Stephen

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Techno-Sciences, Inc.

File: B-238270

Date: April 24, 1990

Lee D. Davisson, for the protester.
D. Joe Smith, Esq., Jenner & Block, for Canadian Astronautics Limited, an interested party.
John F. Rodgers, Esq., and James K. White, Esq., Office of the General Counsel, Department of Commerce, for the agency.
Stephen J. Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Evaluation was proper where source selection documents show that it was reasonably based and consistent with evaluation criteria in the solicitation.

2. Awardee's failure to satisfy size standard requirement in solicitation was not proper basis for rejecting proposal; the procurement was not set aside for small business concerns and the size standard referenced in the solicitation (apparently by mistake) therefore was not applicable.

3. Allegation that awardee, as the incumbent, had an unfair competitive advantage in preparation of proposals because it had access to information not made available to protester is untimely, since protester knew of basis for protest prior to submission of proposal, but failed to raise objection at that time.

DECISION

Techno-Sciences, Inc. (TSI), protests the award of a contract to Canadian Astronautics Limited (CAL), under request for proposals (RFP) No. 52-DDNE-0-00003, issued by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, for the maintenance of three local user terminals (LUTs), used to receive satellite-relayed distress signals. The protester asserts that CAL's and

TSI's cost and technical proposals were improperly evaluated; that CAL failed to meet a size standard in the solicitation; and that CAL, as the incumbent, had information that gave it an unfair advantage in preparing its cost proposal.

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

BACKGROUND

The RFP, as issued, contemplated the award of a firm, fixed-price contract for hardware and software maintenance of the LUTs, with a time and material line item for any adaptive software maintenance (i.e., changes to existing software) that might be required. The solicitation subsequently was amended to provide that any adaptive software maintenance time and materials would be furnished on a cost-plus-fixed-fee (CPFF) basis. Proposals were to be evaluated on the basis of technical merit and cost, with technical factors being substantially more important than cost, and the RFP stated that award would not necessarily be made on the basis of the lowest cost or the highest technical score. The major technical criteria, in descending order of importance, were qualifications of personnel, technical and managerial approach, and past performance.

NOAA received three proposals in response to the solicitation and determined that TSI's and CAL's comprised the competitive range. The agency gave CAL's initial proposal a technical score of 95.2 and TSI's a score of 67.9; following discussions with the two offerors, NOAA increased CAL's technical score to 98.2 and TSI's to 83.3. In response to NOAA's request for best and final offers (BAFOs), which included no new technical questions, CAL proposed a price of $1,284,212 and TSI a price of $1,255,591. Based on a 65/35 technical/cost weighting, CAL received an overall score of 98.03 and TSI, 89.15. NOAA awarded the contract to CAL based on its higher overall score.

TECHNICAL EVALUATION

TSI asserts that in the evaluation of its proposal NOAA did not give it sufficient credit for its experience with the maintenance of LUTs. In this regard, the protester states that, despite the agency's recognition of TSI's excellent personnel qualifications and past performance, TSI improperly was rated deficient in the areas of hardware maintenance experience and ability to manage hardware maintenance. TSI points to its considerable experience with similar LUTs, under a contract with the government of India, as evidence of its demonstrated capability to perform all tasks required

under the present contract, and asserts that NOAA improperly failed to contact the Indian government to verify the quality of TSI's performance and generally failed to give it sufficient credit for this experience.

We will not disturb an agency's technical evaluation where it is not shown to be unreasonable or inconsistent with the solicitation's evaluation scheme. CAP, a Joint Venture, B-229571, Feb. 1, 1988, 88-1 CPD ¶ 95. There has been no such showing here.

The record indicates that NOAA did consider TSI's experience in India, and concluded that its "design and development of the Indian LUT has been very successful." Further, NOAA considered the fact that the LUT in India, which TSI designed, built, and installed, interfaces with the same satellite system used by the LUTs to be maintained under the present solicitation. The agency also noted the firm's additional related experience in providing maintenance and operational support for a LUT at the National Aeronautics and Space Administration. In connection with prior experience generally, the agency concluded that TSI had an impressive list of past clients, had grown over the years through new and repeat business, including the follow-on contract with India for an additional LUT, and seemed to have performed well on previous software and digital hardware design projects. Thus, NOAA did fully consider TSI's past experience.

In comparison, the record indicates that CAL designed, built, and delivered every LUT used to receive satellite distress signals in the United States; provided all of the LUT software; was the only company to have maintained them since delivery; and provided maintenance to LUTs in a number of countries around the world. Thus, it is clear that the substantially higher technical rating NOAA gave to CAL in these areas was reasonably based on that firm's own considerable experience, rather than on a failure to give TSI sufficient credit for its experience.

Similarly, we find no basis for questioning the agency's judgment that, although very strong in the design area, TSI was weaker in hardware maintenance due to its limited maintenance performance on projects of similar size and scope. In particular, NOAA noted that TSI had never had a contract that was strictly for maintenance, and that the firm did not have a functional maintenance organization in place. While TSI disagrees and suggests that any weakness in this area is offset by its reliance on maintenance subcontracts with equipment manufacturers, we note that NOAA found that one of TSI's strengths was, in fact, its "wise

choice of subcontractors," and that "the proposed subcontractors are the original equipment providers and the ones who are presently performing LUT maintenance." Thus, while the record shows that NOAA was cognizant of TSI's strengths in this area, it found those strengths insufficient to offset the firm's basic lack of experience compared to CAL's. We find that this judgment was reasonable.

Finally, TSI suggests that the agency may have evaluated CAL higher on the basis of its satisfactory experience as an incumbent, rather than on the merits of its proposal alone. Our review of the evaluation documents, as indicated above, does not support this allegation. While the facts do not support the protesters claim, we note that an agency properly may take into account aspects of an incumbent's past performance. For example, an agency is not required to disregard an incumbent's specific experience in performing the tasks specified in a solicitation; incumbent contractors with good performance records can offer definite advantages to the government, and those advantages properly may be considered in proposal evaluation. See Institute of Modern Procedures, Inc., B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93.

COST EVALUATION

TSI alleges that NOAA apparently did not evaluate the cost realism of each proposal. According to TSI, CAL's proposed cost for the CPFF portion of the contract (adaptive software maintenance) is understated based on the historic costs indicated in the documents obtained by the protester prior to the submission of proposals. In every other area, TSI notes, CAL's proposed costs are higher. According to the protester, if the proposed costs were reevaluated with the CPFF costs removed, CAL's price would be $1,245,638 and TSI's $1,082,202. Based on this "true" price differential and its high technical score of 89.15, TSI states that it would have scored higher than CAL overall, and therefore would have received the award.

Contrary to TSI's assertions, even if the proposed costs were recalculated as TSI suggests, TSI still would have ranked below CAL in overall score. Based on the 65/35 technical/cost formula that NOAA used in evaluating proposals and on the revised cost figures put forward by the protester, CAL's overall score would have been reduced to 93.58 (based on a formula under which the score for cost was reduced in proportion to the amount by which it exceeded the low proposed cost), but TSI's would have remained at 89.15; TSI, as the low-priced offeror, already had received a 100 percent score for cost, and therefore would realize no increase in its own overall score by virtue of the revised

prices it suggests. Thus, even if TSI were correct in stating that NOAA scored CAL's cost proposal too high, TSI was not prejudiced; CAL's significantly higher technical score still would have resulted in TSI's receiving a lower overall score.

SIZE STANDARD

TSI argues that, although the agency asserts otherwise, this procurement was set aside for small business concerns, as evidenced by its inclusion of a size standard in the RFP; under clause L.9(c), the awardee's average annual receipts for the preceding 3 fiscal years could not exceed $12.5 million. TSI claims CAL does not meet this standard and therefore was precluded from receiving the award. Alternatively, TSI asserts that even if the procurement is not a set-aside the size standard still applied, since clause L.9 referred to the $12.5 million standard as "a set-aside and/or size standard" criterion. TSI would have us read this language as creating a size standard regardless of whether the procurement is a set-aside.

TSI's position is without merit. First, the solicitation clearly was not set aside for small business. The record shows that, although the RFP originally was advertised in the Commerce Business Daily (CBD) as a small business set-aside, it subsequently was readvertised as an unrestricted procurement after the agency determined there were not enough small businesses capable of performing the work to ensure adequate competition. As issued to the 35 firms that responded to the second CBD notice, the solicitation did not include Federal Acquisition Regulation (FAR) clause 52.219-6, Notice of Total Small Business Set Aside, and nowhere else indicated that the competition was limited to small businesses. Moreover, clause L.9 provided: "(a) Percent of set-aside: 0% (b) Type of set-aside: None." The size standard language cited by the protester, apparently retained inadvertently from the original set-aside, did not by itself establish that the procurement was a set-aside. See Clean America, Inc., B-237341, Feb. 9, 1990, 90-1 CPD ¶ 171 (allegation that awardee was large and therefore ineligible for award, rejected, where advertisement in CBD indicated solicitation was not a small business set-aside, FAR clause 52.219-6 was not included in solicitation and size standard was included in solicitation for other reasons).

Further, contrary to TSI's alternative position, the size standard was not applicable even without a set-aside. Procurements must be conducted using full and open competition to the maximum extent possible; unjustified restrictions on competition are improper. Competition in Contracting Act of 1984, 41 U.S.C. § 253(a)(1)(A) (Supp. V 1987). One instance where competition may be restricted is where a procurement is set aside for participation solely by small business concerns. 41 U.S.C. § 253(b)(3). Such set-asides are in furtherance of the statutory requirement that a fair proportion of government contracts be placed with small businesses. See Small Business Act, 15 U.S.C. §§ 638, 644. In the absence of a set-aside, however, there is no justification for restricting competition based on a firm's size; consequently, the size standard in the solicitation here did not preclude award to CAL.

COMPETITIVE ADVANTAGE

TSI asserts that CAL, the incumbent contractor, had an unfair competitive advantage in preparing its cost proposal, since only CAL had access to information on time, manpower, and material requirements under the prior contract that could be used to estimate future requirements. According to TSI, it was essential to know the current condition and the prior 2 years' experience on LUT performance in order to submit a fixed-price bid.

Under our Bid Protest Regulations, to be timely an alleged solicitation impropriety must be protested prior to the date set for the receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1989). The record shows that TSI received all of its documentary information prior to the initial closing date; indeed, NOAA extended the due date for the submission of proposals to permit time for TSI to receive the documents. Based on those documents and on the information in the solicitation itself, TSI obviously should have known whether it had sufficient information to prepare its proposal prior to the time set for the submission of proposals; if it considered the information inadequate, it should have protested the absence of additional information

prior to that date. TSI did not do so, and its post-award protest of the agency's alleged failure to provide information on the incumbent contract therefore is untimely. See CAP, a Joint Venture, B-229571, supra.

The protest is denied in part and dismissed in part.

for James F. Hinchman
General Counsel