



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

Decision

Matter of: TS Group
File: B-249217.2
Date: November 24, 1992

John Wegl for the protester.
Daniel B. Abrahams, Esq., Epstein, Becker & Green, for
Advanced Technology Systems, Inc.; John J. O'Brien, Esq.,
Arent, Fox, Kintner, Plotkin & Kahn, for ViaTech Systems,
Inc.; and Mary Ann Mayhew, Esq., for Computer Data Systems,
Inc., interested parties.
Vaughn E. Hill, Esq., Department of Labor, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Agency properly rejected offeror's best and final offer (BAFO) to provide personnel for automatic data processing support services as technically unacceptable where the offeror's BAFO did not satisfy the minimum solicitation requirements for employee qualifications for 9 of 36 resumed employees, which was the most important technical evaluation area, despite the offeror's being accorded meaningful discussions on this point.
2. Agency conducted meaningful discussions where it informed the offeror of numerous deficiencies in its proposal in the area of employee qualifications and advised the offeror to check this entire section of its proposal, and where the minimum requirements for employee qualifications were clearly stated in the solicitation.
3. Under a multiple award procurement partially set aside for small businesses, an agency is not required to continue discussions with a small business offeror that submitted a technically unacceptable best and final offer.

DECISION

TS Group protests the awards under request for proposals (RFP) No. L/A 91-12 issued by the Department of Labor (DOL) for automated data processing (ADP) support services at the Employment Standards Administration. TS Group asserts that DOL improperly rejected its proposal as technically unacceptable, failed to conduct meaningful discussions, and

improperly failed to make an award to a small business under the partial set-aside provision in the RFP.

We deny the protest.

DOL issued the RFP on July 15, 1991, contemplating the award of three firm, fixed-price, indefinite-quantity, labor-hour contracts. Award was to be made on the basis of best value to the government, considering technical merit and price, with technical merit being most important (evaluation weight of 60 percent). The most important factor for evaluating technical merit was Individual Staff Experience.

The RFP described in detail the work required and how proposals were to be prepared. The RFP called for hourly rates for 23 different labor categories and required offerors to submit resumes for 36 employees evidencing the qualifications of the staff proposed in accordance with the labor qualification requirements. Section C.4 of the RFP provided a detailed description of the duties under each labor category and the qualifications for each employee, and specified that these were "the minimum mandatory qualifications which must be possessed by individual employees who are to be assigned to that labor category." Under the "Instructions for Preparing a Technical Proposal," section L.2, the RFP stated that "[s]uccessful performance on the contract depends heavily on the qualifications of the individuals committed to this effort." Furthermore, the RFP stated that every proposed employee "must possess" (emphasis in original) the minimum qualification specified in the RFP.

DOL identified this procurement as a partial small business set-aside. In this regard, section M.4 of the RFP stated the following:

"The [g]overnment anticipates making up to three contract awards under this solicitation. . . . the Contracting Officer shall make each award to that responsive and responsible offeror which represents the best offer to the [g]overnment, all factors considered. The first award shall be made on a full and open - unrestricted basis. The second award shall be set aside for the small business offeror, **if the first award was not to a small business**, that represents the best offer to the [g]overnment, all factors considered. If the first award was made to small business, the second award shall be unrestricted as to business size. If a third award is made, it shall be made to that responsive and responsible offeror which represents the best offer to the [g]overnment on a full and open - unrestricted - competition basis, all factors considered." (Emphasis in original.)

Section L.16 of the RFP stated that the "second award is set aside for a qualified small business offeror, in accordance with [Federal Acquisition Regulation] FAR § 19.502-3."

By the September 3 due date for initial proposals, 10 offers were submitted. Five of the offerors were small businesses. Following technical evaluations, DOL eliminated three of the small business proposals from the competitive range. DOL determined that the proposals from the remaining two small businesses, including TS Group's, were technically unacceptable but susceptible of being made acceptable and included them in the competitive range.

DOL conducted discussions with the competitive range offerors from March 10 to March 12, 1992. In discussions with TS Group, DOL described the deficiencies present in TS Group's proposal. With respect to the Individual Staff Experience section of TS Group's proposal, DOL cited to TS Group during discussions some examples of deficiencies in the submitted resumes and stated that numerous mandatory requirements were not met. DOL specifically informed TS Group that due to the large number of deficiencies present in its resumes, TS Group should check the entire section closely.

DOL then requested and received best and final offers (BAFO) from all competitive range offerors. TS Group's BAFO included revisions to the resumes of its proposed employees, but 9 out of 36 resumes included in the BAFO were found deficient in at least 1 minimum qualification requirement; of these 9 resumes, 3 were for key employees.¹ Due to the deficiencies in individual staff experience, DOL determined that TS Group's BAFO was technically unacceptable and rejected it.² DOL also rejected as technically unacceptable the BAFOs from the other small business offeror. On June 11, DOL awarded contracts to three of the five remaining acceptable offerors. None of these offerors was a small business.

TS Group protests that the deficiencies in its resumes were not significant enough to justify a determination of technical unacceptability, and that DOL did not adequately advise it of the personnel experience deficiencies during discussions.

¹The RFP required offerors to identify a total of 10 key employees.

²Although DOL's evaluation revealed other deficiencies in TS Group's BAFO, DOL did not consider any of these other deficiencies significant enough to warrant a finding that it was technically unacceptable.

In a negotiated procurement, a proposal that fails to conform to a material solicitation requirement is unacceptable and may not form the basis for award. Consulting and Program Mgmt., 66 Comp. Gen. 289 (1987), 87-1 CPD ¶ 229; Compressed Air Equip., B-246208, Feb. 24, 1992, 92-1 CPD ¶ 220. An offeror has an obligation to submit a proposal which fully demonstrates its technical acceptability. See Compressed Air Equip., supra.

TS Group apparently acknowledges, or at least does not specifically dispute, the resume deficiencies cited by DOL. However, TS Group asserts that this deficiency amounts to nothing more than a "marginal deficiency" when considered with all of the qualifications of which the 36 resumes in its BAFO did satisfy. We disagree.

The minimum staff experience requirements in which TS Group's BAFO was deficient are material because staff experience is the most important factor of technical merit, which itself is allotted the greatest weight in the award decision. The RFP explicitly stated the importance of individual staff experience and specifically stated that the qualifications in the RFP were the minimum requirements that each proposed employee must possess. There is no provision for offerors to meet only a majority of the qualifications for each personnel position; rather, the RFP clearly requires compliance with all minimum qualification requirements. None of the minimum qualifications which TS Group's personnel failed to meet can reasonably be found immaterial in view of the RFP's clear instructions.³ From our review, and as conceded by TS Group, the firm failed to propose the qualified personnel required by the RFP for one quarter of the resumes submitted, and for this reason was properly found technically unacceptable. See Consulting and Program Mgmt., supra; TDA Joint Venture, B-245361, Jan. 2, 1992, 92-1 CPD ¶ 2; Sandaire, B-242301, Apr. 12, 1991, 91-1 CPD ¶ 370.

TS Group asserts that DOL did not conduct meaningful discussions on this point, since DOL identified during discussions only a few of the deficient resumes. TS Group states that it interpreted this to mean that only the resumes identified

³For example, TS Group proposed, as a key employee, an individual for the position of Senior Programmer Analyst--UNIX who did not have the required 2-year minimum experience conducting independent system design work in a UNIX environment. In addition, TS Group proposed another individual for the position of Programmer/Analyst--UNIX who did not have the required experience in writing programs from user-supplied specifications or experience in the active employment of UNIX utilities.

needed revision and that DOL was required to identify all of the deficient resumes in order for discussions to be meaningful.

In order for discussions in a negotiated procurement to be meaningful, contracting officials must advise offerors of the deficiencies in their proposals to afford offerors an opportunity to revise their proposals to fully satisfy the government's requirements. FAR § 15.610(c); Elsinore Aerospace Servs., Inc., B-239672.6, Apr. 12, 1991, 91-1 CPD ¶ 368. However, where numerous deficiencies exist in the qualifications of proposed employees, contracting officials are not required to identify the individual resumes which are deficient where the officials otherwise gave the offeror sufficient notice of the extent and nature of these deficiencies so that the individual resume deficiencies should have been readily discernible to an offeror. Elsinore Aerospace Servs., Inc., supra.

DOL met its obligation to conduct meaningful discussions here. The RFP explicitly stated the minimum qualifications for each labor category and DOL advised TS Group during discussions that the resumes in its proposal were lacking numerous mandatory qualifications and gave a few examples of the problems. DOL further advised TS Group that due to the number of deficiencies, it should check closely the entire resume section of its proposal. It was unreasonable for TS Group to interpret these discussions to mean that only the resumes cited as examples of deficiency problems required revision. Under the circumstances, we consider the discussions conducted with TS Group on this point to be meaningful. Id.

TS Group finally asserts that even if its BAFO is technically unacceptable, DOL was obligated to conduct further discussions with it, with the goal of making TS Group acceptable, in order to satisfy DOL's obligations under the partial small business set-aside regulations. In this regard, TS Group references FAR § 19.502-3(c)(2)(i), which states, in pertinent part:

"After all awards have been made on the non-set-aside portion, the contracting officer shall negotiate with eligible concerns on the set-aside portion, as provided in the solicitation, and make award. Negotiations shall be conducted only with those offerors who have submitted responsive offers on the non-set-aside portion."

TS Group explains that the term "responsive" is not generally applicable to negotiated procurements and is not interchangeable with the negotiation term of "technical acceptability." Since initial proposals that are technically

unacceptable, but which are susceptible to being made acceptable, must be included in the competitive range and be given the opportunity for correction of the deficiencies through negotiations, TS Group contends that the use of the term "responsiveness" for partial set-asides must include technically unacceptable offers which are still susceptible to being cured through reasonable negotiations. TS Group alleges that its BAFO is "responsive," as evidenced by the inclusion of its initial proposal in the competitive range and the improved evaluation score for its BAFO, and asserts that DOL should have extended it an additional opportunity to correct its deficiencies after DOL awarded the first large business contract.


While it is true that the concept of "responsiveness" generally does not apply to negotiated procurements in the same manner in which it applies to sealed bid procurements, Century Indus., Inc., B-197302.2, May 21, 1981, 81-1 CPD ¶ 397, we think FAR § 19.502-3(c)(2)(i) confers no obligation on an agency to conduct further discussions with a small business offeror whose proposal was reasonably found to be technically unacceptable after meaningful discussions. Such a technically unacceptable offer simply is not "responsive" to the solicitation requirements as that term is used in the regulation, and therefore, the offeror is not eligible for negotiation leading to an award under the set-aside portion of the RFP. See generally SINTECH A Div. of MTS Sys. Corp., B-245470, Dec. 27, 1991, 91-2 CPD ¶ 587; Gerber Sci. Instrument Co., B-225383, Jan. 6, 1987, 87-1 CPD ¶ 17 (the concepts of nonresponsiveness and technical unacceptability have the same legal effect in that neither a nonresponsive bid nor an unacceptable proposal can be the subject of a proper award). In other words, the rule for partial small business set-asides is no different from the rule for unrestricted negotiated procurements--where an offeror has been accorded meaningful discussions, there is no obligation for an agency to continue discussions on the

⁴In sealed bidding, a bid is nonresponsive and must be rejected if it takes exception to what is called for in the solicitation. Hagglunds Prinoth, B-238244, Apr. 12, 1990, 90-1 CPD ¶ 385. In contrast, the fact that an initial proposal in a negotiated procurement may not be in full accord with the requirements of the RFP is not sufficient reason to reject the proposal if the deficiencies are reasonably susceptible to correction through negotiations. Century Indus., Inc., *supra*. In such procurements, "nonresponsiveness" is ordinarily considered a subject for negotiation. Self-Powered Lighting, Ltd., B-195935, Mar. 13, 1980, 80-1 CPD ¶ 195. However, a technically unacceptable offer may not be the subject of an award. Consulting and Program Mgmt., *supra*.

basis of the offeror's unacceptable BAFO. See generally Elsinore Aerospace Servs., Inc., supra (once an offeror has been given the opportunity to submit a BAFO, the agency need not reopen discussions to resolve technical deficiencies remaining, or first introduced in the offeror's BAFO).

Since the RFP and FAR S 19.502-3(c) only contemplated the award of a contract under the partial set-aside to a small business that submitted a "responsive" offer, DOL properly did not consider TS Group's unacceptable BAFO for the partial set-aside award.

The protest is denied.


for James F. Hinchman
General Counsel