



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Xerxe Group, Inc.

File: B-280180.2; B-280180.3; B-280180.4

Date: September 28, 1998

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DIGEST

Neither the Small Business Act nor any other statute precludes a contracting agency from comparatively evaluating the proposal of a small disadvantaged business concern where the solicitation's evaluation factors contemplate such an evaluation.

DECISION

The Xerxe Group, Inc. protests the award of contracts to any other offerors under requests for proposals (RFP) Nos. SP0600-97-R-0055-0109 (-0109), SP0600-R-0055-0110 (-0110), and SP0600-97-R-0055-0111 (-0111), issued by the Defense Energy Support Center, Defense Logistics Agency (DLA), for the direct supply of natural gas to various installations in the United States. Xerxe, a small disadvantaged business (SDB) concern, protests the agency's evaluation of its proposals.

We deny the protests.

The protested natural gas requirements were originally to be procured under RFP No. SP0600-97-R-0055 (-0055), issued on June 4, 1997. This RFP provided for the award of fixed-price with economic price adjustment, indefinite-delivery type contracts, or the issuance of basic ordering agreements (BOA), depending on the contract line item number (CLIN). RFP -0055 stated that award would be made to the offeror submitting the offer determined to be the best value to the government, and listed the following evaluation factors in descending order of importance:

- (1) Technical Experience
 - (A) Transportation
 - (B) Supply Management
 - (C) Quality of Previous Experience

- (2) Past Performance
 - (A) Timeliness
 - (B) Reliability
 - (C) Customer Satisfaction¹
- (3) Price
- (4) Socioeconomic Commitment

The RFP specified that technical experience was more important than past performance, and that technical experience and past performance combined were significantly more important than price. RFP at 176. The RFP added that price was significantly more important than socioeconomic commitment. In addition, the RFP provided for a 10-percent evaluation preference for SDB concerns, whereby 10 percent would be added to the total prices (for evaluation purposes only) of all non-SDB concerns' offers prior to the source selection decision. RFP at 203.

The RFP set forth detailed instructions for the preparation of proposals. Specifically, it required that offerors, among other things, complete the pricing sheets and technical experience form included in the RFP. RFP at 175. The technical experience form solicited detailed information regarding, among other things, the offeror's experience in transporting natural gas, in performing supply management, and in handling previous or current contracts with similar end users, and the experience of certain of the offeror's personnel. RFP Attachment II. The RFP explained that the offerors' completed technical experience forms would be used in evaluating the offerors' proposals under the technical experience and past performance evaluation factors and their relevant subfactors. RFP at 176-77.

Xerxe responded to RFP -0055 by completing certain of the solicitation's standard forms, indicating its intention to enter into BOAs and/or contracts, and providing a narrative technical proposal, which included a "Company Profile & Capability Statement," a "Financial Information" section, and a section purportedly describing its "Natural Gas Supply Sources." Xerxe's submission did not, however, include a completed technical experience form or much of the information required for completion of the form.

The agency subsequently informed Xerxe that it could not evaluate Xerxe's proposal as submitted, and sent Xerxe a blank copy of the technical experience form that had been included in the RFP, and requested that Xerxe complete it. Xerxe responded by completing a small portion of the form, identifying three transportation agreement numbers and the CLINs it expected to deliver via the

¹The RFP provided that the technical experience subfactors were listed in descending order of importance, while the past performance subfactors were equal in importance. RFP at 177.

applicable pipelines, and the names of three individuals and each individual's years of experience. Xerxe's submission did not include any other information.

Based on its submission, Xerxe's proposal was rated as "poor" under the technical experience factor. The proposal received a "neutral" rating under the past performance evaluation factor because it did not provide any information regarding Xerxe's experience in supplying natural gas. Xerxe's proposal received a "good" rating under the socioeconomic commitment evaluation factor, even though it did not provide any information in response to this factor, because a rating of "good" was the lowest permitted by the relevant source selection plan.

Because of certain delays, the agency was unable to enter into BOAs or contracts in time to fulfill its monthly requirements for certain of the locations included in RFP -0055. Instead of proceeding under RFP -0055 for these locations, the agency decided to issue to all offerors that had expressed an interest in entering into a BOA or contract for these locations new RFPs for the relevant locations' monthly requirements. These RFPs incorporated by reference the terms of RFP -0055.

Xerxe responded to RFP No. SP0600-97-R-0055-0106 (-0106), which represented the March requirements for certain locations. Although Xerxe's prices under the relevant CLINs were low once the SDB evaluation preference was considered, Xerxe's proposal was determined not to represent the best value because of the awardee's ratings of "excellent" under the technical experience and past performance evaluation factors, and of "very good" under the socioeconomic commitment evaluation factor--in comparison to Xerxe's ratings of poor, neutral, and good under, respectively, the technical experience, past performance, and socioeconomic commitment evaluation factors--and the awardee's evaluated price, which was only slightly higher (considering the SDB evaluation preference) than that proposed by Xerxe.

After being informed that it was not the awardee under RFP -0106, Xerxe requested and received a debriefing. In response to the debriefing, Xerxe submitted additional materials concerning its technical experience and past performance. The additional material consisted primarily of a narrative technical proposal that was virtually identical to that initially submitted by Xerxe on RFP -0055. The agency reevaluated Xerxe's proposal considering this additional information, and again rated it under the technical experience, past performance, and socioeconomic commitment evaluation factors as poor, neutral, and good, respectively, and let the RFP -0106 award stand.

RFPs -0109, -0110, and -0111, which were released in May, June, and July, respectively, represent the agency's June, July, and August natural gas requirements for certain locations. Xerxe submitted offers in response to each RFP. Again, although after the application of the SDB evaluation preference Xerxe's proposed prices were lower than the prices of the respective awardees, its proposals were

determined not to represent the best value because of Xerxe's relatively low ratings vis-à-vis the relatively high ratings of the awardees, which had only slightly higher evaluated prices (including the SDB evaluation preference) than those proposed by Xerxe.

Xerxe protests that DLA is without authority to evaluate Xerxe's proposal, which relies upon its suppliers' experience and technical capabilities, and rate it negatively under the various evaluation factors. In Xerxe's view, only the Small Business Administration (SBA) has such authority because Xerxe qualifies as an SDB concern.

Congress has established for the Department of Defense (DOD) a goal of 5 percent of the contract funds obligated each fiscal year for the award of contracts and subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals.² 10 U.S.C. § 2323(a) (1994 & Supp. II 1996). Section 2323 provides that section 8(d) of the Small Business Act, 15 U.S.C. § 637(d) (1994 & Supp. II 1996), and regulations under that section, govern the determination of whether a business is small and whether it is owned and controlled by socially and economically disadvantaged individuals. Consistent with this, the Small Business Act explicitly vests SBA with the authority to determine whether a prospective federal government contractor can properly be considered an SDB concern. 15 U.S.C. § 636(j)(11)(F)(vii) (1994); Hatco Corp., B-270545, Mar. 21, 1996, 96-1 CPD ¶ 161 at 3. The SBA also has conclusive authority to determine the responsibility of an SDB concern. See 15 U.S.C. § 637(b)(7) (1994); Advanced Resources Int'l, Inc.-Recon., B-249679.2, Apr. 29, 1993, 93-1 CPD ¶ 348 at 2.

That being said, there is nothing in the Small Business Act, or any other statute or regulation, that precludes an agency in its conduct of a procurement from comparatively evaluating the proposal of an SDB concern under the evaluation factors or criteria set forth in the relevant solicitation, as was done here. Advanced Resources Int'l, Inc.-Recon., supra., at 3. Where an offer receives less than the highest possible rating in the context of a comparative evaluation conducted under the criteria specified in an RFP, the matter is one of technical merit (or lack thereof), and not one of responsibility or small business or SDB concern status, which could be the subject of SBA review. D. M. Potts Corp., B-247403.2, Aug. 3, 1992, 92-2 CPD ¶ 65 at 7. Accordingly, Xerxe's protests that the contracting agency is without authority to comparatively evaluate its proposal under the various evaluation criteria are without merit.

²The DOD implementation of this legislation appears in part 219 of the Defense Federal Acquisition Regulation Supplement (DFARS). This regulation lists the inclusion in solicitations of an evaluation preference for SDBs, as was done here, as one means of meeting this goal. See DFARS §§ 219.7000-7003, 252.219-7006.

Xerxe protests the agency's evaluation of its proposal under the supply management subfactor of the technical experience evaluation factor. Specifically, while Xerxe's proposal did not address supply management, it argues that it should not have been found deficient with regard to the "pipeline supply management requirement" because that requirement "simply does not apply to the purchase and resell of Citygate supplies."³ Protest, June 19, 1998, at 3.

There is no indication in the RFP that the supply management evaluation subfactor is not applicable to natural gas supplies procured through the citygate. According to the agency, this is so because an offeror is still responsible for supply management by balancing the particular installation's account with the local distribution company. Agency Report at 18. The agency reports that, even when citygate supplies are procured, the contractor must still monitor the installation's consumption to make sure sufficient natural gas is available and purchased at the citygate to satisfy the installation's needs, thus keeping the installation's account with the local distribution company within balance. *Id.* Because the protester has not substantively responded to the agency's explanation, we have no basis to find it unreasonable.

Xerxe also protests its evaluation under the socioeconomic commitment factor. The record shows that, even if this aspect of its protest were meritorious, Xerxe would not be prejudiced since it could not reasonably affect the award selection, given the very little weight accorded this factor in the RFP evaluation scheme, and the significant superiority of the awardees under the other, more heavily weighted technical factors that offset the awardees' only slightly higher evaluated prices. *See McDonnell Douglas Corp.*, B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 17, 27-28.

Xerxe finally complains that the agency "is without authority . . . to render an adverse determination as to [Xerxe's] . . . eligibility for SDB assistance programs." Protester's Comments at 2. The record reflects that the agency considered Xerxe an SDB concern, and thus entitled to the SDB evaluation preference set forth in the RFPs, in making its award determinations under RFPs -0109, -0110, and -0111. The agency has not, as implied by the protester's assertion, determined Xerxe to be other than an SDB concern. Although the record reflects that the agency does have

³The natural gas industry is comprised of three major segments: (1) the wellhead or production segment, in which natural gas is extracted from the ground; (2) the pipeline or transmission segment, in which the gas is transported by pipeline to the citygate; and (3) the local distribution segment in which utility companies and/or local distribution companies distribute the gas locally to commercial and residential customers. The "citygate" is the connection between the pipeline and the local distribution segment. *Commercial Energies, Inc.*, B-240148, Oct. 19, 1990, 90-2 CPD ¶ 319 at 2-3 nn.2, 4.

some concern as to whether Xerxe can properly be considered an SDB for future procurements, and has requested that Xerxe provide information regarding Xerxe's source of supply of the natural gas, any protest that the agency may not consider Xerxe eligible for the SDB evaluation preference essentially anticipates action in the future that might never arise. Protests that merely anticipate improper agency action are speculative and premature, and will not be considered by our Office. Safety-Kleen Corp., B-274176, B-274176.2, Nov. 25, 1996, 96-2 CPD ¶ 200 at 6.

The protests are denied.

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of the United States