



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mark Dunning Industries, Inc.

File: B-230058

Date: April 13, 1988

DIGEST

Inclusion of proposal in competitive range does not necessarily establish that proposal was technically acceptable, since agency may properly include proposals that may become acceptable through discussions. Subsequent rejection of proposal as technically unacceptable because best and final offer did not cure deficiency pointed out to offeror is upheld when protester has not shown that agency determination of unacceptability was unreasonable.

DECISION

Mark Dunning Industries, Inc., protests the award of a custodial services contract at Eglin Air Force Base, Florida, to Madison Services, Inc., under request for proposals (RFP) No. F08651-87-R-0092 issued by the U. S. Air Force. Mark Dunning alleges that the agency's determination to reject its best and final offer (BAFO) as unacceptable for consideration of award was unreasonable.

We deny the protest.

The RFP was issued on June 26, 1987, as a small business set-aside to 137 prospective offerors to provide recurring custodial services for more than 150 buildings at Eglin. The RFP stated that the resulting contract would be for a firm fixed price for a basic year with 4, 1-year options. The solicitation further stated the selection for award would involve an integrated assessment of the proposals to determine which proposal is most advantageous to the government. The solicitation further advised that the government may award a contract to other than lowest price offeror after consideration of all factors. For purposes of evaluation, the RFP noted that the areas of technical, management, and price were of equal importance. Offerors were advised that their proposed use of staffing would be reviewed to determine soundness of approach and understanding of the particular custodial problems at Eglin.

Eighteen proposals were received by the extended date for receipt of proposals on August 10. A competitive range determination on October 8 excluded 5 offerors as unacceptable. On October 9 deficiency notices and clarification requests were forwarded to the 13 offerors remaining in the competitive range. Mark Dunning was issued a deficiency notice which stated that its "proposal does not reflect sufficient personnel to accomplish job tasks defined in the Performance Work Statement and requires rationale." In response to this deficiency notice, Mark Dunning noted that its proposed manpower requirements were based on its knowledge of the custodial business and Eglin's needs and was sufficient, therefore, to accomplish all job tasks in the performance work statement. (Mark Dunning apparently relied on the experience of the prior contractor's project manager in developing its manpower estimates.)

Discussions were conducted by telephone with the thirteen offerors on November 12-13. Mark Dunning was asked again about the sufficiency of its proposed manpower to furnish the government with satisfactory performance under the RFP's requirements. Specifically, Mark Dunning was advised of "the concern that the manpower you propose may have difficulty accomplishing the tasks" The Air Force asked that Mark Dunning take another look at the requirements and frequencies required, and asked for a rationale if it still considered its manpower sufficient. Mark Dunning was then asked to give manpower "another long serious look." Finally, the Air Force indicated that estimates based on the experience of persons who previously performed the services should be questioned. On November 19 Mark Dunning sent a written confirmation of discussions and confirmed its manpower estimates as originally proposed.

BAFOs were requested on November 30 from the 13 offerors. Mark Dunning was specifically requested to address "all points of discussion noted in your 19 November 87 letter." After evaluation of BAFOs, 7 of the 13 offerors were determined unacceptable for award (including Mark Dunning) on January 6, 1988. Award was made to Madison on January 11 as the offeror within the competitive range with the proposal most advantageous to the government. This protest followed on January 21.

In accordance with our Bid Protest Regulations, 4 C.F.R. § 21.3(c) (1988), Mark Dunning made a request for specific documents relevant to its protest grounds. This request was filed concurrently with the protest. The requested documents were furnished to our Office along with the agency report but were not given to the protester. The requested documents not furnished to the protester were deemed by the agency to be either irrelevant to the protest, procurement

sensitive, or of a proprietary nature. However, our review found the technical evaluation of Mark Dunning's BAFO to be releasable and, accordingly, the Air Force released this document to the protester. Upon receipt of the agency report, Mark Dunning made a timely supplemental request for documents. The requested documents were specific to the agency determination of minimum manhours necessary to perform the contract. The agency report reflects that the protester was rejected from the final competitive range because of insufficient manpower to perform the contract. The agency found the requested documents--Air Force Manual 84-45 regarding janitorial standards and historical data of prior janitorial services at Eglin--to be releasable and provided the documents to our Office and Mark Dunning.

A request by the protester for a fact-finding conference was denied because the protester failed to identify a fact in dispute suitable for resolution under this procedure. The protester proposed a fact-finding conference to consider the propriety of the application of the Air Force manhours estimate to its proposal which we did not view as a factual dispute.

Mark Dunning alleges that the agency rejection of its BAFO was unreasonable because the agency estimate of minimum manhours necessary to complete the contract's requirements is inaccurate,^{1/} and that its own estimate is supported by its calculations based upon prior work experience. Mark Dunning further alleges that if the agency determination of manpower requirements was of such a crucial nature, it should have been identified in the RFP. The protester contends that the elimination of its BAFO from the competitive range was improper because its manpower had already been addressed adequately and, if not, then there was a lack of meaningful discussion which should have alerted the protester to the problem before submission of its BAFO.

The evaluation of technical proposals and the resulting determination of whether an offeror is in the competitive range is primarily the responsibility of the contracting agency, since it is responsible for defining its needs and the best method of accommodating them, and it must bear the burden of any difficulties resulting from a defective evaluation. Accordingly, our Office does not make an independent determination of the merits of technical proposals; rather, we examine the agency's evaluation to

^{1/} The protester has not been provided the agency manhours estimate; however, its assertion of agency inaccuracy is based upon its interpretation of the historical data of janitorial services at Eglin AFB.

ensure that it is reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. See Personnel Decisions Research Institute, B-225357.2, Mar. 10, 1987, 87-1 CPD ¶ 270. The protester bears the burden of showing that the evaluation is unreasonable, and the fact that it disagrees with the agency does not itself render the evaluation unreasonable. GTE Government Systems Corporation, B-222587, Sept. 9, 1986, 86-2 CPD ¶ 276.

Our review of the agency determination of minimum manhour requirements reveals that the agency's in-house manning estimate was reasonable and was based upon its experience at that particular facility, historical manhours data derived from prior contracts, and its expectations for the next 5 years. The protester has provided in its comments an elaborate justification for its manpower estimates, none of which was contained in its BAFO as the agency requested in discussions. Mark Dunning now explains it took into account the lack of an RFP requirement contained in the prior contract for minimum onsite staffing, the increase in carpeted floors, which requires less frequent cleaning under the contract, and generally increased square footage. While we will not take issue with the protester's calculations as proposed, we nevertheless cannot find the agency's estimate, which is based essentially on actual prior years payroll records and the increased square footage, to be unreasonable. The protester asserts that the agency estimate is flawed; however, our Office will not overturn an agency determination of its minimum needs simply because the protester argues that its calculations are more correct. See GTE Government Systems Corporation, B-222587, supra.

Further, we do not agree with the protester that the agency was required to disclose in the RFP the manhour estimate. We have held that an agency is not required to disclose in the solicitation a manning level developed by the agency evaluators to assess whether proposed personnel were adequate where, as here, such model is developed based on tasks in the solicitation and reflects the evaluators judgment concerning the minimum number of personnel necessary to perform the work. Intelcom Support Services, Inc., B-222547, Aug. 1, 1986, 86-2 CPD ¶ 135. Thus, the only requirement is that the RFP place offerors on notice that this is an area which will be evaluated. As noted above, the RFP specifically advised all offerors that their proposed staffing would be reviewed. We thus deny this ground of protest.

Mark Dunning argues next that the rejection of its offer after receipt of BAFOs was improper. We find nothing improper in the rejection of the protester's BAFO from the competitive range for award. Elimination from the competi-

tive range following BAFO's, and without further discussion, is valid where a proposer's BAFO was properly found to be technically unacceptable based on failure to address agency concerns conveyed during discussion. An offeror should not expect any further discussions once it has submitted its BAFO. The fact that a proposal was initially included within the competitive range does not preclude the agency from later excluding it from further consideration following BAFOs if it no longer has a reasonable chance of being selected for award. Space Communications Company, B-223326.2, B-223326.3, Oct. 2, 1986, 86-2 CPD ¶ 377. We cannot question the agency's decision here to exclude the protester's BAFO from the competitive range given the agency's concerns conveyed to the protester and not adequately addressed in its BAFO. Rejection of a BAFO as technically unacceptable due to inadequate staffing, where that concern was the earlier subject of discussions, is reasonable. Becon Construction Company, Inc., B-222649, Aug. 18, 1986, 86-2 CPD ¶ 195.

Mark Dunning's allegation of lack of meaningful discussion also has no merit. In order for discussions to be meaningful, agencies must point out weaknesses, excesses, or deficiencies in proposals unless doing so would result in technical leveling or technical transfusion. C&W Equipment Co., B-220459, Mar. 17, 1986, 86-1 CPD ¶ 258. However, it is not necessary for an agency to furnish information in any particular form or manner, provided that it finds some means which reasonably communicates the nature and gravity of its concerns. E. H. Pechan & Associates, Inc., B-221058, Mar. 20, 1986, 86-1 CPD ¶ 278. See also Intelcom Support Services, Inc., B-225600, May 7, 1987, 87-1 CPD ¶ 487. Our Office has applied this rule where the concern expressed was adequate manning. See Creativision, Inc., B-225829, July 24, 1987, 66 Comp. Gen. _____, 87-2 CPD ¶ 78.

In this connection, Mark Dunning was specifically advised that it should evaluate its manpower estimates. The agency indicated that Mark Dunning's response to the deficiency notice was insufficient to satisfy the agency as to its ability to adequately perform the various tasks required and asked for support for its manpower proposal. However, instead of addressing this concern or providing an explanation of its estimate after discussion, Mark Dunning simply "confirmed" that its proposed manpower would be sufficient to meet the government's needs and failed to further address the matter in its BAFO submission. We do not agree with the protester's contention that it was not apprised of the seriousness or the nature of the deficiency in its proposal. The protester received a deficiency notice identifying insufficient manpower, was asked again during discussions to evaluate its manpower figures, and was told to address this

concern further in its BAFO. We find the fact that the protester provided detailed schedules of manning by day and by building to be irrelevant to the issue of whether or not these schedules met the minimum manpower needs as reasonably determined by the agency. Thus, the record shows that the agency brought the manpower deficiencies to the protester's attention on three separate occasions and provided an opportunity to correct the deficiencies. Under these circumstances, the agency was not required to reopen discussions to afford the offeror yet another opportunity to correct its proposal. AZTEK, B-229525, Mar. 2, 1988, 88-1 CPD ¶ ____.

The protest is denied.

for Seymour Efron
James F. Hinchman
General Counsel