DeGeorge
B242315

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Aerostructures, Inc.

File: B-242315

Date: April 17, 1991

Dennis A. Riley, Esq., and Kenneth A. Martin, Esq., Elliott, Bray & Riley, for the protester.
Robert Janes, Esq., and Carolyn E. Riemer, Esq., Department of the Navy, for the agency.
Steven W. DeGeorge, Esq., Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's requests for specific additional information from the protester and other offerors prior to the initiation of proposal evaluation did not constitute competitive range discussions, but were only clarification contacts made to enable agency to determine which offerors were in the competitive range.

2. Protester's proposal was reasonably found unacceptable and not within the competitive range where, for example, it proposed unqualified key personnel and scored less than half of the total available technical points.

3. Agency's late notice of award is procedural in nature and does not affect the validity of an otherwise properly awarded contract.

DECISION

Aerostructures, Inc. protests the award of a contract to Semcor, Inc. under request for proposals (RFP) No. N62269-90-R-0122, issued by the Department of the Navy, Naval Air Development Center, for engineering services and material in technical support of air vehicle structure research, design and development. Aerostructures contends that the Navy failed to conduct meaningful discussions and that its proposal was improperly excluded from the competitive range. The protester also complains that it was not given timely notice of its exclusion from the competitive range.

We deny the protest.

The RFP was issued on April 9, 1990, and contemplated the award of a cost-plus-fixed-fee indefinite quantity contract. Proposals were to be evaluated based upon cost and five major technical evaluation factors. These factors were listed in the RFP in descending order of importance, and according to the agency's source evaluation plan, were assigned point values as follows: (1) personnel qualifications (40 points); (2) technical approach (25 points); (3) corporate experience (20 points); (4) management and resources (10 points); and (5) facilities (5 points). The RFP also expressly provided that cost was of lesser importance than technical merit in terms of determining the most advantageous proposal to the government.

On May 3, amendment 1 was issued to the RFP which provided that the successful offeror's workforce had to be located within 1 hour's drive of the Center. Subsequently, in response to a prospective offeror's written question, the agency advised that offerors could propose a small number of personnel outside the 1-hour radius, but only on condition that a clear plan to assure responsiveness and economical performance was presented.

Four proposals were received by the May 24 closing date. Upon initial review, the contracting officer determined that each of the proposals needed some clarification in the area of personnel staffing and location in relation to the requirement of amendment 1. Thus, the agency wrote to the protester on June 22 and requested clarification of certain information in its technical and cost proposals pertaining to staffing. This letter expressly stated that it did not constitute negotiations or acceptance of the protester's proposal. Substantially similar letters were sent concurrently to each of the other offerors.

Aerostructures responded on June 28 to the agency's request. The protester's letter described the commuting requirements of four temporary personnel which had been proposed and noted that the associated travel expenses for these individuals had inadvertently been omitted from its proposal. The protester also provided information regarding the probable location from which replacement personnel would eventually be hired.

Following receipt of this information, and responses from the other offerors, the agency conducted an evaluation of the proposals. On the basis of this evaluation, the agency rated two of the proposals unacceptable but capable of being made acceptable, and two, including the protester's, unacceptable and not capable of being made acceptable. The protester's technical proposal was assigned a total score of 44.9 points out of 100. By contrast, Semcor's technical proposal was the

highest rated with 82.8 points. The protester proposed the lowest cost at $4,713,680, compared to Semcor's proposed cost of $5,544,129.

On September 27, the agency established a competitive range that excluded the protester's proposal as well as one other one. Cost and technical discussions thereafter proceeded between the agency and the two offerors in the competitive range, culminating in the receipt of best and final offers (BAFO) on November 9. By letter dated November 26, the protester was notified, for the first time, that its proposal had been found unacceptable and excluded from consideration for award. This letter set forth in general terms the basis for the agency's determination by identifying those major areas of the protester's proposal found to have been unacceptable. On November 30, the agency awarded a contract to Semcor and subsequently notified the three unsuccessful offerors.

The protester advances essentially two arguments against the exclusion of its proposal from the competitive range. First, the protester contends that the communications in June regarding its proposed personnel staffing actually constituted discussions, as opposed to clarifications, thus triggering a requirement that they be made meaningful by the agency. According to the protester, these discussions were not meaningful because it was not advised of and given an opportunity to cure the matters disclosed by the agency's letter of November 26. Secondly, the protester argues that, regardless of the nature of the June communications, its proposal was capable of being made acceptable and, therefore, should have been included in the competitive range.

We do not believe that the agency engaged in discussions with the protester concerning its proposal. An agency may properly request clarifications as part of the evaluation process to determine which proposals are in the competitive range; these clarification contacts are not considered competitive range discussions which, as the protester states, must be meaningful. Allied-Signal Aerospace Co., B-236050, Nov. 6, 1989, 89-2 CPD ¶ 428 (agency's request for specific additional information from offeror found not to be discussions, but "part of the ongoing evaluation process to determine which offerors would be included in the competitive range"); see also ALM, Inc.; Technology, Inc., B-217284; B-217284.2, Apr. 16, 1985, 85-1 CPD ¶ 433. The record here substantiates the Navy's position that it made only clarification contacts--proposals had not been evaluated at the time the requests for clarification were made, no competitive range had yet been established, and the agency asked only for further explanation of certain areas of the proposals preparatory to initiating proposal evaluation.

We find unpersuasive the protester's second contention, that its proposal did not warrant exclusion from the competitive range. The evaluation of proposals and the resulting determination as to whether an offer is in the competitive range is a matter within the discretion of the contracting agency, since that agency is responsible for defining its needs and the best method of accommodating them. Information Sys. & Networks Corp., 69 Comp. Gen. 284 (1990), 90-1 CPD ¶ 203. In reviewing a competitive range determination, we examine the agency's evaluation to ensure that it was reasonable and in accord with the evaluation criteria. ICONCO/NAT'L Joint Venture, B-240119, Oct. 16, 1990, 90-2 CPD ¶ 296.

According to the Navy, the protester's proposal contained significant deficiencies in three of the technical evaluation categories. In fact, it is the agency's view that each of the deficiencies under the first two evaluations was so significant that each on its own could have warranted the conclusion that the proposal was unacceptable. Under personnel, the agency found that the resumes submitted in support of 2 out of the 14 required positions did not meet the minimum qualifications. In addition, four of the personnel proposed by the protester, including the project manager, were identified as temporary employees who would be available for only a few months of the contract which has a potential 5-year life. This, combined with the absence of any identification of potential replacement personnel, was considered to be an unacceptable approach. The proposal was also significantly downgraded under management and resources for this same reason. Under the technical approach category, the protester's proposal was found unacceptable in its response to 8 of the 14 subtasks described in the statement of work (SOW). According to the agency, the protester did not present a cogent response to the RFP, but rather parroted back the SOW requirements.

In summary, Aerostructures received less than half of the available points in the technical evaluation. For these reasons, the agency determined that the protester's proposal was outside the competitive range.

The protester maintains that its proposal was reasonably susceptible to being made acceptable. The protester asserts that it could have easily cured the unacceptability of the two resumes by substituting two new resumes for other qualified individuals. Regarding its proposed use of temporary personnel, the protester contends that such an approach was not prohibited by the RFP, but in fact was expressly contemplated. As to technical approach, the protester maintains that any deficiencies in its proposal were merely informational and were obviously correctable in view of the fact that

the firm holds a current contract with the Navy under which it is satisfactorily performing under a similar SOW. Finally, Aerostructures argues that the substantial cost savings presented by its proposal alone justified its inclusion in the competitive range.

Having carefully examined the record in this case, we have no basis to question the Navy's determination to exclude Aerostructures's proposal from the competitive range. Our review leads us to agree that the nonconformities and deficiencies present in the protester's proposal were of such a magnitude and significance that, at minimum, a major rewrite would have been necessary to make it acceptable. In particular, we believe the agency was justifiably concerned over the protester's planned use of temporary personnel, especially since the project manager position was included. Personnel was the most heavily weighted area and application of this evaluation factor was dependent upon an appraisal of the particular individuals proposed. We find reasonable the agency's conclusion that the proposed use of temporary personnel, without any identification of replacements, not only militated against a reliable appraisal, but also demonstrated deficiencies in terms of management and resources. See, e.g., Scientific Management Assocs., Inc., B-238913, July 12, 1990, 90-2 CPD ¶ 27.

In addition, we do not share the protester's view that the deficiencies in its proposal categorized under technical approach should have been automatically considered correctable by virtue of the fact that it is presently performing a contract for the Navy which involves a similar SOW. A technical evaluation must be based on information submitted with the proposal and not upon an offeror's prior performance or capabilities. Inter-Con Sec. Sys., Inc., B-235248; B-235248.2, Aug. 17, 1989, 89-2 CPD ¶ 148. Accordingly, the agency acted reasonably in finding fault with the lack of detail in the protester's response to the SOW.

The protester argues that regardless of any technical inadequacies, its proposal should have been included in the competitive range because of its low cost. We disagree. A technically unacceptable offer can be excluded from the competitive range irrespective of its lower cost. See American Technical & Analytical Servs., B-240144, Oct. 26, 1990, 90-2 CPD ¶ 337.

Finally, the protester complains that it was not given prompt notice of its exclusion from the competitive range and further consideration for award. The competitive range was established on September 27; Aerostructures was not notified of its exclusion until approximately 2 months later. The Navy reports that the delay in notifying the protester was due to

decreased staffing in the contracts office and a budget crisis which imposed a delay on its procurement process generally. The agency also submits, however, that since Aerostructures's proposal was properly considered, no prejudice to the firm could have resulted from the delayed notification. We agree. Since a late notice, such as occurred here, is only procedural in nature, it does not affect the validity of an otherwise properly awarded contract. See Sikora & Fogleman, B-236960, Jan. 17, 1990, 90-1 CPD ¶ 61.

The protest is denied.

James F. Hinchman
General Counsel