148172

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

Decision

Matter of: Quintron Systems, Inc.

File: B-249763

Date: December 16, 1992

Peter S. Latham, Esq., Latham & Latham, for the protester.
Ralph A. Rockow for Dynamic Science, Inc., an interested party.
John Pettit, Esq., and Michaelisa T. Johnson, Esq., Department of the Air Force, for the agency.
Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging propriety of second request for best and final offers that was initially untimely filed with the procuring agency will not be considered since it is untimely when subsequently filed with the General Accounting Office.

2. Agency's follow-up discussion question regarding inadequate staffing levels after offeror had been initially advised of that deficiency did not constitute technical leveling where offeror's initial proposal was unacceptable due, in part, to misleading data regarding historical and projected staffing levels which had been provided in the solicitation.

DECISION

Quintron Systems, Inc. protests the Department of the Air Force's award of a contract to Dynamic Science, Inc. (DSI) under request for proposals (RFP) No. F04703-92-R-0002 for launch support services at Vandenberg Air Force Base, California. Quintron, the incumbent contractor, protests that the agency improperly requested a second round of best and final offers (BAFO) and engaged in technical leveling.

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

The RFP, which was issued as a small business set-aside on February 3, 1992, sought proposals to provide technical support for missile and satellite launch programs at

Vandenberg Air Force Base during a base period and four option periods. The RFP contemplated award of a cost-type contract and required offerors to submit proposals to perform various contract line item numbers (CLINs), including CLINS for: (1) "basic operations and maintenance" (O&M) work; and (2) "additional undefined" work.[1] The RFP included a table which provided a summary of historic staffing requirements for the various portions of the contract and stated that the total projected staffing requirements for fiscal year 1993 (the base contract period) was 175,270 man-hours.

The agency received four proposals by the March 23 closing date, including those of DSI and Quintron. Based on its initial evaluation of proposals, the agency determined that only Quintron's was technically acceptable. DSI's initial proposal and that of a third offeror were considered deficient due to unacceptably low levels of proposed staffing; nonetheless, both were considered susceptible to being made acceptable and were retained in the competitive range.[2]

After its initial evaluation, the agency concluded that the non-incumbent offerors' unacceptably low proposed staffing levels might have been caused by misleading data contained in the RFP. Specifically, the table listing past and projected staffing requirements was labeled "total contract hours." The agency believed that the non-incumbent offerors might have interpreted the data in this table as representing the total man-hours actually billed to the government (that is, including "nonproductive" hours such as vacation time, sick time, etc.) when, in fact, it reflected only "productive" hours (exclusive of vacation time, sick time, etc.). On May 8, the agency amended the RFP to clearly advise offerors that the data represented only "productive" man-hours and sent the amendment to each of the competitive range offerors.

---

[1]The "basic O&M" portion of the contract was to be performed on a cost-plus-incentive-fee basis via the issuance of "routine installation tasks." The "additional undefined" portion of the contract contemplated extraordinary repairs beyond the scope of the CLIN for "basic O&M" work, and was to be performed on a cost-plus-fixed-fee basis via the issuance of "work requests"; each "work request" was to be negotiated at the time it was issued.

[2]The fourth offeror's proposal was determined to require major revision to become acceptable and was eliminated from the competitive range.

On May 8, the agency opened discussions with the competitive range offerors, sending clarification requests (CR) and deficiency reports (DR) that identified specific weaknesses and deficiencies in each offeror's proposal. Among other things, the agency advised DSI that its proposed staffing levels were unacceptably low and expressly referenced the RFP amendment clarifying the staffing table. Between May 18 and 20, the agency conducted oral discussions concerning the CRs and DRs with each competitive range offeror. On May 29, each offeror submitted written responses to the CRs and DRs.

DSI's response to the DR regarding its proposed staffing level confirmed that DSI had, in fact, misinterpreted the staffing table; specifically, DSI stated, "[the RFP amendment issued on May 8] . . . changed . . . the table . . . to productive manhours, thus increasing the apparent staffing level." DSI's response indicated it would make minor increases to its proposed staffing levels.

By letters dated June 25, 1992, the offerors were asked to submit BAFOs. With its BAFO request, the agency advised DSI that its response to the RFP amendment and the agency's DR regarding proposed staffing indicated that DSI was still proposing unacceptably low staffing levels.

On July 2, the offerors submitted their BAFOs. DSI's BAFO provided for significant increases to the staffing levels it had initially proposed, offering staffing consistent with the projected 175,270 "productive" man-hours listed in the RFP. DSI's BAFO also made other changes to its initial proposal; specifically, DSI offered a "rebate" program as part of its cost proposal and added language indicating that it intended for most post-launch repair and refurbishment of launch facilities to be performed pursuant to "work requests" under the CLIN for "additional undefined" work.

These two new aspects of DSI's proposal created concerns for the agency. Specifically, the agency questioned whether DSI's proposed "rebate" program could be incorporated into the contract under applicable laws governing appropriation of federal funds and questioned whether DSI understood that most post-launch repair and refurbishment activities were to be performed pursuant to "routine installation tasks" issued under the CLIN for "basic O&M" work. Due to these concerns, the contracting officer determined it would be in the best interest of the government to obtain further information prior to making a source selection. Accordingly, the contracting officer sought and obtained authorization to reopen discussions and request a second round of BAFOs.

By letters dated July 15, all offerors were notified that discussions were being reopened and that a second round of BAFOs would be sought. Specifically, each letter stated:

> "With this letter you are notified that the Air Force is conducting a second round of discussions with all offerors for the subject acquisition. At the conclusion of this second round, the Air Force will issue a call for a second Best and Final Offers (BAFO) by separate letter. At the present time, we contemplate that the BAFO due date will be Friday, [July 24, 1992]."

Along with the letter sent to DSI, the agency included a CR questioning DSI's understanding of the scope of work to be performed under the CLIN for "basic O&M" work, and a DR questioning the acceptability of DSI's proposed "rebate" program. Between July 16 and 18, the agency conducted oral discussions with each of the competitive range offerors. During the discussions with DSI, the agency pointed out that it considered the vast majority of the post-launch repair activities to fall under the CLIN for "basic O&M" work and advised DSI that the agency did not understand how DSI's proposed "rebate" program could be incorporated into the contract.

During discussions with Quintron, the agency advised Quintron that there were no deficiencies in its proposal, but stated that it was permitted to change any portion of its proposal. At that time, Quintron personnel specifically questioned the agency's basis for seeking a second round of BAFOs. The agency explained, among other things, that at least one of the other offerors appeared to have misunderstood the contract requirements and that clarification was considered to be in the best interests of the government.

DSI and Quintron both submitted BAFOs by the July 24 closing date. In its BAFO, DSI replaced its "rebate" program with a conventional cost proposal and satisfactorily discussed its understanding of the scope of the CLIN regarding "basic O&M" work. In its BAFO, Quintron stated that it was not making any changes to its proposal. The proposals were subsequently evaluated and DSI's proposal, which offered the highest level of proposed staffing at a significantly lower cost than that proposed by Quintron, was determined to represent the best value to the government.

On July 31, Quintron filed an agency-level protest challenging the decision to request a second round of BAFOs and asserting that, by doing so, the agency had engaged in technical leveling. On August 3, the agency selected DSI for contract award. By letter dated August 10, the agency denied Quintron's agency-level protest on the basis that it

was not timely filed.[3] On August 10, Quintron filed a protest with our Office.

Quintron first protests that the Air Force's request for a second round of BAFOs was improper. However, as Quintron acknowledges, it knew of the Air Force's decision to seek a second round of BAFOs on July 15, and it specifically questioned the Air Force's decision in that regard during the discussions held on July 16, but did not protest that matter prior to submitting its BAFO on July 24.

Under our Bid Protest Regulations, improprieties incorporated into a solicitation must be protested prior to the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1992). Generally, a protest challenging an agency's request for BAFOs must be filed prior to the closing time for BAFOs. See, e.g., Select, Inc., B-246167, Oct. 24, 1991, 91-2 CPD ¶ 372. Our Regulations provide that a matter protested to our Office which was initially protested to the contracting agency will only be considered if the initial agency-level protest was filed within the time limits for filing a protest with our Office. 4 C.F.R. § 21.2(a)(3); Tandy Constr., Inc., B-238619, Feb. 22, 1990, 90-1 CPD ¶ 206.

To be timely under our Regulations, Quintron's agency-level protest challenging the second request for BAFOs was required to be filed prior to the July 24 closing. However, Quintron submitted its second BAFO without filing a protest and did not protest the agency's action until July 31. Accordingly, Quintron's protest challenging the agency's request for a second round of BAFOs is untimely. 4 C.F.R. § 21.2(a)(3).

Quintron next protests that the agency's discussions with DSI constituted technical leveling. Quintron's position is that after initially advising DSI that its proposed staffing levels were inadequate, the agency was precluded from again discussing the matter with DSI.[4]

---

[3]The agency alternatively denied the protest on the grounds that the request for BAFOs was proper and that no technical leveling had occurred.

[4]Quintron asserts that its allegations regarding technical leveling are timely because it did not learn of the substance of the agency's communications with DSI until August 4. Quintron explains that, on August 4, its program manager had a conversation with another Quintron employee during which that employee related yet another conversation which he had with a DSI employee on July 13. During the

(continued...)

Technical leveling occurs when an agency helps to bring one proposal up to the level of other proposals through successive rounds of discussions by pointing out inherent weaknesses remaining in an offeror's proposal due to the offeror's lack of diligence, competence, or inventiveness after the offeror has been given an opportunity to correct those deficiencies. Federal Acquisition Regulation (FAR) § 15.610(d); Raytheon Ocean Sys. Co., B-218620.2, Feb. 6, 1986, 86-1 CPD ¶ 134. An agency is obligated to individualize the evaluated deficiencies of each offeror during discussions. Pan Am World Servs., Inc. et al., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446; see also Indian Community Health Servs., Inc., B-217481, May 15, 1985, 85-1 CPD ¶ 547. Because of the varying degree of weaknesses or deficiencies in proposals, it is proper for an agency to conduct appropriately different discussions with each offeror. TRS Design & Consulting Servs., B-218668, Aug. 14, 1985, 85-2 CPD ¶ 168. When the requirements stated in a solicitation change or require significant clarifications, a procuring agency should reopen discussions and permit offerors to revise their proposals. FAR § 15.606; General Eng'g Serv., Inc., B-242618.2, Mar. 9, 1992, 92-1 CPD ¶ 266.

Here, the record indicates that, after initial proposals were submitted, the agency realized that its RFP had created confusion regarding the estimated staffing levels; accordingly, the agency amended the RFP and, in first advising DSI that its proposed staffing was unacceptably low, expressly referenced the RFP amendment. DSI then proposed to make minor adjustments to its staffing to reflect, among other things, the higher staffing requirements of the amended RFP. Thereafter, the agency advised DSI that, notwithstanding its intention to make

---

[4](...continued)
July 13 conversation, the DSI employee purportedly told the Quintron employee that the agency was asking DSI to increase its proposed staffing. Quintron maintains that it was not until August 4, when its program manager gained actual knowledge of the agency's allegedly improper activities, that Quintron knew of its basis for protest. We note that Quintron has chosen not to identify the position held by its employee who actually learned of the basis for protest on July 13, and we have no basis to assess whether that employee's knowledge should be imputed to Quintron. Under these circumstances, while it is not clear that this portion of the protest is timely, since it is our practice to resolve doubts over the timeliness of a protest in the protester's favor, we will consider the merits of this portion of Quintron's protest. See, e.g., Honeywell, Inc., B-244555, Oct. 29, 1991, 91-2 CPD ¶ 390.

limited staffing level adjustments, its proposed staffing was still inadequate. DSI responded by submitting a BAFO which proposed staffing levels acceptable to the agency.

Since DSI's initial modification of its proposed staffing levels was its first response to the agency's correction of a misleading provision of the RFP, the agency's follow-up question was really the first discussion of DSI's fully responsive proposal. The question was necessary to advise DSI that its deficient staffing was not due solely to the misleading RFP data. Accordingly, the follow-up question was not the result of DSI's "lack of diligence, competence or inventiveness," see FAR § 15.610, and did not constitute technical leveling.

Quintron also asserts that the agency's questions to DSI preceding its second request for BAFOs constituted technical leveling which afforded DSI an improper competitive advantage.

A contracting agency may properly reopen discussions following receipt of BAFOs in circumstances where it is clearly in the government's interest to do so. FAR § 15.611(c). Such action is appropriate, for example, where "it is clear that information available . . . is inadequate to reasonably justify contractor selection and award based on the [BAFOs] received." Id. Further, it is properly within an agency's discretion to reopen discussions because of weaknesses or deficiencies which first become apparent when an offeror submits revisions to its initial proposal. CBIS Fed., Inc., B-245844.2, Mar. 27, 1992, 92-1 CPD ¶ 308.

Here, the agency limited its discussion preceding its request for second BAFOs to deficiencies which first appeared in DSI's first BAFO. Specifically, the agency only sought information regarding DSI's proposed "rebate" program and DSI's understanding of the activities contemplated under the CLIN for "basic O&M" work. The agency's use of questions directed only at weaknesses or deficiencies in DSI's proposal that first became apparent following DSI's submission of its first BAFO is consistent with the agency's intended purpose of obtaining additional information regarding those matters prior to making a source selection. See FAR § 15.611(c). Since the agency's discussion with DSI

preceding the request for second BAFOs was so limited and did not revisit the earlier questions concerning staffing levels, it did not constitute technical leveling.

The protest is dismissed in part and denied in part.

for James F. Hinchman
General Counsel