The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: William B. Hackett & Associates, Inc.

File: B-232799

Date: January 18, 1989

DIGEST

1. Protester's best and final offer (BAFO) properly was rejected as being technically unacceptable where protester failed to rectify technical deficiencies brought to protester's attention prior to the date for submission of BAFOs.

2. A technically unacceptable proposal may be excluded from the competitive range irrespective of its low offered price.

3. An initial proposal was properly included in the competitive range where the agency reasonably determined that the proposal was susceptible of being made acceptable through discussions.

DECISION

William B. Hackett & Associates, Inc., protests the award of a contract to DynCorp Support Services Inc., under request for proposals (RFP) No. N00123-88-R-0157, issued by the Department of the Navy for integration/assembly and warehouse operations services for the Fleet Hospital program. The Fleet Hospital program provides in-theater medical care to Navy and Fleet Marine Forces personnel through the use of self-contained, relocatable modular hospital units and support elements. The protester challenges the rejection of its proposal as technically unacceptable and the adequacy of discussions.

We deny the protest in part and dismiss it in part.

The RFP requested separate technical and fixed priced cost proposals, and advised that award would be made on the basis of the lowest priced technically acceptable offer.

The Navy received four timely proposals. Three of these, including DynCorp's, were found technically acceptable. Hackett's proposal was determined technically unacceptable, but the contracting officer decided to include it in the

competitive range because there was a likelihood that an amendment would be issued that would contain substantial changes to the specifications. An amendment of this nature was never issued. All offerors were advised by letter of their deficiencies and asked to submit a best and final offer (BAFO).

After the technical evaluation of BAFOs, the Navy determined that Hackett's proposal remained unacceptable. By letter dated September 6, 1988, the Navy advised Hackett that its proposal was technically unacceptable and stated that its BAFO contained qualifying statements which so restricted its proposal as to make it non-responsive to the statement of work. These statements related Hackett's interpretation of what was contained in certain requirements of the RFP and when they were to be performed, which Hackett stated had an impact on its cost proposal. The contracting officer determined that award should be made to DynCorp as the lowest-priced technically qualified offeror and notified other offerors still within the competitive range of the award by letter dated September 9.

By letter dated September 12, Hackett protested to the Navy the rejection of its proposal as technically unacceptable. Hackett contended that its original proposal contained the same qualifying statements as its BAFO, yet these qualifications were not listed as deficiencies in the request for BAFOs. Hackett argued that it was not found technically unacceptable for any other reason than the "qualifications" stated in its letter transmitting its BAFO, and that the qualifying statements were restatements of the RFP criteria.

By letter dated September 14, the Navy acknowledged that it erred in its earlier letter to Hackett by not stating all the deficiencies in Hackett's BAFO. The Navy stated that it had assumed a formal debriefing would be requested at which all aspects of Hackett's proposal would have been discussed. The Navy attached the technical evaluation of Hackett's BAFO and stated that its underlying determination as to the acceptability of the proposal was based on the technical evaluation comments in the attachment.

The Navy met with Hackett on September 19 to discuss the merits of its protest and the findings set forth in the technical evaluation. The Navy conducted another evaluation of Hackett's proposal based on what was discussed at the meeting. Hackett protested to our Office on September 28, before the Navy rendered a decision on its agency-level protest.

Hackett protests that it was the lowest priced qualified offeror and should have been awarded the contract. Hackett argues that the Navy did not thoroughly evaluate its proposal and disputes the proposal deficiencies cited by the Navy. Hackett states that the Navy has presented different reasons for rejecting its proposal on three occasions: the September 6 letter notifying Hackett that its BAFO was technically unacceptable because of qualifying statements; the September 14 letter acknowledging Hackett's agency-level protest and attaching the technical evaluation of Hackett's BAFO; and the November 3 agency report to our office on its protest stating that Hackett's original proposal was unacceptable but included in the competitive range because an amendment changing the specifications was anticipated. According to Hackett, the change in the Navy's positions demonstrates the Navy's bad faith. Hackett complains that it was never told its original proposal was unacceptable, and asserts that the Navy decided from the beginning to disqualify it. Hackett contends the Navy harmed it by allowing it to prepare a BAFO, knowing that the amendment that could "save" Hackett would not be issued.

It is not the function of our Office to evaluate proposals de novo or to resolve disputes over the scoring of proposals. Rather, we will examine an agency's evaluation and competitive range determination only to insure that they were reasonable and consistent with the stated evaluation criteria. The determination of the relative merits of a proposal is primarily a matter of administrative discretion which we will not disturb unless it is shown to be arbitrary. Wellington Assocs., Inc., B-228168.2, Jan. 28, 1988, 88-1 CPD ¶ 85. Moreover, the protester must clearly establish that an evaluation was unreasonable. This is not accomplished by the protester's mere disagreement with the agency's judgment. Systems & Processes Engineering Corp., B-232100, Nov. 15, 1988, 88-2 CPD ¶ 478.

The Navy reports, and our review of the record confirms, that Hackett's initial proposal and BAFO were found unacceptable independent of the "qualifying statements" outlined in the letters attached to the initial cost proposal and BAFO. The record indicates that the technical evaluation team was not aware of any of the qualifying statements in Hackett's original proposal because the letter containing the qualifications was attached to the cost proposal and not submitted to the team for review. The technical evaluation of Hackett's original proposal found it unacceptable on 11 of 19 subfactors relating to RFP requirements. Hackett's BAFO was found unacceptable, apart from any consideration of the qualifying statements, on 8 of

19 subfactors: inventory control, kit fabrication/integration, shipment, medical equipment, civil engineering support equipment/civil engineering end item (CESE/CEEI), technical library, manpower requirements and organizational approach.

Hackett argues that the Navy must not have read its BAFO because it adequately addressed these areas. However, our review of the record shows that the Navy did evaluate its BAFO, but found its proposal was still deficient. While Hackett contends its proposal was acceptable, we find that the agency had reasonable basis for the conclusions it drew.

For example, under the medical equipment subfactor, the Navy notes that Hackett's BAFO was silent on the requirement in amendment 4 to perform acceptance inspections and preventative maintenance on oxygen generators and x-ray equipment. The record indicates both items are critical, and that for the contractor not to acknowledge the requirement could mean a significant percentage of the casualties could not be treated.

Hackett comments that its BAFO indicated Hackett, working with experts at the Fleet Hospital Support Office, had written the Integrated Preventative Maintenance Plan (1984) included as attachment 19 to the original RFP, and also indicated that Hackett would follow procedures in compliance with Navy regulations. However, we do not find it unreasonable for the Navy to determine that this blanket offer to comply with regulations did not provide the agency sufficient information to evaluate how Hackett would comply with the solicitation requirement. See IPEC Advanced Systems, B-232145, Oct. 20, 1988, 88-2 CPD ¶ 380.

The Navy also points out that Hackett's initial proposal and BAFO did not address the RFP's requirement for civil engineer end items (CEEI), which include such items as a power distribution system, water (potable and waste) distribution system, heaters and air conditioners. In its comments, Hackett concedes its initial proposal and BAFO could be deficient in this area, but asserts its confidence that it could perform adequately in this area. We thus have no basis to question the agency's technical evaluation in this regard. See The Gibson Hart Co., B-232259, Nov. 29, 1988, 88-2 CPD ¶ 529.

Under the technical library subfactor, the Navy determined that both the initial proposal and BAFO did not address the RFP provision for tagging equipment, preparing NAVMED Form 6700/3 and assigning preventative maintenance numbers. The

Navy also noted that Hackett's proposal provided for notification of missing manuals prior to shipment of the hospital, whereas the Statement of Work required immediate notification of missing manuals.

Hackett comments that its BAFO provided for developing a fully automated database which would allow notification of missing manuals prior to shipment. Hackett argues that since its proposed system was to be automated, it would be by definition immediate, since "why else would someone want to automate the function except for speed and control, the requirement of this function?" Hackett questions whether the fact that its proposal did not include the word immediate was sufficient to warrant a finding of unacceptable. Hackett also notes that in the Medical Equipment section of its proposal it mentioned it would comply with the NAVMED 6700 manual, so it would by definition complete form NAVMED 6700/3.

We do not find the Navy's position here unreasonable. Hackett's proposal provided for notification of missing manuals prior to shipment; it did not clearly set forth that it would provide for immediate notification of missing manuals and complete NAVMED form 6700/3 as required by the RFP. The Navy explains that immediate notification was required so that appropriate action could be taken to obtain missing manuals prior to declaring that the hospital had reached initial operating capability, which could occur months before the shipment. Furthermore, the record indicates that the Navy evaluators felt failure to tag equipment, prepare NAVMED Form 6700/3 and assign preventative maintenance numbers would hamper efforts in activating equipment, maintaining history records, and identifying items subject to recall because of a life threatening hazard.

Under the subfactor inventory control, the Navy determined that Hackett's BAFO was unacceptable because it inadequately addressed the requirement to establish procedures to control acceptance and surveillance of dated and deteriorating pharmaceuticals, and failed to address material subject to recall by the manufacturer. Hackett contends that its BAFO addressed these items in the hierarchical structure it proposed and in the FIFO (first-in, first-out) method of inventory control. According to Hackett, it is an undisputable fact that the FIFO system of inventory control must be implemented when dealing with dated and deteriorative items, pharmaceutical or otherwise.

The record indicates that the Navy considered that Hackett's proposal addressed a stock rotation system which ensures the oldest item is picked first, and that Hackett's proposal indicated that items that expire and can be extended would be pulled and marked for extension. However, the Navy felt that this explanation did not address pharmaceutical material subject to recall by the manufacturer, and indicated there would be a considerable amount of double handling of material because of expiration. The fact that Hackett objects to the evaluation, and perhaps believes its own proposal was better than as evaluated by the Navy, does not render the evaluation unreasonable. See DALFI, Inc., B-224248, Jan. 7, 1987, 87-1 CPD ¶ 24.

Another area of deficiency cited by the Navy concerns kit fabrication/integration. The Navy noted that Hackett's BAFO did not address a requirement to remove exterior packaging on tents, and did not establish a methodology for tracking and controlling not-in-stock, shelf-life and maintenance significant material, which were considered key elements in a very critical area. Hackett comments that it mentions not-in-stock, shelf-life and maintenance significant items in the inventory and storage control segments of its proposal.

We do not find the Navy's position unreasonable. The Statement of Work for the integration function clearly indicates that the "contractor is tasked with developing the integration method which combines the required assemblies and end items into various facilities for each hospital, while considering end item maintenance, periodic inspections and replacement of dated and deteriorated items." Arguably, then, Hackett should have mentioned in the integration portion of its proposal how it would address this task, or at least referred to other sections of its proposal where it felt it addressed these items.

In any event, as discussed above, the Navy also reasonably found that the inventory section of Hackett's proposal inadequately addressed surveillance of shelf-life items. Furthermore, Hackett does not dispute in its comments that it failed to address the requirement to remove exterior packaging on tents.

Under the shipment subfactor, the Navy found that the initial proposal and BAFO had no provisions for the requirement to account for government seals, which the record indicates is an accountable item used to prevent pilferage of material stored in hospital containers, and for the requirement to block and brace rail cars. According to the record, rolling stock, such as ambulance and material

handling equipment, needs to be loaded on rail cars and properly secured; failure to do so may result in damaged or lost equipment.

Hackett acknowledges that it did not specifically mention seal control or rail car blocking and bracing in its proposals, but argues that since it is a government logistics company, it set up procedures to follow all government codes and regulations, which in the normal course of events would include blocking and bracing the cargo carrier if necessary, and providing seals. Hackett argues this is customary in government transportation departments, and feels it was not necessary to specifically mention.

While we have no reason to question Hackett's capabilities as a government logistics company, an offeror in a negotiated procurement must demonstrate within the four corners of its proposal that it is capable of performing the work upon terms most advantageous to the government. Here, Hackett failed to show this in its proposal. Its company expertise and capability is not material. See Interworld Maritime Corp., B-232305, Nov. 29, 1988, 88-2 CPD ¶ 531.

The Navy also found Hackett's proposal unacceptable on two other subfactors: manpower requirements and organizational approach. The Navy noted that Hackett's BAFO did not demonstrate a knowledge of the full manpower requirements, and that manning levels were not clear, with part-time manyears identified but not shown against functional area requirements. The Navy felt it was not adequate to state manpower requirements would decrease from the initial program year through the third year. Under the organizational approach subfactor, the Navy determined that the BAFO's omissions included no work breakdown structure, no controls in place (i.e. cost, schedule, etc.), and no demonstration of the actual skills, organization or controls required to perform. As Hackett does not refute these criticisms in its comments, we have no basis to question the Navy's evaluation of these subfactors.

Although the protester may have offered to perform the contract at the lowest cost to the government, it also submitted what the agency reasonably determined was a technically unacceptable proposal. Its potentially lower price is therefore irrelevant, since once a proposal is found technically unacceptable, it cannot be considered for award. Evaluation Technology, Inc., B-232054, Nov. 15, 1988, 88-2 CPD ¶ 477.

Hackett also argues that it was never told its original proposal was unacceptable. The record shows that the Navy advised Hackett by letter dated July 1 of all areas of deficiencies in Hackett's initial proposal which the Navy's evaluation disclosed. Hackett was allowed to revise its initial proposal in response to the concerns raised by the Navy. Though Hackett was not advised of the Navy's concerns about the qualifying statements in its transmittal letter, which was attached to its initial cost proposal and not reviewed by the technical evaluation team, Hackett was not prejudiced by this omission. As discussed above, its proposal was reasonably found to be unacceptable for deficiencies in areas of its proposal which the Navy had advised were deficient. Thus, even if it had been advised of the Navy's concerns about its qualifying statements, its BAFO would still have been technically unacceptable and excluded from the competitive range.

Hackett appears, in the alternative, to be arguing that it should not have been included in the competitive range, if the Navy found its original proposal unacceptable. However, we have consistently defined the competitive range as consisting of all proposals that have a "reasonable chance" of being selected for award, that is, as including those proposals which are technically acceptable as submitted or which are reasonably susceptible of being made acceptable through discussions. ACRAN, Inc., B-225654, May 14, 1987, 87-1 CPD ¶ 509. FAR § 15.609(a) (FAC 84-16) mirrors this definition and provides that if doubt exists as to whether a proposal is in the competitive range, the proposal should be included. This is consistent with the over-riding mandate of the Competition in Contracting Act of 1984 that military agencies obtain "full and open competition" in their procurements. 10 U.S.C. § 2304(a)(1)(A) (Supp. IV 1986). Thus, as a general rule, an agency should endeavor to broaden the competitive range since this will maximize the competition and provide fairness to the various offerors. Furthermore, the determination of whether a proposal is in the competitive range is principally a matter within the contracting agency's reasonable exercise of discretion. Consolidated Engineering Inc., B-228142.2, Jan. 13, 1988, 88-1 CPD ¶ 24.

We find the procuring agency's actions here to be reasonable. The record indicates that the Navy included Hackett in the competitive range because it anticipated issuing an amendment which would contain specification changes affecting price. The Navy could thus reasonably conclude that Hackett's proposal was susceptible of being acceptable

through discussions and should be included in the competitive range. Such an action comported with its statutory requirement to maximize competition.

Hackett contends that the Navy's actions on this procurement were in bad faith, and that our Office has the responsibility to investigate its allegations.

Procurement officials are presumed to act in good faith, and in order to show otherwise, a protester must meet a heavy burden. See American Management Co.--Request for Reconsideration, B-228280.2, Mar. 7, 1988, 88-1 CPD ¶ 242. Hackett has not done so. To the extent that Hackett is asking us to conduct an investigation to substantiate its allegation, the protester has the obligation of presenting its own case. We do not conduct investigations for the purpose of establishing the validity of a protester's argument. See Fayetteville Group Practice, Inc., B-226422.5, May 16, 1988, 88-1 CPD ¶ 456.

Hackett also alleges in its comments that the awardee does not have qualified biomedical technicians in place and has requested to be relieved from the initial December deadline on its first hospital.

This issue is not for resolution under our Bid Protest Regulations, 4 C.F.R. § 21.3m(1) (1988). Whether a contractor actually performs in accordance with the solicitation's requirements is a matter of contract administration that is the responsibility of the contracting agency. Louisiana Foundation for Medical Care, B-225576, Apr. 29, 1987, 87-1 CPD ¶ 451.

Finally, Hackett has requested that it be reimbursed the costs of preparing its proposal and its protest costs. However, since we find the protest without merit, we deny the claim for costs. Transportation Research Corporation, B-231914, Sept. 27, 1988, 88-2 CPD ¶ 290.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel