

DECISION



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

[Protest Alleging That Agency Was Biased Toward Awardee]

FILE: B-196100

DATE: May 23, 1980

MATTER OF: Decision Sciences Corporation

DIGEST:

1. Agency's call for best and final offers alone does not constitute meaningful discussions where uncertainty existed with respect to technical aspects of proposal and where, if uncertainties were cleared up through discussions, Government would obtain substantial advantage associated with proposal which was significantly lower in price.
2. Authority in FPR § 1-3.805-1 to make award on basis of initial proposal permits acceptance of proposal exactly as initially received but does not permit such award where there is uncertainty as to pricing or technical aspects of any proposals.

Decision Sciences Corporation (DSC) protests award of a contract to Messer Associates, Inc. (Messer) under request for proposals (RFP) No. IRS-79-66, issued by the Internal Revenue Service (IRS) for a fixed price study to improve its distribution of printed materials. DSC contends its technically acceptable proposal was significantly lower in price and that the IRS erred in failing to conduct negotiations with DSC to clear up several minor questions as to DSC's allocation of staff time to the project, thereby denying DSC an opportunity to improve its proposal and itself the opportunity to save a significant amount of money. DSC also alleges the IRS acted in a fraudulent, arbitrary and capricious manner and was biased toward Messer.

We sustain the protest for the reasons discussed below.

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The solicitation set out the evaluation criteria and the maximum point value of each. One of the criteria, to which was assigned a maximum of 25 points, required offerors to furnish a statement of the qualifications and time commitments for each professional assigned to specified tasks. The RFP stated that the technical proposal would be the most important single consideration in the award and that the lowest priced proposal within the competitive range would be assigned 10 points for price with higher priced proposals assigned points for price by dividing their prices into the price of the lowest priced proposal and multiplying by 10. In addition to paragraph 11 of Standard Form 33-A (Rev. 1-78), the RFP specifically stated that award might be made without negotiation and that it was of primary importance that proposals be submitted initially on the most favorable terms to the Government. The RFP also stated that award would be made to that offeror whose offer conforming to the solicitation would be most advantageous to the Government, price and other factors considered.

Upon receipt of initial proposals, three were found to be within the competitive range. Although the agency states that no oral or written discussions were conducted, best and final offers were requested, received and evaluated. Neither DSC nor Messer made any changes to its technical proposal although DSC reduced its price from \$278,000 to \$259,994 while Messer's price remained at \$381,785. Messer's technical proposal was given 71.55 points and DSC's was given 63.85, a difference of 7.70 points. After applying the specified formula for determining points for price, the total points for technical and price were 78.35 for Messer and 73.85 for DSC, a difference of 4.50. The contracting officer made a determination of price reasonableness and awarded the contract to Messer at a price approximately 37 percent above DSC's initial price and 47 percent higher than that proposed by DSC in its best and final offer.

We point out that it is not the function of our Office to evaluate the technical merits of proposals, to resolve disputes over the scoring of technical proposals or to substitute our judgment for that of the

procuring agency as to which offeror should have received the award. Sogitec, Incorporated, B-196158, January 24, 1980, 80-1 CPD 70; Decision Sciences Corporation, B-182558, March 24, 1975, 75-1 CPD 175. Therefore, technical evaluations and award determinations by procuring agencies will be questioned by our Office only upon a clear showing that they were arbitrary or unreasonable or inconsistent with the specified evaluation criteria. Group Operations Incorporated, 55 Comp. Gen. 1315 (1976), 76-2 CPD 79.

DSC strongly objects to the points deducted by IRS because DSC's proposal was unclear and not specific as to how much time each professional would devote to each task. We have reviewed the proposals and evaluations and agree that DSC's proposal is unclear and very general as to time commitments. For example, while the proposal indicates which staff members would be assigned to each task and the total number of days each staff member would be assigned to all tasks, it cannot be determined whether the total days would be distributed equally over the tasks or be concentrated unduly on one or more tasks. We believe the proposed distribution of effort can be an important reflection of the offeror's understanding of the problem and that it was not unreasonable for the IRS to deduct points because of the proposal's ambiguity in this matter.

Although DSC contends it designed its project schedule to complete all work within approximately 110 working days, this intention was also not made clear in the proposal. As the solicitation required contract completion in 210 calendar days, DSC contends there was a maximum of 110 working days within that period and the IRS was in error in concluding that the 90-day proposed assignment of a DSC staff member would not be essentially full time. However, the 210 calendar day period between September 12, 1979, the date of contract award, and April 9, 1980 has 6 holidays and 60 week-end days leaving a total of 144 working days. Therefore, we cannot conclude that the agency's conclusion that the staff member would not be assigned full time was unreasonable.

We believe however, that since IRS regarded DSC as in the competitive range, it should have conducted discussions with DSC to try to resolve these aspects of the DSC proposal

that were not clear. Certainly, in negotiated procurements, discussions are generally required to be conducted with all offerors within a competitive range. Although Federal Procurement Regulations (FPR) § 1-3.805-1 permits the agency to make an award without discussions where it can be demonstrated from the existence of adequate competition or accurate prior cost experience with the service that acceptance of the most favorable initial proposal without discussions would result in a fair and reasonable price, the regulation also provides that in any case where there is uncertainty as to pricing or technical aspects of any proposals, award shall not be made without discussions.

Therefore, while an agency may make award on an initial proposal basis, even to a higher-priced offeror, Shapell Government Housing, Inc., et al., 55 Comp. Gen. 839 (1976), 76-1 CPD 161, it should not do so when, through discussions, it may be able to clear up uncertainties and realize substantial cost savings, such as seems to be the case here. Moreover, as the offerors here were given the opportunity to revise their offers in responses to the call for best and final offers, the award was not, in fact, made upon the basis of initial proposals. The mere request for best and final offers is sufficient to constitute discussion. Dyneteria, Inc., B-181707, February 7, 1975, 75-1 CPD 86.

That alone does not suffice here, however, since discussions must be meaningful. Raytheon Company, 54 Comp. Gen. 169 (1974), 74-2 CPD 137; 51 Comp. Gen. 431 (1972). As we stated in 50 Comp. Gen. 117, 123 (1970):

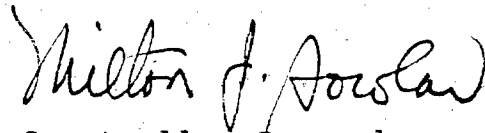
"FPR 1-3.805-1 requires that discussions be conducted with all offerors within a competitive range, price and other factors considered. It is a well-established principle in Federal procurements that such discussions must be meaningful and furnish information to all offerors within the competitive range as to the areas in which their proposals are believed to be deficient so that competitive offerors are given an opportunity to fully satisfy the Government's requirements. 47

Comp. Gen. 336 (1967). When negotiations are conducted the fact that initial proposals may be rated as acceptable does not invalidate the necessity for discussions of their weaknesses, excesses or deficiencies in order that the contracting officer may obtain that contract which is most advantageous to the Government. * * *

When these principles are applied here, it is clear the agency should have conducted discussions with all offerors within the competitive range and any points on which clarification was needed such as time commitments should have been revealed to DSC. We do not believe that 48 Comp. Gen. 663 (1969), which the agency cites, supports the contrary view. In that case, the protest was sustained because the award was made after discussions only with the awardee on the basis of a revised proposal differing technically and in price from the initial proposal.

However, despite DSC's assertions, the record does not establish that the deficiency in this procurement was the result of fraudulent, arbitrary or capricious action by the agency. Rather, the record shows the agency was mistaken in its belief that best and final offers could be requested without the necessity for conducting meaningful discussions.

Because of the advanced performance status of the contract, we do not think it would be in the best interest of the Government to recommend its termination at this time. Therefore, we are recommending by letter of today to the Secretary of the Treasury that action be taken to preclude a recurrence of the deficiency discussed above.



For the Comptroller General
of the United States