



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dayton T. Brown, Inc.

File: B-223774.3

Date: December 4, 1986

DIGEST

1. Allegation that procuring agency amended solicitation to reduce importance of technical factors in evaluation for purpose of steering award to another firm is without merit, where record shows that amendment was necessary to avoid misleading offerors and protester presents no evidence of agency bad faith or bias.
2. Whether awardee will be able to perform contract using employees whose resumes were included in awardee's proposal is a matter of responsibility, and General Accounting Office will not review agency's affirmative determination of awardee's responsibility absent showing of possible agency fraud or bad faith or alleged agency failure to apply definitive responsibility.
3. Detailed allegations raised for the first time in protester's comments on agency report are untimely, and will not be considered, where the allegations are not based on new information and are not mere expansions of original protest allegations.

DECISION

Dayton T. Brown, Inc. (Brown), protests the proposed award of a contract to National Technical Systems under request for proposals (RFP) No. N00024-86-R-4137(Q), issued by the Department of the Navy for engineering and technical services. Brown argues that the Navy evaluated the proposals improperly and that, had the evaluation been proper, Brown, not National, would have been in line for the award. We deny the protest in part and dismiss it in part.

The RFP, as issued, provided that "the technical criteria are substantially more important than the cost criteria." Five different technical criteria were listed, and cost was to be evaluated based on proposed cost, proposed fixed fee, and cost realism.

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Five offers--including those of Brown and National--were received and evaluated. National received the highest overall score and Brown the third highest, with the following breakdown:

	<u>Technical</u>	<u>Cost</u>	<u>Total</u>
1. National	85.45	87.93	86.44
3. Brown	89.15	58.54	76.91

The total scores were based on a preestablished weighting of 60 percent technical and 40 percent cost. The Navy determined at this point that, in view of this 60/40 weighting scheme, the RFP statement that technical criteria would be "substantially" more important than cost could mislead offerors. Thus, amendment 0003--issued to Brown, National, and the second ranked offeror on May 13, 1986, along with discussion questions and a request for best and final offers (BAFO)--deleted the word "substantially" from the RFP description of the relative importance of the technical and cost factors.

All three offerors submitted BAFOs. The rankings of the three remained the same, although the scores changed somewhat, as follows:

	<u>Technical</u>	<u>Cost</u>	<u>Cost Plus Fixed Fee</u>	<u>Total</u>
1. National	90.64	96.41	\$4,572,194	92.94
3. Brown	92.06	62.11	7,555,483	80.07

While Brown's technical score was highest, National's evaluated cost was so much lower than Brown's that, even though cost was weighted less than technical considerations, National's total score was highest by a substantial margin. National thus was recommended for award.

Brown first argues that the Navy proceeded in bad faith--motivated by a desire to assure an award to National--in amending the solicitation to delete the word "substantially." We find this argument to be without merit. Where agency bad faith is alleged, the protester must present supporting factual evidence; contracting officials are presumed to act in good faith and, in order to establish otherwise, there must be virtually irrefutable proof that the agency had a malicious and specific intent to harm the protester. Urdan Industries, Ltd., B-222421, June 17, 1986, 86-1 C.P.D. ¶ 557. The Navy has explained that the solicitation was amended because it was misleading to

offerors in light of the preestablished evaluation weights. This explanation is reasonable, and Brown has furnished no evidence in support of its bare assertion to the contrary.

To the extent Brown is arguing merely that the RFP should not have been amended and that technical considerations should have remained "substantially" more important than cost, the argument is untimely. Under our Bid Protest Regulations, protester assertions based on alleged improprieties incorporated in an RFP by amendment must be raised no later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1986). Here, BAFOS based on the amended RFP were due on May 20. Since the protest was not filed until August, any challenge to the amendment is untimely.

Brown also alleges that National has undergone a reorganization entailing a reduction in staff, and that the resumes included in its proposal therefore may be invalid. Whether National could or would perform the contract with its proposed personnel, however, relates to National's responsibility as a prospective contractor. The Navy has determined that National is a responsible concern, and our Office will not review such an affirmative responsibility determination absent a showing of possible agency fraud or bad faith or an alleged agency failure to apply properly definitive responsibility criteria. 4 C.F.R. § 21.3(f)(5). These circumstances are not present here.

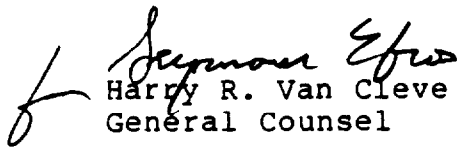
In its comments on the Navy's report, Brown argues for the first time that the Navy misapplied the evaluation criteria and failed to evaluate National's proposed costs properly. These arguments are untimely. Our Regulations require that protests involving allegations such as these be filed no later than 10 working days after the bases of protest were, or should have been, known. 4 C.F.R. § 21.2(a)(2). Brown's new arguments are based not on new information in the agency report or that otherwise came to Brown's attention, but on the evaluation of the firm's own proposal and "information and belief" concerning the evaluation of National's proposal. This being the case, these arguments should have been raised in Brown's original protest.

Brown submits that these new arguments are merely expansions of its original protest grounds, and thus should be deemed timely. We disagree. The original protest focused only on the reason for the solicitation amendment deleting the word "substantially" from the evaluation criteria, and National's ability to perform. The arguments in question are specific and detailed in nature, and were neither referred to in

Brown's original protest, nor reasonably inferred from it. We will not consider these protest bases to have been timely raised in the original protest.

Finally, Brown maintains that, even if its arguments are untimely, they should be considered under the significant-issue exception to our timeliness rules. See 4 C.F.R. § 21.2(c). We will review an untimely protest under this exception, however, only where it involves a matter of widespread interest or importance to the procurement community that has not been considered on the merits in previous decisions. Blinderman Construction Co., B-222523, June 16, 1986, 86-1 C.P.D. ¶ 554. We have considered the propriety of technical and cost evaluations, and the relative importance of these factors, in numerous prior decisions. See, e.g., NUS Corp.; The Austin Co., B-221863, B-221863.2, June 20, 1986, 86-1 C.P.D. ¶ 574. Thus, while we recognize the importance of the matter to the protester, we do not consider these new issues significant as contemplated by our Regulations.

The protest is denied in part and dismissed in part.


Harry R. Van Cleve
General Counsel