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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Delphinus Engineering, Inc.

File: B-296902; B-296902.2

Date: September 20, 2005

Joseph G. Billings, Esq., and Philip A. Tordella, Esq., for the protester. Terence Murphy, Esq., and Patrick H. O'Donnell, Esq., Kaufman & Canoles, for Q.E.D. Systems, Inc.; Daniel R. Weckstein, Esq., Stephanie M. Himel-Nelson, Esq., and Michael L. Sterling, Esq., Vandeventer Black LLP, for Tecnico Corporation; and Michael J. Gardner, Esq., Troutman Sanders, for George G. Sharp, Inc., the intervenors.

Catherine Kellington, Esq., Department of the Navy, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The protester--a section 8(a) qualified business--had no basis to expect that the agency would award it a contract as the only 8(a) offeror submitting a technically acceptable proposal, where the solicitation was issued on an unrestricted basis and stated that award would be made to the offerors submitting the proposals determined to be most advantageous to the agency considering the listed technical factors and cost.

2. The agency's evaluation of the protester's response to a sample task order did not have to consider protester's performance on another contract not identified in the protester's proposal.

DECISION

Delphinus Engineering, Inc. protests its failure to receive a contract under request for proposals (RFP) No. N65540-03-R-0001, issued by the Department of the Navy, for engineering and technical support services to support the installation and repair of various ship habitability areas. Delphinus argues that the agency was required to award it a contract because Delphinus was the only firm certified under the Small Business Administration's (SBA) section 8(a) program to have submitted a

technically acceptable, competitively priced proposal, and that the agency's evaluation of its proposal was unreasonable.¹

We deny the protest.

The RFP, issued on an unrestricted basis on June 25, 2003, provided that the agency would award a single or multiple indefinite-delivery/indefinite-quantity cost-plus-fixed-fee task order contract or contracts for the required services. The solicitation stated that awards would be made to the offerors submitting the proposals "determined most advantageous to the Government" based upon the following evaluation factors: cost, corporate experience/past performance, sample task order/technical approach, personnel, management/quality assurance plan, and facilities. The RFP, as amended, informed offerors that all of the evaluation factors other than cost, when combined, would be significantly more important than cost. With regard to the non-cost factors, the RFP provided that the corporate experience/past performance factor was most important, with the sample task order/technical approach, personnel, and management/quality assurance plan factors being equal in importance and each more important than the facilities factor.² RFP at 72. The solicitation included detailed proposal preparation instructions and informed offerors that oral presentations would be required.

The agency received proposals from five offerors, including Delphinus, by the September 5, 2003 closing date. The offerors' technical and cost proposals were evaluated, and all five proposals were included in the competitive range. Agency Report (AR) at 4; Tab 21, Pre-Negotiation Business Clearance Memorandum (BCM), at 1. Discussions were conducted, the offerors' responses were received and evaluated, and final revised proposals (FRP) were requested and received. AR at 4; AR, Tab 21, Written Discussion Letters; Tab 24, FRP Requests. The agency's final evaluation results were as follows:

¹ Section 8(a) of the Small Business Act authorizes the SBA to contract with government agencies and arrange for the performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (2000).

² Each of the technical factors included subfactors.

Offeror	Technical Score ³	Evaluated Cost
Sharp	91.99	\$392,770,263
Tecnico	88.73	\$421,483,740
Q.E.D.	86.15	\$413,762,176
[DELETED]	71.92	\$417,681,683
Delphinus	71.10	\$412,161,109

AR, Tab 25, Post-Negotiation BCM, at 5. The agency determined that the proposals of Sharp, Tecnico, and Q.E.D. represented the best value to the agency, and awarded contracts to those firms.⁴ After requesting and receiving a debriefing, Delphinus filed this protest.

Delphinus primarily argues that because it was certified under the section 8(a) program, and submitted a technically acceptable, competitively priced proposal, the agency was required to award Delphinus a contract. The protester explains that the services sought under the RFP had “[h]istorically . . . been performed under the 8(a) program,” and that when the agency “sought to remove the Habitability work from the 8(a) program,” Delphinus objected, and an agreement was reached “to remove the requirements under RFP N65540-03-R-0001 from the 8(a) program,” but this “agreement was predicated on several conditions, including that [the agency] would award at least one contract to an 8(a) concern as long as the 8(a) concern submitted a technically acceptable, competitive offer.” Protest at 1. While Delphinus has not provided a written copy of this agreement, it points to certain correspondence as well as declarations submitted by a former employee of the SBA to show the existence of the agreement. Delphinus also notes that one of the notices of this procurement action, posted in Federal Business Opportunities (FedBizOpps) on January 10, 2003, announced that although the procurement was “unrestricted” it “is anticipated that at least one award will be made to a small business and one to an 8A business provided that they are technically acceptable and competitive pricing is obtained.” AR, Tab 7, FedBizOpps Notice (Jan. 10, 2003), at 2.

As explained below, we find no merit to Delphinus’s arguments that the agency was required to award it a contract under the RFP because it was the only 8(a) firm to submit an acceptable proposal, and to the extent that Delphinus’s arguments are intended as challenges to the terms of the solicitation, the arguments are untimely.

The Competition in Contracting Act of 1984 (CICA), as implemented by the Federal Acquisition Regulation (FAR), requires that solicitations include a statement of

³ The technical scores are out of a possible 100 points.

⁴ The three awardees will compete for delivery orders for the required services. AR at 5.

evaluation factors and their relative importance, and further requires that agencies evaluate and select proposals for award based solely on the terms of the solicitation. 10 U.S.C. §§ 2305(a)(2)(A), 2305(a)(3)(A), 2305(b)(1) (2000); FAR §§ 15.203(a); 15.303; 15.304; 15.305; 15.308. As set forth above, the RFP here included cost and non-cost evaluation factors, and provided for award based upon a determination, consistent with the evaluation of proposals under the stated evaluation factors, as to which proposals were most advantageous to the government. The solicitation did not indicate in any manner that awards would be made to a small business and/or an 8(a) concern provided its proposal was determined technically acceptable and competitively priced (as opposed to being the most advantageous to the government); nor did the solicitation provide that any evaluation preference would be applicable to proposals submitted by either small businesses or 8(a) concerns; nor did the solicitation state that it was totally or partially set-aside for eligible section 8(a) concerns.⁵ As such, and contrary to Delphinus's position, it would have been wholly improper under the terms of the RFP for the agency to have awarded a contract to Delphinus on the basis that Delphinus had submitted a technically acceptable, competitively priced proposal.

Delphinus nevertheless argues that the agency is required to award it a contract because it was assertedly orally advised by the cognizant contracting officer that because the solicitation provided for multiple awards, it was consistent with the purported agreement—that is, that the agency would award a contract to an 8(a) concern as long as it submitted a technically acceptable, competitively priced proposal. Protester's Comments at 13.

Delphinus's interpretation of the solicitation's award provisions is unreasonable. The fact that the solicitation provided for multiple awards cannot reasonably be interpreted as requiring that one of the contracts be awarded on a completely different basis than that authorized by the solicitation's terms. Regardless of what any agency official may have said, the RFP simply did not provide for the award of a contract to an 8(a) concern that submits a technically acceptable proposal. Accordingly, any verbal assurances that Delphinus believes it received in this regard are without effect. In this regard, the unambiguous terms of the solicitation control,

⁵ Generally, an evaluation preference for SDB concerns provides that the price of each non-SDB offeror will be evaluated by adding a factor of 10 percent to the actual price offered. See FAR § 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business (SDB) Concerns. Additionally, solicitations may be set aside for section 8(a) concerns under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), which, as noted previously, authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. These subcontracts may be awarded on a competitive or noncompetitive basis. FAR § 19.800.

even if we assume for the sake of argument that agency officials provided conflicting oral advice; oral advice even from a contracting officer is not binding on the government, and an offeror relies on oral advice that is inconsistent with a solicitation's terms at its peril. Accurate Automation Corp., B-292403; B-292403.2, Sept. 10, 2003, 2003 CPD ¶ 186 at 6; Diamond Aircraft Indus., Inc., B-289309, Feb. 4, 2002, 2002 CPD ¶ 35 at 2. In short, Delphinus had no reasonable basis to believe that an award was required to be made to an 8(a) concern submitting an acceptable proposal, and to the extent it believes that RFP should have so provided, the allegation is an untimely challenge of an alleged impropriety in the terms of the solicitation, which was required to have been filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2005).

The protester also asserts, in a supplemental protest and in its comments on the agency report, that the agency's "removal of the procurement from the 8(a) program" was improper. Protester's Comments at 2. The protester specifically argues here that "the Agency failed to follow the regulations relating to locating 8(a) sources before determining that the habitability work should be procured on an unrestricted basis," and "did not follow the regulations for justifying bundling habitability work where the work was previously performed by two 8(a) contractors." Supplemental Protest at 24-25. The protester also argues that the agency improperly failed to provide the SBA with the appropriate documents prior to proceeding with the issuance of the solicitation on an unrestricted basis, and "fraudulently induced the SBA into agreeing to remove the habitability work from the 8(a) program and procuring the work on an unrestricted basis." Supplemental Protest at 25.

These arguments, raised well after the award of contracts under the RFP, are untimely and not for consideration. The record reflects that the protester was clearly aware of the agency's "removal of the requirement from the 8(a) program" as early as December 2002 and was aware of the unrestricted nature of the RFP upon its issuance. Accordingly, any protest challenging the agency's issuance of the solicitation on an unrestricted basis should have been filed by the solicitation's September 3, 2003 closing date. 4 C.F.R. § 21.2(a)(1); Global Bus. and Legal Servs., B-290381.2, Dec. 26, 2002, 2002 CPD ¶ 222 at 5; JCI Env'tl. Servs., B-250752.3, Apr. 7, 1993, 93-1 CPD ¶ 299 at 8 n.6.

Delphinus also argues that the agency's evaluation of its proposal under the sample task order/technical approach factor was unreasonable.⁶ In reviewing protests

⁶ In its initial protest, but in no later submission, Delphinus also argued that the agency improperly evaluated it under the corporate experience/past performance evaluation factor and did not conduct meaningful discussions. Where, as here, an agency submits a detailed response to protest arguments, and the protester makes no further mention of an issue, we deem the issues abandoned. Citrus Coll.; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8.

against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the evaluation factors set forth in the RFP. The protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. Hanford Env'tl. Health Found., B 292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 4.

The RFP required that proposals include, among other things, the offeror's response to a sample task order, including the submission of a "written proposal documenting the labor categories, labor hours, materials, subcontracts and Other Direct Costs" for the sample task order's performance. The solicitation explained that, among other things, the offerors' responses would be evaluated to assess the "offerors['] overall understanding of the work required, the alteration process, their ability to assign the proper personnel, and their ability to perform the work." RFP at 63. The RFP also informed offerors of the specific types of questions that the agency would consider as proposals were evaluated under the sample task order portion of the sample task order/technical approach factor, such as "To what extent has the offeror identified a proper mix of management/engineering and technician/trade personnel?" or "Does the offeror provide a reasonable explanation for the costs of materials, subcontracts, travel, and other miscellaneous expenses?" RFP at 64.

The agency evaluated Delphinus's initial proposal, and determined that while Delphinus's "QA [quality assurance] workbook was good," its "cost estimate was questionable compared with the government estimate." AR, Tab 20, Initial TEB Report, at 9; see Tab 21, Pre-Negotiation BCM, at 54. The agency also noted that "[a] few labor category man-hour estimates were low while some material costs were high." Id. Delphinus's proposal received a rating of 12.17 out of 20 points under the sample task order/technical approach factor.

Written discussions were held with each of the offerors, including Delphinus. With regard to its response to the sample task order, the agency identified the following as one of the "Prime Technical Issues":

Delphinus needs to revisit the technical requirements and costs submitted as part of the sample task order. Some costs as well as labor hour estimates were not comparable to the Government estimate. In addition, the contractor needs to revisit timeframes associated with the tasks.

The agency's discussion letter concluded by requesting that Delphinus "submit an explanation" regarding each of the issues raised, including Delphinus's response to the sample task order. AR, Tab 22, Agency Discussion Letter to Delphinus (Oct. 27, 2004).

The agency evaluated Delphinus's response to discussions, and found that Delphinus's revised response to the sample task order "proposed changes in labor hours required and the shortening of the time frame from 11 to 9 weeks." AR, Tab 23, Supplemental TEB Report, at 7; Tab 25, Post-Negotiation BCM, at 36. Given the agency's determination that Delphinus's estimate was "considerably under the government estimate, which was used as a benchmark," the agency concluded that Delphinus's proposed "unrealistic timeframe does not provide support that Delphinus maintains the technical expertise to perform valid estimates." AR, Tab 23, Supplemental TEB Report, at 7; Tab 25, Post-Negotiation BCM, at 36. The agency thus reduced Delphinus's proposal's rating under the sample task order/technical approach factor from 12.17 to 11.5 out of 20 points.

In challenging the agency's evaluation of its proposal under the sample task order/technical approach factor, Delphinus argues that the sample task order "involved the same work that personnel at Delphinus Engineering had performed on the USS ABRAHAM LINCOLN," and that "[i]t should have been clear to the Agency that the shortened time frame and reduced costs resulted from efficiencies generated by experience gained by Delphinus Engineering in performing the same work on another ship." Protest at 16; see Protester's Comments at 37. Delphinus asserts that the agency "had the ability to verify Delphinus Engineering's statements regarding shorter time frames and lower costs . . . by checking with the Navy customer for the USS Abraham Lincoln," and that the agency was required to do so. Protester's Comments at 37. Delphinus also attached the declaration of a Delphinus employee to its comments on the agency report that explains the development of Delphinus's response to the sample task order and why in Delphinus's view its proposed labor hours and costs were realistic. Protester's Comments, attach., Declaration of Delphinus Program Manager/Business Development.

We find the agency's evaluation of Delphinus's proposal under the sample task order/technical approach factor reasonable. Specifically, the record reflects that the agency found Delphinus's proposed response to the sample task order to be unrealistic with regard to certain of the labor hours and costs proposed, and requested that Delphinus review its estimates and provide an explanation regarding its response to the sample task order. The record provides that Delphinus did not provide any explanation regarding the costs and labor hour estimates set forth in its response to the sample task order. See Protest at 16; AR, Tab 11E, Delphinus's Revised Response to the Sample Task Order. Although the protester submitted in its comments on the agency report an explanation regarding the development of its sample task order and why it believes that its proposed costs and labor hours are reasonable, this analysis provides no basis on which to question the agency's evaluation of Delphinus's proposal, given the protester's failure to provide any such analysis or explanation to the agency during the conduct of the procurement. GEC-Marconi Elec. Sys. Corp., B-276186; B-276186.2, May 21, 1997, 97-2 CPD ¶ 23 at 7.

Additionally, and contrary to the protester's assertion, Delphinus's response to discussions did not explain or otherwise state that Delphinus had performed the same or similar work on the USS Abraham Lincoln.⁷ Moreover, even if we assume that Delphinus had informed the agency that it had performed the same or similar work on the USS Abraham Lincoln, this alone would not render the agency's evaluation unreasonable. The solicitation specifically advised that "offerors must provide details concerning what the contractor will do and how it will be done," including "a full explanation of the techniques, disciplines, and procedures proposed to be followed." RFP at 62. Given the solicitation's requirements that offerors provide details regarding their proposals, the agency could reasonably decline to accept Delphinus's cost and labor hour estimates supported solely by a statement that Delphinus had performed the same or similar work previously. We also note that contrary to the protester's assertion, the agency was not required to "verify Delphinus Engineering's statements regarding shorter time frames and lower costs . . . by checking with the Navy customer for the USS Abraham Lincoln," even assuming such statements were made. See Protester's Comments at 37. This is so because an offeror bears the burden for failing to submit an adequately written proposal, and contracting agencies are not obligated to go in search of needed information which the offeror has omitted or failed to present. Fluor Daniel, Inc., B-262051, B-262051.2, Nov. 21, 1995, 95-2 CPD ¶ 241 at 8.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁷ There is nothing in the contemporaneous record that supports Delphinus's assertion that it told the agency that the sample task order involved the same work that Delphinus had performed on the USS Abraham Lincoln, and Delphinus has not provided a declaration or other statement during the course of this protest in support of this assertion.