



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: International Training, Incorporated

File: B-242254

Date: March 13, 1991

Jerome E. Hoffman for the protester.
William H. Scott for BSR, Incorporated, an interested party.
Herbert F. Kelly, Jr., Esq., Department of the Army, for the agency.
John Formica, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that provisions in request for proposals (RFP) are overly restrictive and favor a particular offeror is untimely where the alleged RFP defects were apparent prior to the closing date for receipt of initial proposals but the protest was not filed with either the contracting agency or the General Accounting Office until after award.
2. Agency acted reasonably in rejecting as technically unacceptable a proposal submitted in response to a solicitation for evasive driver training where the training facility proposed by protester failed to comply with solicitation requirements.
3. Protest that agency was biased in favor of the awardee in its evaluation of proposals for evasive driver training is denied where there is no credible evidence showing bias, and the record supports the agency's rejection of the protester's proposal as technically unacceptable and its selection of the awardee.
4. New grounds of protest raised for the first time in the protester's comments on the agency report are untimely where the protester could and should have raised these grounds when it filed its protest.

DECISION

International Training, Incorporated (ITI) protests the rejection of its proposal as technically unacceptable and the award of a contract to BSR, Incorporated under request for

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proposals (RFP) No. DABT02-90-R-0034, issued by the Department of the Army for evasive driving training to be conducted at the contractor's facility.

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

The solicitation, which was issued on June 29, 1990, informed offerors that technical and managerial capabilities were of approximately equal importance, and that award would be made to the lowest priced acceptable offeror. The solicitation required in relevant part that the proposed training facility have "up and down hill slopes, . . . shrubbery or man-made obstacles that will accommodate realistic ambush scenarios . . . [and] be located in an area where only authorized personnel can view the training."

Three proposals were received by the July 30 closing date. The proposals were evaluated, and the agency found that ITI's proposal deviated from a material requirement in the solicitation in that its training facility, located on an unused airport runway, did not have up and down hill slopes. The agency also concluded that ITI's facility was deficient because it did not have a clearly defined roadway and was unrealistic for off-road recovery exercises because the terrain surrounding the roadway did not portray the terrain typically found along most established roadways. The agency also found that the obstacles and visible barriers erected along ITI's roadway, which were made of straw, could not accommodate realistic ambush scenarios. An agency evaluator visited ITI's facility on August 21, and confirmed the existence of the training facility deficiencies identified in the evaluation. The agency subsequently advised the protester in writing of the deficiencies in its proposal.

The protester responded by modifying its facility so that its roadways were more clearly defined, and developing an off-road recovery training area which it asserted was typical of "real world" terrain. With regard to the agency's determination that its facility could not accommodate realistic ambush scenarios, the protester explained that its straw barriers and obstacles "are all strategically placed to realistically portray known terrorist attacks." Additionally, the protester stated that it planned to cover the straw barriers with "safe materials" and then portray the barriers as walls, phone booths, buildings, or fences. ITI also acknowledged that its facility did not have up and down hill slopes, as required by the solicitation.

Based upon this response, ITI's proposal was determined to be technically unacceptable because its facility did not have up and down hill slopes, could not accommodate realistic ambush scenarios even with the modifications to the straw barriers

proposed by ITI because probable attack locations would still be obvious to the driver/trainee, and did not realistically portray the terrain found along most established roadways. Award was subsequently made to BSR, the incumbent contractor.

ITI's protest centers on its argument that the solicitation specifications, particularly the requirement that the training facility have up and down hill slopes, overstate the government's minimum needs and favor BSR. ITI further contends that its proposal should not have been determined technically unacceptable, and that it was rejected only because the Army was biased towards BSR. In this regard, the protester maintains that it will be able to create realistic ambush scenarios and argues that the agency failed to give it credit for several positive aspects of its proposal.

ITI's argument that the solicitation specifications are overly restrictive and favor BSR is untimely and will therefore not be considered. Under our Bid Protest Regulations, protests based upon alleged improprieties apparent on the face of a solicitation must be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1990); Seer Publishing Inc., B-237359, Feb. 12, 1990, 90-1 CPD ¶ 181. Here, because the alleged defects in the RFP were apparent on the face of the solicitation, ITI would have had to file its protest prior to the July 30 closing date for receipt of initial proposals in order to be timely.

As far as the evaluation of proposals is concerned, that is primarily within the discretion of the procuring agency and not our Office; the agency is responsible for defining its needs and the best method of accommodating them, and must bear the burden resulting from a defective evaluation. Consequently, we will not make an independent determination of the merits of offers; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation factors. Litton Sys., Inc., B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114. The fact that the protester disagrees with the agency's judgment does not render the evaluation unreasonable. Id. In a negotiated procurement, where, as here, a proposal fails to conform to the material terms and conditions of the solicitation, the proposal is unacceptable and it may not form the basis for award. Fraser-Volpe Corp., B-237617, Mar. 12, 1990, 90-1 CPD ¶ 263.

ITI has acknowledged that its facility does not have up and down hill slopes as required by the solicitation. As to the realism of its ambush scenarios, the protester claims that through the use of straw barriers depicting a "city street" environment, it "has developed a whole new generation of evasive driver training," and contends that the Army's

conclusion that its facility could not accommodate realistic ambush scenarios "clearly demonstrates [its] willingness to proceed in the future with outdated technology and tactics." We have reviewed the evaluation record, including photographs of the ITI facility supplied by the protester with its proposal and revised offer, and it is our view that the record clearly supports the agency's determination that the facility could not accommodate realistic ambush scenarios. Therefore, we have no basis on which to object to the agency's determination that ITI's facility was technically unacceptable.

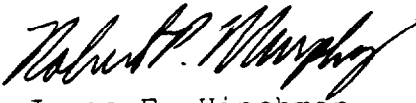
Since we have no basis upon which to disagree with the agency's rejection of the ITI proposal on these two grounds, the protester's arguments that its proposal had other positive aspects which the agency allegedly failed to recognize are not relevant.

As to ITI's argument that the agency was biased in favor of the awardee, since the record supports the agency's rejection of ITI's proposal as technically unacceptable, we find no credible evidence to support the protester's claim. See Greyback Concession, B-239913, Oct. 10, 1990, 90-2 CPD ¶ 278.

Finally, ITI argues for the first time in its comments on the agency report that the awardee's facility is not compliant with the solicitation's requirement that it be located in an area where only authorized personnel can view the training. ITI's argument here is apparently based on its familiarity with BSR's facility, as the protester has provided photographs taken from a roadway accessible to the public which purportedly showed a segment of BSR's training facility. The protester also complains for the first time in its comments that it was unable to fully demonstrate its training capabilities to the agency evaluator during the August 21 visit to ITI's facility because the evaluator limited his stay to one and one-half hours, and was accompanied by his daughter and a companion which raised security and liability concerns. Protest arguments such as these must be filed within 10 working days after the basis for protest is known or should have been known in order to be timely. 4 C.F.R. § 21.2(a)(2); Norden Serv. Co., Inc., B-235526, Aug. 22, 1989, 89-2 CPD ¶ 167. Since ITI's newly raised contentions could have been raised when it filed its protest, they are untimely and will not be considered. A protester may not

introduce new issues in its comments that it could and should have raised earlier in the protest process. Norden Serv. Co., Inc., B-235526, supra.

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


for James F. Hinchman
General Counsel