caldwell Consulting Assocs., B-242767; B-242767.2, June 5, 1991, 91-1 CPD ¶ 530.

The record shows that the SEB found that GPI's initial proposal was well written and overall acceptable. Of the maximum 1,000 technical evaluation points available, GPI's initial proposal received a total consensus score of 843 points, the highest technical score received by any proposal within the competitive range. The SEB's main concerns following the initial evaluation included GPI's summary treatment of applicable laws and regulations and their application to the DOE sites; GPI's organizational structure and flowchart for document review; GPI's reliance on the corporate resources of proposed subcontractors for contract performance; and that GPI did not adequately discuss the lines of authority, responsibilities, and interface with other contractors and with other regulatory agencies.

In a December 17 letter, DOE informed GPI that its proposal was included within the competitive range, and invited the firm to participate in oral discussions. DOE attached to that letter a document entitled "CLARIFICATIONS/ QUESTIONS/COMMENTS FOR ORALS [GPI] AREAS FOR TECHNICAL PRESENTATION/DISCUSSION," which contained 11 discussion items, separated into 4 main areas (technical approach, personnel, organizational approach, and team experience), corresponding to the general areas of concern.

Under the technical approach section, DOE specifically asked GPI to discuss its understanding of the applicable statutory scheme, the regulatory integration requirements, and DOE's environmental restoration program, including applicable agreements. DOE also asked GPI to discuss its proposed methodology for document tracking and review to assure regulatory compliance. Under the organizational approach section, DOE specifically requested that GPI explain its organizational structure and the responsibilities of the proposed positions, including the logistics of how the proposed team members would interact to assure that the prime contractor, i.e., GPI, maintained responsibility for the contract. DOE also asked GPI to explain how it would interface with other DOE contractors and regulatory agencies. These items tracked the weaknesses the SEB identified in GPI's initial proposal, clearly leading GPI to those areas in its proposal of concern to the evaluators. DOE requested that GPI address those specific points during an oral presentation on January 13, 1994. Following that presentation, DOE asked GPI to submit its BAFO.

The SEB evaluated the protester's BAFO and concluded that despite the specific discussion items, GPI had failed to adequately discuss its understanding of the applicable laws

and regulations, their application to DOE sites, and their implementation. The SEB found that GPI's document review process lacked detail, and that GPI did not appear to understand the importance of document tracking and review to verify regulatory compliance. As a result, the SEB downgraded GPI's proposal under evaluation factor No. 1, one of the two most important evaluation factors, awarding the firm a total of 184 points out of a maximum of 320 points for that factor. The SEB also downgraded GPI's proposal under evaluation factor No. 3 for failure to discuss how GPI would interact with other DOE contractors and other regulatory agencies.

In addition to not adequately responding to the SEB's concerns as identified in DOE's December 17 letter, the SEB concluded that GPI had made various changes in its BAFO unrelated to the discussion items which actually weakened its proposal. One of the most significant changes GPI made was the addition of another business as a team member which GPI had not previously identified in its initial proposal. The evaluators felt that GPI's relationship with this new team member was unclear and not finalized. The SEB also concluded that although GPI proposed a "team" approach to performing the contract with two other firms as team members, the "team" actually consisted of three separate firms, and it appeared as if the three companies would be performing the contract not so much as a "team," but as three separate entities.

The SEB viewed GPI's proposed "team" arrangement as a significant weakness in GPI's proposal, particularly since only one person from each of the three firms would actually be located at one site, and each of those individuals was assigned the dual role of being that company's representative and the key person for the contract. The SEB concluded that GPI's proposed approach could have a detrimental effect on the efficiency and coordination of activities. The SEB also concluded that GPI had not adequately identified the organizational roles and responsibilities for each team member, leaving the evaluators to guess at which member would be responsible for which tasks. As a result of these weaknesses, GPI's technical proposal lost a significant number of points under factor No. 3, "planning and organization," which was worth a maximum of 140 points. GPI's proposal received a total of 28 points under evaluation factor No. 3. Overall, GPI's technical proposal received a final consensus score of 644 points, the lowest score received by any proposal within the competitive range.

Contrary to the protester's assertions, the items DOE identified for discussion in its December 17 letter adequately led GPI into the weak areas of its proposal which

required explanation or amplification. The record shows that in some cases where the SEB downgraded GPI's BAFO, the protester had made either minor editorial changes or no substantive changes at all to its proposal, despite the fact that DOE specifically indicated the SEB's concerns in those areas. The fact that the protester's responses to DOE's discussion items and the changes to its BAFO did not overcome the SEB's concerns regarding weaknesses in GPI's initial proposal does not establish that the agency's discussions were inadequate.

GPI correctly notes that DOE did not raise in its discussion letter every weakness ultimately recorded in the evaluators' rating sheets following BAFOs which allegedly could have been identified in GPI's initial proposal; Agencies are not obligated, however, to discuss every aspect of a technically acceptable proposal that receives less than the maximum possible rating. See Johnson, Basin and Shaw, Inc., B-240265; B-240265.2, Nov. 7, 1990, 90-2 CPD ¶ 371. Here, GPI's initial proposal was the highest-rated (843 out of 1,000 points) in the competitive range, and, as already discussed, the agency's December 17 letter adequately pointed out those areas in GPI's proposal which required explanation or further clarification. Those weaknesses which the protester alleges were present in its initial proposal but were not discussed did not reflect the SEB's major concerns with GPI's BAFO.

The protester relies on our decision in Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168, to argue that "[e]ven if the agency did not recognize the supposed weaknesses until after the oral [presentation], it was nevertheless required to disclose them so that GPI could attempt to respond to its BAFO." In that case, we found that an agency had failed to conduct meaningful discussions where it twice requested BAFOs from an offeror, without apprising that offeror that its initial proposal contained a deficiency which rendered the proposal technically unacceptable. We stated that if a proposal is included in a second competitive range because it has a reasonable chance for award, then the agency must point out a deficiency that makes the proposal unacceptable.

By contrast here, DOE included GPI's initial highly rated proposal in the initial and only competitive range DOE developed for the procurement; DOE did not engage in subsequent rounds of discussions; and the weaknesses GPI alleges should have been apparent to DOE from its initial proposal did not render GPI's proposal technically unacceptable. Since DOE did not request subsequent BAFOs, and since we cannot reasonably conclude that those weaknesses were material to the acceptability of GPI's

proposal, the agency was under no obligation to point out those weaknesses to GPI.

To the extent that GPI assumed that it would be afforded other opportunities to revise its proposal if its BAFO was inadequate, there is no requirement that agencies notify offerors of deficiencies remaining in their BAFOs or conduct successive rounds of discussions until such deficiencies are corrected. See Honeywell Regelsysteme GmbH, B-237248, Feb. 2, 1990, 90-1 CPD ¶ 149. Where deficiencies are introduced in a BAFO, the agency is not obligated to reopen discussions to allow the firm to attempt to cure those deficiencies. ABB Power Co. T&D, Inc., B-246249, Feb. 6, 1992, 92-1 CPD ¶ 157. When GPI added a new team member to its proposal, whose role and responsibilities had not been previously identified, and which the SEB had not evaluated, GPI ran the risk that the SEB would have serious questions about that firm, and downgrade its proposal accordingly.

Awardee's Eligibility

The protester also argues that since SMS had completed its period of participation in the 8(a) program on August 31, 1993, award to the firm after that date was improper.

The facts in this regard are not in dispute. SMS submitted its initial proposal by the May 18 closing date established in the RFP. DOE had assigned the procurement Standard Industrial Classification (SIC) code 8744.[4] On June 23, the United States District Court for the District of Columbia enjoined the agency from taking further action under the RFP using SIC code 8744. See Analysas Corp. v. Bowles, 827 F. Supp. 20 (D.D.C. 1993).[5]

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[4]SBA establishes a ceiling (typically a dollar figure representing a firm's average annual receipts) for defined industries, each of which is referenced by a four-digit SIC code. See FAR Subpart 19.1. Firms must fall below the industry's ceiling in order to qualify as small businesses under that particular SIC code.

[5]Analysas challenged SBA's promulgation of the SIC code. SBA had relied on 13 C.F.R. § 121.301(c), which authorizes SBA to issue temporary SIC codes, as justification for not following the standard notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. (1988 and Supp. V 1993). The District Court held that the SBA had failed to show the type of emergency circumstances that could justify its failure to comply with the APA's notice and comment procedures, and enjoined the agency from taking any action under the RFP using that code.

On July 30, DOE amended the RFP by replacing SIC code 8744 with SIC code 8731. DOE distributed that amendment to all 450 firms that had initially requested the RFP and to the firms listed on DOE's mailing list under SIC code 8731. A letter accompanying the amendment explained that SIC code 8744 was no longer applicable to the procurement and that competition would be limited to 8(a) firms eligible under SIC code 8731. That letter further explained that firms which had previously submitted a proposal and were qualified under SIC code 8731 could, but were not required to, resubmit their proposals. Firms not resubmitting a proposal were to acknowledge the amendment in writing by September 3.

By letter dated August 25, SMS acknowledged the amendment, informed the agency that it would not modify or resubmit its proposal, and requested that DOE evaluate its proposal as previously submitted. SMS completed its period of participation in the 8(a) program on August 31, 1993. The agency awarded the contract to SMS on March 30, 1994.

As a preliminary matter, DOE and SMS argue that since SBA affirmed SMS' 8(a) eligibility on three occasions prior to award, and since SBA is the sole arbiter in determining section 8(a) program matters, our Office does not have jurisdiction to review this issue.[6] While the parties correctly argue that our review does not extend to matters that are solely within the purview of SBA, our Office will review competitive section 8(a) procurements for compliance with applicable procurement laws and regulations. See Morrison Constr. Servs., Inc., 70 Comp. Gen. 139 (1990), 90-2 CPD ¶ 499; Southwest Resource Dev., B-244147, Sept. 26, 1991, 91-2 CPD ¶ 295. Accordingly, we will review the award to SMS in this context.

Section 207 of the Small Business Administration Reauthorization and Amendments Act of 1990, Pub. L. No. 101-574, 104 Stat. 2814 (1990), amended section 8(a)(1) of the Small Business Act, 15 U.S.C. § 637(a)(1), by adding the following language under subparagraph (C), authorizing SBA to make an award to a small business concern owned and controlled by socially and economically disadvantaged individuals which has completed its period of program participation if:

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[6]The parties cite S and F Indus.--Recon., B-255134.2, Dec. 13, 1993, 93-2 CPD ¶ 314; Premier Cleaning Sys., Inc., B-249179.3, July 27, 1992, 92-2 ¶ 51 and Little Susitna, Inc., B-244228, July 1, 1991, 91-2 CPD ¶ 6, in support of their position.

> (i) the contract will be awarded as a result of an offer (including price) submitted in response to a published solicitation relating to a competition conducted pursuant to [this section]; and
>
> (ii) the prospective contract awardee was a Program Participant eligible for award of the contract on the date specified for receipt of offers contained in the contract solicitation. [Emphasis added.]

SBA interprets this provision to mean that so long as the firm was eligible on the date that it submitted its initial offer which included price, the firm would remain eligible for award despite changed circumstances prior to award.[7]

GPI points out that the District Court in Analysas, supra, enjoined the agency from taking any action under the RFP using SIC code 8744. GPI argues that by incorporating the new SIC code, DOE's action was tantamount to conducting a new procurement targeted at a different universe of offerors which were previously ineligible to compete. According to GPI, therefore, the original closing date (May 18, 1993) is not the appropriate date for determining whether SMS was a program participant eligible for award. Since DOE essentially conducted a new procurement and established September 3, 1993, as the new closing date for receipt of initial proposals from a different group of potential sources, GPI asserts that the appropriate date for determining whether SMS was a program participant eligible for award is September 3. GPI maintains that since SMS had completed its period of participation in the 8(a) program prior to that date, award to the firm was improper.

While it is clear that the amended RFP did not seek different services or modify the agency's minimum needs, by incorporating the new SIC code into the RFP, DOE invited participation by another group of potential sources previously ineligible to compete. Even assuming, however, that DOE's action significantly changed the field of competition--and therefore could be regarded as tantamount to conducting a new procurement--we think that SBA, the agency primarily responsible for administering and implementing section 8(a) of the Small Business Act, reasonably could conclude that SMS remained eligible for award under the amended RFP.

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[7] See Small Business Size Regulations; Minority Small Business and Capital Ownership Development, Final Rule, 59 Fed. Reg. 12,811, 12,816 (March 18, 1994) (to be codified at 13 C.F.R. § 124.311(i)).

In enacting section 207, Congress intended to avoid unfairly penalizing 8(a) firms that expend time and effort to prepare and submit a proposal during their period of 8(a) participation, but which because of unforeseeable circumstances complete their term in the program before the agency may make award. See Consolidated Indus., Inc., B-256278; B-256278.2, June 3, 1994, 94-1 CPD ¶ 343. Here, SMS was an active, eligible program participant that submitted a proposal by the May 18 closing date and obviously expended time, effort, and resources to prepare its proposal. As a result of the Analysas litigation, clearly an unforeseeable event not within SMS' control, the procurement was delayed and SMS completed its period of participation in the 8(a) program before DOE could award the contract. Since this appears to be the type of circumstance Congress had in mind in amending the Small Business Act, we think SBA, in interpreting the Act, could view section 637(a)(1)(C) as encompassing this situation.[8] We therefore find no violation of law or regulation.

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel

[8]Since SBA is charged with effectuating the congressional policies expressed in the Small Business Act, its interpretation and implementation of that law are accorded significant weight, CADCOM, Inc., 57 Comp. Gen. 290 (1978), 78-1 CPD ¶ 137, and thus we will not object to SBA's position unless it is clearly contrary to law. See J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-2 CPD ¶ 322.