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Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Scheduled Airlines Traffic Offices, Inc.

File: B-256288.2; B-256288.3

Date: August 31, 1994

DECISION

Scheduled Airlines Traffic Offices, Inc. (SATO) protests the award of a contract to Wagonlit Travel by the Department of the Army under request for proposals (RFP) No. DAJA37-93-R-0223, to manage and operate a network of commercial travel offices at military installations in Germany, Italy, Belgium and the Netherlands. SATO protests that certain terms of the RFP (concerning the combination of both official and unofficial (leisure) travel services in one procurement) are unlawful and that Wagonlit's contract will unlawfully divert appropriated funds to nonappropriated fund instrumentalities (NAFI). SATO also protests that the agency failed to follow stated evaluation criteria for award, improperly considered the protester's and awardee's technical proposals essentially equivalent in quality, and permitted an inherent conflict of interest of one technical evaluator which tainted the evaluation of proposals.

We dismiss the protest; several of the protest issues are untimely and the remainder of the issues fail to establish a basis for challenging the agency's actions.

The RFP, issued on October 15, 1993, contemplated award of a contract for both official travel and unofficial (leisure) travel services at no cost to the government where the successful contractor is compensated through commissions it receives from industry travel providers (e.g., airlines, hotels and transportation providers.) The RFP provided for the contractor to pay the government a percentage of the fees and commissions earned from its travel sales--for official travel services, offerors were to propose a discount on the prices otherwise charged for travel or a rebate payable to the U.S. Treasury; for unofficial travel services, offerors were to propose a concession fee to be directed to the local Morale, Welfare and Recreation (MWR) fund, a NAFI.

Section M of the RFP set forth the following evaluation factors for award, listed in descending order of importance; official travel; unofficial travel; and discount/concession/commission fee. The RFP, as initially amended, required offerors to propose a mandatory minimum 3 percent discount for official travel sales and a 6 percent concession fee for unofficial travel sales. These mandatory minimum fees were eliminated by subsequent amendment to the RFP (following a protest of those terms by SATO.) That amendment changed the mandatory minimum fee requirement to a desirable element and advised offerors that the discount/concession/commission fee, although not independently point scored in the evaluation of proposals, could become the determinative factor among essentially equivalent technical proposals in the final source selection.

Three proposals were received by the April 25, 1994, amended closing date for the receipt of proposals. The proposals submitted by SATO and Wagonlit were included in the competitive range. The agency determined the two proposals to be essentially equal technically and awarded the contract to Wagonlit based upon its higher total (official and unofficial travel) commission fee offered. SATO's protest followed. SATO subsequently supplemented its protest on the basis of a post-award debriefing held with the firm on July 26.

SATO initially protests the procurement of both official and unofficial travel services under the RFP as violative of the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b) (1988). SATO contends that due to the combination of services in one award, any payment through the proposed concession fee for unofficial travel to the MWR fund would be unlawful since any public monies received by the government from the contractor must be deposited into the U.S. Treasury, not a NAFI. SATO also contends that since the Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4)(B) (Supp. III 1991), and the terms of the RFP require award to be made to the offeror offering the proposal most advantageous to the government, the agency improperly evaluated proposals on the basis of unofficial travel services proposed; SATO contends the leisure travel services solicited by the RFP provide no direct benefit to the government and should not have been considered in the evaluation for award.

We dismiss this aspect of the protest which concerns the evaluation of unofficial travel as untimely because it challenges alleged improprieties in the solicitation that were apparent prior to the initial closing date for the receipt of proposals. Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These

rules 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) (1994); Englehard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324.

These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process, Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. In order to prevent these rules from becoming meaningless, exceptions are strictly construed and rarely used. Id. Although the protester requests that we consider the merits of these protest issues even if untimely filed, the record does not support SATO's position that good cause has been shown as to why the protester could not have filed the protest in a timely fashion. Further, the challenges of combining official and unofficial travel in one procurement, and of the agency's determination that unofficial travel services were appropriate for evaluation, do not present the type of issues which we consider significant to the procurement community as a whole to allow exception to our longstanding timeliness rules.

SATO next protests that the award to Wagonlit is improper because the protester believes its proposal was superior to Wagonlit's and the agency improperly gave more weight to Wagonlit's higher concession fee for unofficial travel than to SATO's higher discount rate for official travel.

We dismiss these protest contentions since they do not establish bases for challenging the agency's action. Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds of a protest, 4 C.F.R. § 21.1(c)(4), and that the grounds stated be legally sufficient. 4 C.F.R. § 21.1(e). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Robert Wall Edge--Recon., 68 Comp. Gen. 352 (1988), 89-1 CPD ¶ 335.

SATO states that it believes its proposal was superior to the awardee's, yet the protester does not provide sufficient factual information to establish the likelihood that the agency acted unreasonably in finding the two proposals essentially equivalent technically. SATO does not challenge Wagonlit's qualifications but rather generally protests the evaluation process without providing any support for its allegations of improper action. The protester's speculation

in this regard is insufficient to constitute a valid basis of protest. The allegation that the agency failed to follow stated evaluation criteria by giving additional weight to Wagonlit's higher unofficial travel concession fee is also insufficient to constitute a valid basis of protest since the RFP provided for a comparison of total fees (including official and unofficial travel) proposed and stated that such comparison could be the determinative factor for award among essentially equal proposals. Although SATO contends the agency favored Wagonlit's decision to propose a fee structure similar to that initially included in the amended RFP as mandatory minimum amounts, which were later deleted from the RFP, the RFP provided for the agency's consideration of total proposed fees among essentially equal proposals. Nothing in the protest shows that Wagonlit's proposed fees were the result of anything other than the firm's exercise of its own judgment based upon the same information available to all offerors. SATO's speculation that the agency gave improper weight to unofficial travel fees is unsupported by the record since Wagonlit's total proposed fees were higher than SATO's. Thus, the protester's allegations of impropriety in this regard do not provide sufficient factual information to establish the likelihood that the agency here violated applicable procurement laws and regulations.

SATO also states that since Wagonlit's concession fee for unofficial travel is almost twice as high as the awardee's discount rate for official travel, Wagonlit will unlawfully divert appropriated funds (related to official travel) to the MWR fund. The protester, however, does not provide sufficient factual information in this regard to constitute a valid basis of protest. The RFP allowed for the disparity in proposed official and unofficial travel concession fees and strictly prohibited the commingling of such fees. It further required the contractor to establish internal controls for subsequent audit to ensure the two types of travel transactions are separate. As submitted, this matter concerns contract administration which is not reviewed by our Office. 4 C.F.R. § 21.3(m)(1). In any event, SATO provides no evidence to support its unsubstantiated allegations that Wagonlit will nevertheless commingle the funds it receives and transfer official travel commissions to the unofficial travel concession fees it proposed to pay toward the MWR fund. Since these protest allegations are insufficient to constitute valid bases of protest, they must be dismissed without further action.

Finally, SATO challenges the agency's evaluation in light of the presence on the source selection evaluation board (SSEB) of an Army MWR fund employee who, SATO contends, has an "obvious interest in maximizing the amount" of MWR payments versus the quality of the services to be provided. SATO

contends that this "inherent conflict of interest . . . unacceptably taints the evaluation process." In response to this allegation, the agency reports that the SSEB members were not given cost proposal information, including proposed discounts and concession fees, and therefore, no bias, as alleged by the protester, could have been realized despite any member's affiliation with the MWR since the SSEB did not know which proposal offered the greatest economic benefit to the MWR. In response to the agency's explanation, SATO states that its protest contention should not be summarily dismissed without the protester's receipt of a full report on the merits of the evaluation and notes that even without the cost information, the SSEB member still could have unfairly favored the unofficial travel aspects of the technical proposals. The protester, however, again does not provide sufficient factual information to show how any such alleged bias favored the awardee over other offerors or otherwise affected the evaluation.

In the absence of any specific allegation supported by evidence of bias in the evaluation of proposals, procurement authorities are presumed to act in good faith. See SDA Inc., B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ 320. Since the SSEB was not given cost proposal information, we do not believe SATO has presented sufficient factual information to establish the likelihood that the agency here violated applicable procurement laws or regulations; SATO's protest does not establish any basis upon which the SSEB member's affiliation with the MWR made it inappropriate for him to participate on the SSEB in evaluating the travel service proposals here. Therefore, this protest issue must be dismissed without further action. Robert Wall Edge--Recon., supra.



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