Curcio

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: B.K. Dynamics, Inc.

File: B-228090

Date: November 2, 1987

DIGEST

Contracting agency's failure to inform protester of deficiencies in its technical proposal, which was included in the competitive range, deprived the protester of the opportunity to participate in meaningful discussions. Protester, however, was not prejudiced since its cost proposal was so much higher than the awardee's cost proposal that, even if protester had raised its technical proposal to the level of the awardee's, the protester would not have been awarded the contract.

DECISION

B.K. Dynamics, Inc., protests the award of a contract to Techplan Corporation under Department of the Air Force request for proposals (RFP) No. F49620-87-R-0006, issued to obtain a contractor to provide international cooperative research and development assessments. B.K. contends that the Air Force improperly failed to conduct meaningful discussions with the firm.

We agree with B.K. that the discussions that were held were not meaningful, but we deny the protest because the record shows that this deficiency did not prejudice B.K. in the competition.

The RFP solicited offers for a base period of 8 months and four 1-year option periods. Cost proposals were to be evaluated on the basis of the base and option years, although the government expressly reserved the right to award a contract that included options for fewer than 4 years. The solicitation also provided that technical merit would be the most important factor in the selection decision, although cost also would be important.

The Air Force received five proposals, with Techplan's cost proposal the third lowest and B.K.'s the highest. The technical evaluation concluded that Techplan's proposal was

technically superior to the other proposals, but that four of the five offerors, including B.K., should be included in the competitive range. The Air Force conducted written discussions with those four offerors concerning only their cost proposals, and requested best and final cost offers. Techplan's final cost proposal was second low, while B.K.'s cost proposal remained high. The Air Force determined that Techplan's proposal offered the best overall value to the government and awarded a contract to that firm for the base period, which also included options for 2 more years, with the decision whether to exercise those options to be made later in the contract period.

B.K. protests that the Air Force's failure to conduct technical discussions with the firm was a violation of the agency's statutory duty to hold meaningful discussions with all offerors in the competitive range. B.K. argues that if the Air Force had pointed out the deficiencies in B.K.'s technical proposal and had given the firm an opportunity to submit a revised technical proposal, B.K. might have been able to raise its technical score sufficiently to outrank Techplan's.

The Air Force responds that while B.K.'s proposal had some weaknesses relative to the technical evaluation factors, the evaluators found that B.K. had a thorough understanding of the agency's needs, and the proposal was not marked down significantly in any area. The Air Force argues that it therefore was proper not to conduct technical discussions with B.K. because the evaluators did not have any questions concerning B.K.'s technical proposal. The agency additionally notes that the RFP was for expert and consultant services which are dependent on staff, and avers that technical discussions were not warranted anyway because the proposal could not have been significantly improved without replacing key personnel, a major proposal revision. Finally, the Air Force asserts that because B.K. thoroughly understood the technical requirements of the RFP, any technical discussions with the firm would have resulted in technical leveling or technical transfusion, which are prohibited by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d) (1986).

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305b(4)(B) (Supp. III 1985), and its implementing regulation, FAR, 48 C.F.R. § 15.610(b), require that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Such discussions must be meaningful, that is, agencies must point out weaknesses, excesses or deficiencies in the offeror's proposal unless doing so would result in technical transfusion or technical leveling. FAR, 48 C.F.R. § 15.610(d)(1)

and (2); Price Waterhouse, B-222562, Aug. 18, 1986, 86-2 C.P.D. ¶ 190. Once discussions are opened with an offeror, the agency must point out all deficiencies in the offeror's proposal, and not merely selected ones. Jones & Co., B-224914, Feb. 24, 1987, 66 Comp. Gen. ___, 87-1 C.P.D. ¶ 201.

Here, the Air Force's request for best and final cost proposals constituted discussions, so that the failure to discuss technical matters was proper only if B.K.'s initial technical proposal contained no uncertainties or weaknesses. See Sperry Corp., 65 Comp. Gen. 195 (1986), 86-1 C.P.D. ¶ 28. We do not find that this was the case. For example, as indicated by the debriefing summary, the evaluators found that B.K. did not give samples of the Contract Data Requirements Lists formats for required deliverables, and that B.K.'s proposal for certain items listed in the statement of work did not demonstrate sufficient program manager involvement. Our review of the technical evaluation also shows that B.K.'s proposal was downgraded for failure to address or elaborate on certain factors. These omissions are the type that may well have been resolved through technical discussions. See Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 C.P.D. ¶ 400.

Further, we do not agree with the Air Force that technical discussions would have led to prohibited technical transfusion or technical leveling. Technical leveling arises only where, as a result of successive rounds of discussions, the agency has helped to bring one proposal up to the level of another proposal by pointing out inherent weaknesses that remain in the proposal because of the offeror's own lack of diligence, competence or inventiveness after having been given an opportunity to correct them. See Price Waterhouse, B-222562, supra. Here, however, the Air Force did not hold even one round of technical discussions with B.K. We also do not see how there would have been any risk of technical transfusion--improperly transferring Techplan's approach to B.K. through discussions, see FAR, 48 C.F.R. § 15.610(d)(2)--if B.K. had been informed of omissions in its own proposal. We therefore find that the Air Force failed to hold meaningful discussions with B.K.

Despite our conclusion, however, our Office will sustain a protest alleging that the government failed to hold meaningful discussions with a firm only if the protester demonstrates that it was prejudiced by the government's actions. See Science and Management Resources, Inc., et al., B-212628, et al., Jan. 20, 1984, 84-1 C.P.D. ¶ 88. The record does not show that B.K. was prejudiced here. First, B.K. itself states that if the Air Force had pointed out technical deficiencies in the firm's offer, "BK's proposal could have been revised, perhaps sufficiently to enable BK

to outrank Techplan technically." Thus, B.K. itself acknowledges that technical discussions would not necessarily have raised B.K.'s technical proposal to the level of Techplan's proposal. Further, the RFP provided that both technical merit and cost would be considered in choosing the successful offeror; B.K.'s evaluated best and final cost offer was $1.2 million higher than Techplan's final cost offer of $1.93 million, and B.K. does not suggest that it could have sufficiently lowered its cost proposal further to be competitive with Techplan. Thus, even if B.K. had been able to raise its technical proposal to the level of Techplan's, B.K. still would not have received the award.

B.K. also protests that the Air Force could not properly award a contract to Techplan that included a base period and provision for 2 option years because the RFP required offerors to submit prices for 4 option years. Paragraph L-24 of the RFP, however, specifically reserved to the Air Force the right to award a contract that provided for fewer than 4 option years. Therefore, the award was consistent with the terms of the solicitation, and thus is not subject to legal objection by our Office.

The protest is denied.

James F. Hinchman
General Counsel