

Van Schaik



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mandex, Inc.; Tero Tek International, Inc.

File: B-241759; B-241759.2; B-241759.3

Date: March 5, 1991

James E. Keough, Esq., Keough Professional Corporation, for Tero Tek International, Inc., and Mary Lou Patel for Mandex, Inc., the protesters.
Kenneth M. Bruntel, Esq., Crowell & Moring, for EC III Corp., an interested party.
Craig E. Hodge, Esq., and Capt. Weslyn M. Erickson, Esq., Department of the Army, for the agency.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests that solicitation should have included preference for small disadvantaged businesses and that solicitation included incorrect standard industrial classification code concern alleged improprieties apparent from the face of the solicitation and are untimely. Under the General Accounting Office Bid Protest Regulations, they were required to be filed prior to due date for receipt of proposals.
2. Protest that agency failed to inform all offerors that proposals were required to be based on a level-of-effort of 146 man-years is denied where all offerors were informed of the requirement, and contrary to protester's contention, awardee's proposal was based on the required level-of-effort.
3. Alleged inconsistencies in an agency's application of its internal proposal evaluation plan do not themselves provide a basis for questioning the validity of an award selection since evaluation plans are solely for the guidance of agency officials. Where solicitation stated that agency would follow evaluation plan, the agency's failure to follow that plan resulted in no prejudice to protester since when it prepared its proposal, the protester was not aware of and could not have relied on the specifics of the plan.

050803/143371

DECISION

Mandex, Inc. protests the terms of request for proposals (RFP) No. DAAD01-90-R-0065, issued by the Department of the Army for test observer/recorder and automotive services. Tero Tek International, Inc. also protests the award of a contract to EC III Corp. under that solicitation.

We dismiss Mandex's protest and we deny Tero Tek's protests.

BACKGROUND

The solicitation contemplated the award of a cost-plus-fixed-fee contract. The successful contractor must have a permanent staff substantially as identified in the solicitation and will be required to respond to task orders issued by the government with additional staff having the appropriate skills. Under the RFP, award was to be made to the offeror submitting the best overall proposal with consideration given to technical and management factors, present and past performance, and cost. The technical and management factors were most important and cost was least important.

Nine firms submitted 10 initial proposals (one firm submitted an alternate proposal). Tero Tek submitted one of the initial proposals with Mandex as a subcontractor. After evaluating the technical proposals and past and present performance and performing a cost realism analysis, the contracting officer created a competitive range of four offerors, including Tero Tek and EC III.

After negotiations and the receipt and evaluation of best and final offers (BAFO), the Army awarded the contract to EC III based on its superior technical proposal. EC III also had proposed the lowest cost and was rated superior on past and present performance. The Army reports that, in accordance with the RFP evaluation scheme, award was made on the basis of EC III's technical superiority with past and present performance and cost less important.

After Tero Tek and Mandex protested, the Army determined in accordance with 31 U.S.C. § 3553(d)(2)(A)(ii) (1988) that urgent and compelling circumstances significantly affecting the interests of the United States did not permit delaying performance of the contract.

THE MANDEX PROTEST

Mandex states that it did not submit a proposal under the solicitation but instead was a subcontractor to Tero Tek because the solicitation did not include an evaluation

preference for small disadvantaged businesses (SDB) and included a standard industrial classification (SIC) code unfavorable to Mandex. Mandex points out that the solicitation did not include the SDB clause because the solicitation called for an award based on "quality" or "best value," but maintains that the Army awarded the contract to EC III based solely on low cost and therefore deviated from the award scheme set out in the solicitation which placed a premium on "quality." Mandex explains that had the solicitation been issued with award to be made on the basis of cost, the ground on which it maintains that the award actually was based: (1) it would have pursued a change in the solicitation's SIC code, (2) it would have protested the lack of an SDB preference clause, and (3) it would have submitted a proposal as a prime contractor.

Our Bid Protest Regulations require that protests based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to the closing date. 4 C.F.R. § 21.2(a)(1) (1990). Mandex argues that its grounds for protest arose when it learned that the Army deviated from the "best value" award scheme set out in the RFP, which placed a premium on quality, or technical/management considerations, over cost. According to Mandex, it reasonably assumed that the agency would follow the evaluation scheme announced in the solicitation and, therefore, had no basis to protest the agency's failure to include the SDB preference until it found out after the award that, in fact, a cost-based award was made.

Mandex, however, is simply incorrect about the basis of award. The record clearly shows that the Army awarded the contract to EC III based on the evaluation and award scheme set out in the solicitation. Although Mandex is correct that EC III submitted the lowest cost proposal, EC III's proposal also was highest scored under the technical/management evaluation factors. The award therefore was consistent with the RFP, which placed a premium on technical/management considerations over cost and provided for award based on a "best value" evaluation. Since the evaluation was conducted in accordance with the evaluation scheme set forth in the solicitation, the Army's actions did not establish a basis for the Mandex protest. Accordingly, Mandex's objections to the SIC code and the solicitation's lack of an SDB preference clause are untimely and will not now be considered.

THE TERO TEK PROTEST

Tero Tek principally argues that after the initial proposals were evaluated the Army changed the requirements of the solicitation without issuing an amendment or informing all of the competitive range offerors of the change and, as a result, all offerors did not compete on an equal basis. Specifically, Tero Tek maintains that the Army sent a letter to all of the offerors except EC III, the awardee, stating that BAFOs were required to be based on 146 man-years of effort per year and that EC III consequently may have submitted a BAFO which included fewer than 146 man-years. Tero Tek also argues that even if EC III proposed the required 146 man-years, it may have proposed an approach that varied the number of positions and/or labor categories required by the RFP.

The solicitation included a "STAFFING ESTIMATE" chart which set out various labor categories and a total level-of-effort of 146 man-years. The solicitation stated that the chart was "the Government's best manning level estimate to meet the workload or level-of-effort to be expected in the performance of the contract." According to the Army, many of the offerors initially proposed approaches that resulted in less than the Army's anticipated available productive hours based on unverifiable contingencies or unsupported assumptions. The Army explains that it sent letters to each of those offerors to inform them that they must propose 146 man-years of effort and to create a "level playing field."

The record includes copies of identical letters which were sent to three of the competitive range offerors, not including EC III. Those letters stated "your proposal must be based on 146 man-years of effort plus the indicated overtime." The Army reports that the same letter was not sent to EC III. Nonetheless, the record includes a September 28 letter from EC III to the Army which indicates that EC III understood that it was required to propose a total of 146 man-years. EC III's letter states that the contracting officer informed EC III in a September 27 letter:

"The estimated manning at paragraph 1.24 of the statement of work is meant to reflect the anticipated manyears required not the number of personnel. That is, there could be 200 persons working on the contract at a given time but it is not anticipated that the total man-years will exceed 146."

In response, EC III's September 28 letter stated: "We interpret this paragraph to require EC III to bid a total of 146 manyears of effort per year We will also include the required 10 percent overtime." Thus, it appears that

EC III understood that it was required to propose 146 years of effort per year. Moreover, although in its initial proposal EC III had proposed staff reductions based on "innovative data collection and reporting techniques," in its BAFO, EC III proposed 146 man-years of effort per year and deleted the proposed staff reductions.^{1/} Thus, it is clear that all offerors were aware of the 146-man-year requirement and we find no merit to the assertion that offerors did not compete on an equal basis.

Tero Tek, nonetheless, argues that EC III's September 28 letter indicates that the advice given to that firm was not the same as that given to the other offerors since the EC III letter stated that the Army told the firm that "there could be 200 persons working on the contract." Tero Tek maintains that EC III may have used this advice to its advantage in preparing its proposal and to the prejudice of the other offerors.

Although the advice given to EC III was stated differently from that given the other offerors, it received the same message--146 man-years were required. There is no indication that the reference to "200 persons working on the contract" informed EC III of anything that it or any other offeror did not already know--that the number of persons working under the contract at a given time could vary depending on the task orders.^{2/}

Tero Tek also argues that EC III's technical proposal may have included references to cost and that it inappropriately received a high technical rating based on possible cost savings. In the report responding to the protest, the

^{1/} In its determination to allow performance of the contract, the Army stated that various types of testing which previously were performed under three separate contracts are to be performed under the EC III contract. Tero Tek maintains that this statement indicates that EC III's contract will allow it to combine automotive and testing positions. We think that the Army's statement, taken in context, simply indicates that the solicitation itself combined work under a single contract that previously had been done under three separate contracts.

^{2/} Tero Tek also argued that the Army failed to issue an amendment or otherwise inform all competitive range offerors that they should include in their BAFOs \$35,000 for equipment and material in support of test and other unusual activities. Tero Tek argues that it was prejudiced because it included this cost as instructed while EC III was not told to do so. On the contrary, the Army sent to all four competitive range offerors identical letters instructing them to include this cost and there is no indication that EC III failed to do so.

contracting officer stated that EC III's proposal "was rated technically superior due, in part, to its proposal of innovative management techniques, not inconsistent with the stated solicitation requirements, which may ultimately decrease cost and/or increase productivity to the benefit of the Government." Tero Tek argues that this comment indicates that EC III included cost-related information in its technical proposal in violation of the RFP. Also, Tero Tek maintains that the contracting officer's statement shows that cost improperly was used as a driving force in the technical evaluation and, as a result, the evaluation was conducted in a manner inconsistent with the evaluation scheme in the RFP, under which technical merit was more important than cost.

There is no merit to these allegations. There was no improper information relating to cost in EC III's technical submissions and we find no evidence in the record that the technical evaluation board improperly credited EC III with cost-related aspects of that firm's proposal. Although some cost-saving initiatives in EC III's initial proposal were deleted when, in its BAFO, EC III agreed to the required 146-man-year level-of-effort, the evaluation record shows that the technical evaluation board believed that other unique features of EC III's proposal may save money and/or improve productivity. We think these features of the proposal were appropriate considerations under the solicitation's technical and management evaluation criteria, under which the evaluators were to consider whether an offeror's proposed organization and staffing were effective for accomplishing the work and operating efficiently.

Tero Tek also argues that the Army did not conduct a cost realism analysis of EC III's proposal to determine if labor rates proposed by that firm, for instance for data collector positions, were realistic. On the contrary, the record includes an initial proposal cost analysis report and a BAFO cost analysis report. Those reports include a detailed analysis of each offeror's proposed costs, including labor costs, indirect costs, costs for training, general and administrative expenses, facilities and the agency's determination of the most probable cost for each offeror. Specifically, although Tero Tek argues that the agency did not analyze the realism of EC III's proposed labor rates for data collector positions, the Army's report on the protest indicates that the agency determined that the wages proposed by EC III for those positions in its BAFO were realistic and, while the positions were not covered by a Service Contract Act wage determination, the report states that the awardee reasonably conformed these positions with the wage rates set forth in the wage determination for computer operators. While the protester seems to object to this, it has provided no

intelligible reason for its position and we see nothing improper in the agency's conclusion.

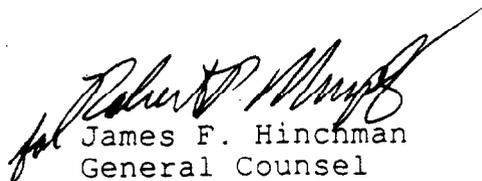
Tero Tek, in a supplemental protest, argues that when the Army evaluated the BAFOs, it failed to follow the solicitation evaluation scheme and the agency's established evaluation plan. Tero Tek notes that the RFP stated that proposals would be evaluated using "the established evaluation plan," that the evaluation would be conducted "by a team" of agency evaluators, and that each proposal would "receive a numerical rating which will include qualitative narratives." The protester also notes that the Army's evaluation plan, which was not a part of the solicitation, indicated that BAFOs would be evaluated in accordance with the same procedures used for initial proposals, including evaluation by "a board of evaluators."

Although initial proposals were evaluated by a technical evaluation board, the chairman of the board individually reviewed the BAFOs and made changes in the scores of the awardee and one other offeror. Under both the initial technical evaluation and the BAFO evaluation, the protester's technical rating was considerably below the awardee's. According to Tero Tek, since the RFP required that the evaluation plan be followed and that plan required the same procedures for BAFO evaluation as were used for the initial evaluation, the BAFO evaluation conducted by the board chairman alone was not in accordance with the RFP.

Alleged deficiencies in the application of an agency evaluation plan or source selection plan do not alone provide a basis for questioning the validity of the award selection. These plans are internal agency instructions and as such do not give outside parties any rights. Quality Sys., Inc., B-235344; B-235344.2, Aug. 31, 1989, 89-2 CPD ¶ 197. The agency is required to follow the evaluation scheme set forth in the RFP for the information of potential offerors, and to conduct its evaluation in a manner that will reach a rational result. Id. It is clear from the record that the proposals here were evaluated using the evaluation criteria set forth in the RFP. The RFP did state that a "team" of evaluators would conduct the evaluation and the record shows that only the chairman of the evaluation team, in fact, reviewed and rescored the BAFO materials. To the extent this was inconsistent with any portion of the evaluation plan that was not also specified in the RFP, it does not provide a basis of protest. Id. To the extent that reviewing and rescoring of the BAFOs by the chairman alone was not consistent with the process as described in the RFP (which stated that a "team" would evaluate proposals), we fail to see how the protester was prejudiced since Tero Tek was not aware of and, therefore, could not have relied on the evaluation plan in preparing its

proposal. There is also no showing that the evaluation result would have been different had the full panel convened to reevaluate the BAFOs.^{3/} Accordingly, we see no legal basis to question the evaluation.

The Mandex protest is dismissed and Tero Tek's protests are denied.


James F. Hinchman
General Counsel

^{3/} After the protest was filed, the Army reconvened the evaluation panel, rescored the BAFOs and reached essentially the same result as the evaluation board chairman.