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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60119 97575

FILE: B-183292

DATE: November 4, 1975

MATTER OF: Donald N. Humphries & Associates; Master Tax, Inc.;
Innocept, Inc.

DIGEST:

1. Since determinations of technical acceptability are within discretion of procuring agency, in absence of clear evidence that agency acted arbitrarily, and record in this case is devoid of any evidence which would justify our Office concluding that technical evaluations were without reasonable basis, there is no basis to take exception to awards.
2. Where solicitation clearly provided for only one award in particular region, while multiple awards were provided for in other regions, protest against provision for only one award filed after closing date for receipt of proposals was untimely.
3. Contention that price was given undue weight is not supported where evaluation provision stated that award would be made on basis of lowest price of three highest technically acceptable proposals.
4. Contracting officer may allow an offeror to waive expiration of proposal acceptance period and make valid award thereunder.
5. Although offerors selected for award were afforded opportunity to revise total price to receive award for reduced scope of work, failure of agency to conduct discussions with other offerors within competitive range does not provide basis for GAO to take exception to awards as unit prices for reduced work were not revised and, therefore, relative price position of offerors would not have been affected by revision of total price.
6. Government need not make award initially contemplated under solicitation where it is determined reduction in available funds requires commensurate reduction in scope of work.
7. Determination of competitive range on basis of three highest technically evaluated proposals without consideration of price and relative weight vis-a-vis technical is improper since competitive range should be determined from array of scores of all proposals submitted and with regard to price. Although award will not be disturbed, agency is advised to preclude recurrence of such deficiency in future procurements.

The Small Business Administration (SBA) issued request for proposals (RFP) RFP-SBA-406-MA-75-1 on October 7, 1974. The solicitation, a 100-percent small business set-aside, requested proposals to render management and technical assistance to individuals or enterprises eligible under Section 402 of the Economic Opportunity Act (42 U.S.C. § 2906(b)). Offerors could only submit proposals in the regions where the offeror had an office physically located within the SBA region where the work was to be performed. For performance the country was divided into 10 regions which were further subdivided into areas within each region.

The proposals were evaluated on a point system pursuant to the following factors:

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| <p>"1. Quality, experience and capability of staff offeror intends to assign to this project.....</p> <p>"2. Previous experience and effectiveness in performing services, indicated by prior work and demonstrated by ability to deal effectively with individuals and enterprises eligible to be served.....</p> | <p><u>Maximum Points</u></p> <p>50</p> <p>50</p> |
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"EVALUATION CRITERIA:

- "1. QUALITY, EXPERIENCE AND CAPABILITY OF STAFF OFFEROR INTENDS TO ASSIGN TO THIS PROJECT.

The proposal will present in detail the staffing offeror will assign to the project. This will include biographical data on professionals. The biographical data on the proposed Project Director (PART VIII) should include information as to his experience in developing and supervising subcontractors.

"2. PREVIOUS EXPERIENCE AND EFFECTIVENESS IN
PERFORMING SERVICES.....

Offeror must list: (A) Roster of clients presently being served; (B) List of clients served in the immediate prior year with specific examples of work performed and the results of this service. Offeror should narrate business history, with emphasis on dealings with small firms.

For both (A) and (B) offeror should narrate experience with business concerns owned and controlled or operated by minorities and disadvantaged persons, i.e., low income individuals -- particularly those located in urban or rural areas with high unemployment."

The Special Instructions included in the solicitation to all offerors stated on page 9 thereof that:

"Evaluation of a proposal shall be based on the evaluation criteria as set forth herein. All proposals shall be evaluated numerically according to the stated 100 point scoring system. Prior to consideration of price as a determining factor, the proposal must have received a numerical score placing it amongst the top three eligible proposals (after internal SBA check of offeror's stated qualifications has been conducted). At this time only, will price be considered. Awards based on initial proposals without discussion of such proposals will be made on the basis of the lowest price among the three highest evaluated proposals, for each area."

Protests have been filed with our Office against the awards which were made in two of the regions.

Donald N. Humphries (Humphries) protests the award to Craven, Weishaar, Wooldridge & Dooley for Region VII on the bases that (1) the SBA in awarding the contract did not fully comply with the evaluation criteria set out in the RFP, (2) only one contract was awarded in

Region VII, which is contrary to multiple awards being made in other regions, and (3) since price was not considered as a major factor in making awards of similar contracts in the past it should not have been so considered here.

The record shows that Humphries' proposal received an evaluation score of 62.7, or fifth lowest for Region VII. The three responsible offerors whose proposals for that region received the highest evaluation scores were Lawrence Leiter and Company (83.3); Craven, Weishaar, Wooldridge and Dooley (66.3); and Dee Gosling and Co. (64.3). Award was made to Craven, Weishaar, Wooldridge and Dooley who submitted the lowest price among the three highest evaluated proposals--not Lawrence Leiter and Company as indicated in Humphries' protest.

With regard to technical evaluations, it has been the position of this Office that such matters are within the discretion of the procuring agency in the absence of clear evidence that the agency has acted arbitrarily. 48 Comp. Gen. 314, 317-318 (1968); 51 id. 621 (1972); 52 id. 718, 724 (1973). The record shows that all proposals were independently evaluated by each member of a 3-man panel in accordance with the evaluation criteria set forth in the RFP and we do not find any irregularities or deficiencies in the evaluation. Based upon our review of the evaluation that was made we cannot conclude that there was an abuse of such discretion by the SBA.

The question of whether more than one contract was to be awarded in Region VII was a matter of administrative discretion. In this connection, the Region VII Director determined prior to issuance of the RFP that the award of one contract was adequate for the region's needs. The solicitation clearly set out that only one contract was to be awarded for Regions IV and VII, while multiple awards were to be made in other regions. Since Humphries' protest in this regard was not filed in our Office until after the closing date for receipt of proposals, it is untimely under section 20.2 of our Interim Bid Protest Procedures, in effect at the time of the filing of the protest, which provided:

"* * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of proposals shall be filed prior to * * * the closing date for receipt of proposals."
4 C.F.R. § 20.2(a) (1975)

With regard to Humphries' last point, SBA refers to several past procurements for the same services and points out that price was a factor considered in making the awards. Furthermore, we note that the subject RFP evaluation criteria specifically provided that award would be made on the basis of the lowest priced of the three highest technically acceptable proposals. In these circumstances, we do not believe price was evaluated inconsistently with the stated criteria.

Master Tax Inc. (Master Tax) and Innocept Inc. (Innocept) protest the award of contracts for the areas in Region VI in which they submitted joint proposals. The major bases for their protest are that (1) SBA selected contractors for award based on proposals which had expired and should, therefore, have requested new proposals, (2) SBA negotiated directly with the single selected contractor for a change in requested task days and contract price without giving the other offerors an opportunity to submit new proposals based on the revised contract requirements, (3) SBA did not apply the technical evaluation criteria fairly, (4) SBA did not make an award in area 24 (New Orleans), and (5) since Innocept had indicated that it was prepared to offer lower prices if it was in contention in more than one district, the failure to discuss price deprived the Government of advantageous prices.

With regard to the first point, we have upheld the contracting officer's decision to allow an offeror to waive the expiration of its proposal acceptance period so as to make an award on the basis of the offer as submitted since the only right conferred by expiration of the acceptance period is conferred upon the offeror and the latter may waive such right and accept an award. See Riggins & Williamson Machine Company, et al., 54 Comp. Gen. 783, 75-1 CPD 168 (1975).

The second contention is to the effect that since the RFP required all offers to be on an "all or none" basis, SBA's request to the selected offeror in each region to accept award for a reduced scope of work and price constituted "discussions" within the meaning of section 1-3.805-1 of the Federal Procurement Regulations (1964 ed. amend. 118). It is argued, therefore, that SBA was required to negotiate with the other qualified offerors.

SBA reports that subsequent to selection of the successful offeror for the respective regions funds available for the work were reduced and it was therefore necessary to eliminate work for several areas and reduce the estimated man-day requirements by 22 percent in

the areas where award was to be made. Therefore, the offerors selected for award in the various areas were asked if they would accept award for the reduced work at the same price per task day.

The agency's position that its request to the offerors did not constitute an opening of negotiations is as follows:

"* * *The successful offerors in this case were not afforded an opportunity to revise or modify their proposals within the rationale of your decision. [51 Comp. Gen. 479, supra.] They were merely asked if they would accept award for the indicated reduced quantities."

We agree with the agency's position on this point. The question of what constitutes discussions has depended ultimately on whether an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether such opportunity resulted from the action initiated by the Government or the offeror. 51 Comp. Gen. 479, 481 (1972). In the instant case, the SBA merely extended an opportunity to the successful offerors to accept award for a lesser amount of work than specified in the solicitation at the offered unit price which had the effect of reducing the lowest offeror's total prices even further. Since the successful offerors were not permitted to revise their unit prices, the failure to afford other offerors within the competitive range the same opportunity was not prejudicial as it would not have affected the relative price position of the offerors. In this context, we don't believe the "discussions" with the successful offerors constituted "discussions" as that term is used in section 1-3.805-1 of the Federal Procurement Regulations (1964 ed.) and our decision cited above. Therefore, SBA's failure to conduct discussions with all offerors within the competitive range does not provide a basis for our Office to take exception to the awards. To the extent 49 Comp. Gen. 402 (1969) is inconsistent herewith, it will no longer be followed. We do not mean to imply that a reduction in the work of such magnitude as to have an effect on the competition would not require a resolicitation or new determination of competitive range. If the new reduced quantity of work would permit parties to compete--or to compete more effectively--than in the case of the quantities solicited, the procedure utilized in this procurement would not be appropriate.

Master Tax and Innocept question why no award was made for area 24 in Region VII, especially since their proposal was the lowest priced among the three highest evaluated proposals. The Government under paragraph 10(b) of the solicitation reserved the right to reject any or all offers. Even without that reservation, an offeror has no absolute right to an award merely because he has submitted the lowest proposal. See B-174966, May 12, 1972; 50 Comp. Gen. 50, 52 (1970). Since it was determined that the reduction in funds would not permit the awards originally contemplated it was within sound administrative discretion to reduce the scope of work and eliminate certain areas from the awards.

Finally, paragraph 10(g) of the RFP provides:

"The Government may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government." (Emphasis supplied.)

Accordingly, even though Innocept stated it could offer lower prices if it was in contention in more than one district, such offer was not for consideration since it was decided to make award on the basis of the initial offers.

For the foregoing reasons, the protests are denied.

However, in considering the merits of the protests, we noted deficiencies in the solicitation. The SBA, by limiting consideration of price to the proposals which received a numerical score placing them in the top three acceptable proposals, in effect, used the score of the lowest offeror in that group as a predetermined cutoff score to determine the competitive range. The practice of using a predetermined cutoff score to establish the competitive range has been held improper. 50 Comp. Gen. 59 (1970). Rather, the competitive range should be determined by examining the array of scores from all proposals submitted, and borderline proposals should not automatically be excluded from consideration. B-176761(2), January 24, 1973. Since all offerors were under the same limitation and submitted proposals without protest, we are not taking exception to the awards. In the future, however, the SBA should determine the competitive range by examining the array of scores of all proposals submitted as outlined in B-176761(2), supra.

Furthermore, in its report on the Humphries' protest SBA stated that the provision of the RFP concerning evaluation of price, previously set forth herein, was included in the solicitation to comply with the admonition in B-178295, October 18, 1973, to the effect that subsequent solicitations for these services should inform offerors of the relative weights that will be accorded price and other evaluation factors. We do not believe SBA's attempt to comply with the "admonition" was successful. As stated in the cited case "each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality." While the provision used indicates that price is the determinative factor among the top 3 proposals, it improperly failed to provide for consideration of price in determining the competitive range, Federal Procurement Regulations § 1-3.805-1(a) (1964 ed.), or to apprise offerors of the relative weight of price vis-a-vis technical.

By separate letter we are advising the SBA that appropriate steps should be taken to preclude a recurrence of these deficiencies.

R. Z. Keenan
Acting Comptroller General
of the United States