

DECISION



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

FILE: B-219174

DATE: September 23, 1985

MATTER OF: The Aerial Image Corporation, Comcorps

DIGEST:

1. Protest that price should have been a more significant proposal evaluation factor is untimely where filed after the closing date established by a solicitation amendment which clearly advised offerors that price would be given a weight equaling one-fifth the total weight assigned to technical factors.
2. Protest that agency should have made award on the basis of initial offers is untimely where not filed within 10 working days after protester learned of the agency's decision to request revised proposals.
3. Protest that contracting agency improperly failed to conduct technical discussions with protester is denied where protester's proposal was found technically acceptable and contained no technical deficiencies or uncertainties that required discussion.
4. A delay in meeting procurement milestones is a procedural deficiency which has no effect on the validity of the procurement.

The Aerial Image Corporation, Comcorps (Comcorps), protests the award of a contract to Multi Media Presentations, Inc. (Multi Media), under request for proposals (RFP) No. DLA910-85-R-1200, a two-step negotiated procurement, issued by the Defense Logistics Agency (DLA). The RFP solicited fixed-price offers for the production of an audio-visual slide show for the United States Air Force (Air Force) recruitment effort.

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Comcorps raises a number of protest issues. First, Comcorps argues that price should have been a more significant evaluation factor. Second, Comcorps argues that award should have been made to Comcorps on the basis of its initial offer. Third, Comcorps argues that DLA improperly failed to point out technical deficiencies in its proposal. Fourth, Comcorps questions the awardee's significant price reduction in its best and final offer without modifying its technical proposal. Finally, Comcorps argues that there were undue delays in this procurement.

The protest is dismissed in part and denied in part.

Under the RFP, proposal evaluation was based on the following evaluation criteria: (1) thematic treatment of the slide show production; (2) creative treatment of the slide show production; (3) personnel experience; (4) in-house capability and subcontractor use; and (5) evidence of past performance in the multi-image medium. The RFP advised offerors that these factors would be worth 100 points (20 points for each factor) and that price was to be given a weight of one-fifth the total weight assigned to technical factors. Price was to be scored in accordance with a specified formula. The solicitation evaluation scheme emphasized technical factors over price, encouraged a wide range of innovative and creative proposals, and reflected the agency's intent to discourage low budget productions of marginal quality which would not provide strong support for the Air Force's recruitment efforts.

Fourteen offerors submitted technical proposals under step one of the solicitation. All 14 offerors, including Comcorps, were point-scored and determined to be technically acceptable, and all were requested to submit fixed-price proposals under step two. Shortly after receiving the price proposals, the contracting officer was advised that funding for this procurement would be limited to \$125,000. The prices of the top-ranked technical proposals all exceeded \$125,000. Because the availability of funds changed the terms of the original solicitation, the contracting officer issued amendment No. 2, advising offerors of the funding limitation and affording them the opportunity to submit revised technical and/or cost proposals. Thirteen offerors submitted revised proposals.

Award was made to Multi Media, which received the highest overall score of 87.5 points (74 points for technical factors and 13.5 points for price). In its final proposal, Multi Media did not change its technical proposal,

but lowered its price from \$168,750 to \$125,000. Comcorps proposed the lowest price and received the full 20 points allowed for price; however, that firm received a technical score of 61 points and ranked fifth overall among the 13 offerors with an overall score of 81 points.

Comcorps first contends that price should have been a more important evaluation factor. Comcorps contends that by making price an insignificant evaluation factor, proposal evaluation essentially was based upon subjective technical factors.

This protest basis is untimely. Amendment No. 1, issued to clarify the solicitation's original award scheme, specifically advised offerors that "price will be given a weight equaling approximately one fifth of the total weight which will be assigned to the technical factors." Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), protests based upon alleged improprieties incorporated into a solicitation by an amendment must be filed not later than the next closing date for receipt for proposals. Consequently, Comcorps' protest filed in this Office several months after the February 15, 1985, closing date for receipt of proposals established by amendment No. 1 is untimely and is dismissed. See Cosmos Engineering, Inc., B-217430, Jan. 18, 1985, 85-1 C.P.D. ¶ 62; see also Sperry Flight Systems, B-212229, Jan. 19, 1984, 84-1 C.P.D. ¶ 82.

Comcorps' contention that award should have been made to Comcorps on the basis of its initial proposal is also untimely. Our Bid Protest Regulations require that a protest concerning other than an apparent solicitation impropriety must be filed within 10 working days after the basis for protest was known or should have been known. 4 C.F.R. § 21.2(a)(2) (1985). Here, Comcorps knew upon receipt of amendment No. 2 to the solicitation, issued on April 2, 1985, that offerors were being given the opportunity to revise their proposals (and, thus, no award would be made on the basis of initial proposals). However, Comcorps did not assert this basis of protest until June 18, several months after the issuance of the amendment and after it had learned that award had been made to another firm on the basis of that firm's revised proposal. The issue therefore was not timely filed and is dismissed.

Next, Comcorps contends that since DLA made offerors aware of pricing deficiencies in their proposals by advising them of the \$125,000 funding limitation and gave them the

opportunity to revise their prices on the basis of this information, it was unfair of the agency not to also point out technical deficiencies in firms' proposals. The record shows that while Comcorps received relatively high technical scores for personnel experience, in-house capability and subcontractor use and past performance, the firm received substantially lower scores for creative and thematic treatment of the slide show production. Comcorps states that had DLA advised the firm of its concerns over Comcorps' creative and thematic treatment of the production, that firm, with only minor revisions, would have been able to upgrade its already low priced proposal.

With certain exceptions not applicable here, 10 U.S.C. § 2304(g) (1982) requires that discussions be conducted with all offerors in the competitive range, price and other factors considered. Our Office considers that discussions have taken place if an offeror is given the opportunity to revise its initial proposal, either in terms of price or technical approach. Systems Engineering Associates Corp., B-187601, Feb. 24, 1977, 77-1 C.P.D. ¶ 137; RAI Research Corp., B-184315, Feb. 13, 1976, 76-1 C.P.D. ¶ 99. In this regard, we have held that an agency's decision not to engage in technical discussions is unobjectionable where a proposal contains no technical uncertainties. Weinschel Engineering Co., Inc., B-217202, May 21, 1985, 64 Comp. Gen. _____, 85-1 C.P.D. ¶ 574; Information Management, Inc., B-212358, Jan. 17, 1984, 84-1 C.P.D. ¶ 76; Drexel Heritage Furnishings, Inc., B-213169, Dec. 14, 1983, 83-2 C.P.D. ¶ 686. RAI Research Corp., B-184315, supra.

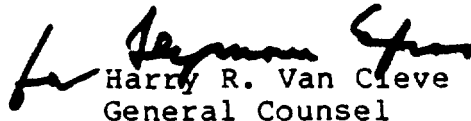
Here, we do not find DLA's decision to limit discussions to price considerations unreasonable. All offerors were advised of the \$125,000 funding limitation and given the opportunity to revise both their technical and cost proposals. Various offerors took advantage of this opportunity to revise their technical proposal or price or both. Further, while Comcorps argues that DLA should have advised the firm of the specific technical defects in Comcorps' and all other offerors' proposals, DLA has explained that since Comcorps' and all other offerors' proposals, both as initially submitted and revised, met the agency's requirements and were found technically acceptable, there were no technical deficiencies or uncertainties that required discussions. Thus, while DLA in evaluating the relative merits of the firms' proposals did not rank Comcorps' proposal as high as other proposals with regard to creativity and thematic treatment, it did not consider the

firm's proposal technically deficient. In any case, the thematic and creative treatment evaluation criteria, are necessarily extremely subjective areas in the evaluation of an artistic project. See Centurion Films, Inc., B-205560, Mar. 25, 1982, 82-1 C.P.D. ¶ 285. An agency need not conduct technical discussions where, as here, the agency is seeking creativity, and discussions, could result in technical "transfusion" (disclosure to a competitor of an offeror's innovative or ingenious approach or problem solution). See Information Network Systems, B-208009, Mar. 17, 1983, 83-1 C.P.D. ¶ 272; American Nucleonics Corp., B-193546, Mar. 22, 1979, 79-1 C.P.D. ¶ 197. This protest basis therefore is denied.

Comcorps also protests that the awardee, Multi Media, in its revised offer, reduced its price over \$40,000 from its initial cost proposal without changing its technical proposal. Comcorps reasons that but for the \$125,000 funding limitation, the agency would have paid over \$40,000 more for the same offer. However, Multi Media's decision to lower its price without changing its technical proposal is a matter of its own business judgment which undoubtedly took into consideration the funding limitation and its own profit margin and pricing strategies. See Syosset Laboratories, Inc., B-212139, Sept. 23, 1983, 83-2 C.P.D. ¶ 369. Consequently, this protest basis is denied.

Finally, Comcorps contends that there were undue delays in this procurement which took about 4 months. However, a delay in meeting procurement milestones is a procedural deficiency which has no effect on the validity of the procurement. See COMSEC Systems Corporation--Reconsideration, B-216596.3, Dec. 11, 1984, 84-2 C.P.D. ¶ 652.

The protest is dismissed in part and denied in part.


Harry R. Van Cleave
General Counsel