



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

Decision

REDACTED VERSION¹

Matter of: AAA Engineering & Drafting, Inc.

File: B-250323

Date: January 26, 1993

J. William Bennett, Esq., Bennett, Yazbeck & O'Halloran, for the protester.

Donald G. Featherstun, Esq., Pettit & Martin, for Crawford Technical Services, Inc., an interested party.

Dennis R. Cooper, Esq., Defense Logistics Agency, for the agency.

Donald A. Morrison, Esq. and David R. Kohler, Esq., Small Business Administration, for the agency.

John Formica, Esq., Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Although an agency could consider information obtained from an offeror during a pre-award survey in evaluating the offeror's technical acceptability, the agency could not, in the absence of urgency, reject an offer that was otherwise in line for award without inquiring of the offeror as to the intent and meaning of the information, where the import and the meaning of the information is not clear.

DECISION

AAA Engineering & Drafting, Inc. protests the rejection of its proposal as technically unacceptable under request for proposals (RFP) No. DLA200-92-R-1000, issued by the Defense Logistics Agency (DLA) for mail, supply, audio-visual, and distribution of publications and forms services for the Defense Logistics Services Center, Battle Creek, Michigan.

We sustain the protest.¹

¹The decision issued on January 26, 1993, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[DELETED]."

¹A protective order was issued in this case, and counsel for AAA Engineering and Crawford were admitted under the protective order and received access to protected materials.

The RFP, issued on April 6, 1992, contemplated the award of a firm, fixed-price contract for a 1-year base period with four 1-year options. The successful contractor under the RFP is required to furnish the labor, equipment, tools, parts, materials, supplies, and supervision necessary to provide the mail, facilities, audio-visual, and publications and forms distribution services specified in the solicitation's statement of work (SOW). The RFP provided that award would be made to the responsible offeror submitting the lowest-priced, technically acceptable proposal. Technical evaluation criteria were set forth as follows:

- (a) Technical Approach
- (b) Manning
- (c) Organization
- (d) Personnel Qualification
- (e) Implementation Plan
- (f) Offeror's Management and Operational Experience

The solicitation explained that with regard to the "manning" technical evaluation criterion the offers would "be evaluated on allocation and management of resources."

The agency received five proposals in response to the RFP by the solicitation's May 15 closing date. The technical evaluation panel (TEP) reviewed the proposals, and found AAA Engineering's proposal unacceptable because the manning chart submitted by AAA Engineering in its proposal identified a total of [DELETED] employees to staff the facility, consisting of [DELETED] management and [DELETED] staff positions. The TEP determined, based on actual experience, that a minimum of [DELETED] employees was necessary to perform the requirements of the SOW.

The agency informed the protester by letter of June 10 that its proposal was not technically acceptable as submitted because of its "lack of staffing." This letter stated that "[b]ased on past experience both with the [g]overnment and the current contractor, [DELETED] employees is not sufficient to meet the required services," and provided AAA Engineering with an opportunity to submit a revised proposal.

On June 12, AAA Engineering submitted a revised manning chart identifying a total of [DELETED] employees, consisting of [DELETED] management and [DELETED] staff positions. This chart also noted that "[DELETED] will be utilized to fill in areas as needed."

After some clarification, AAA Engineering's revised proposal was found technically acceptable by the TEP based upon the proposed staffing of [DELETED] positions [DELETED]. By letter of June 24, AAA Engineering was informed by DLA that

discussions had been completed, its proposal had been found technically acceptable, and best and final offers (BAFO) were to be submitted by July 1.

After the receipt of BAFOs, the agency amended the solicitation to reflect certain modifications to the SOW, and requested that a second round of BAFOs be submitted by July 31. AAA Engineering's July 31 BAFO was the lowest-priced offer received by the agency.

Previously, in June, the agency had requested that the Dallas Defense Contract Management Area Office (DCMAO) perform pre-award surveys of three offerors, including AAA Engineering. Video Transcript (VT) at 9:27:50.² Although the members of the pre-award survey team reviewing AAA Engineering's technical, quality assurance, and financial capabilities all recommended that AAA Engineering receive award, the pre-award survey report, dated July 2, recommended that "no award" be made to the protester. This recommendation of "no award" was the result of the pre-award survey manager's discussions with DLA's contracting officer, during which the contracting officer expressed concerns with AAA Engineering's performance on contracts for similar services at other government installations.

After receiving the results of the pre-award survey, the contracting officer requested that DCMAO conduct a follow-up survey to develop a detailed analysis of AAA Engineering's commitment and ability to provide the [DELETED] employees identified in its proposal for staffing the facility. VT 9:28:05; 9:57:39. During this second pre-award survey, AAA Engineering was asked by DCMAO to submit a manning chart that named the specific individuals who would fill its [DELETED] management and [DELETED] staff positions.³ VT 11:52:34. AAA Engineering provided DCMAO with a copy of the manning chart previously submitted to DLA with the addition of the names of the individuals available to staff the Michigan facility. DCMAO subsequently provided a copy of this manning chart to the contracting officer.⁴

²A hearing was held in this case to elicit testimony from the DLA contracting officer and an AAA Engineering representative concerning DLA's consideration of AAA Engineering's manning charts.

³This information was not required by the RFP or requested by the contracting officer during discussions.

⁴It is unclear from the record exactly when the contracting officer first received this chart from DCMAO. In the agency's report on the protest, the contracting officer
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The contracting officer viewed this manning chart as modifying AAA Engineering's technically acceptable offer by reducing the staffing from [DELETED] positions to [DELETED] positions. First, the manning chart listed the same individual under the positions designated as "lead supply clerk" and "supply clerk." The contracting officer concluded that because this individual could not fill both the lead supply clerk and supply clerk positions on a full-time basis, AAA Engineering now proposed to staff the facility with one less individual than AAA Engineering had proposed previously. Second, the manning chart also contained the notation "[p]art [t]ime" under a mail clerk position and a supply clerk position, instead of the names of individuals. The contracting officer determined from these "part-time" notations that AAA Engineering had reduced these positions, which had been previously designated by AAA Engineering, and evaluated by the agency, as full-time positions, to part-time positions.

At this time, the contracting officer decided to take a "two-track approach to . . . expedite the procurement process." VT 9:36:06. First, she found AAA Engineering nonresponsible, concluding that AAA Engineering did not have a good record of integrity and business ethics, lacked the capability to staff the Michigan facility in accordance with its manning chart, and lacked the capacity to perform with the proposed manning. As AAA Engineering is a small business concern, the contracting officer referred her nonresponsibility determination to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) procedures, as required by 15 U.S.C. § 637(b)(7) (1988).⁵ The contracting officer also

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states that she first received the manning chart from DCMAO on July 30. This initial date of receipt was verified by the contracting officer at the hearing. VT 11:00:30. However, the contracting officer also testified at the hearing that she received the manning chart from DCMAO prior to the July 28 closing date for receipt of the second round of BAFOs, VT 9:30:52, and further testified that she received the manning chart either "right at BAFO time or right after BAFO time." VT 11:03:26.

⁵The record is unclear as to exactly when the contracting officer referred her nonresponsibility determination to SBA. The referral letter is dated July 29, but contains a memorandum prepared by the contracting officer dated July 31. In any event, it is clear that the referral was received by the SBA shortly after these dates, as the SBA's letter to AAA Engineering notifying it that it had been found

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requested that the TEP reconvene to reevaluate AAA Engineering's technical proposal in light of the manning chart submitted by AAA Engineering to DCMAO during the follow-up pre-award survey.

On August 19, the SBA Dallas Regional Office notified DLA that it would be issuing a COC to the protester. The following day, the contracting officer notified SBA of DLA's intent to appeal the Regional Office's proposed issuance of a COC to SBA's Central Office. SBA thus deferred its issuance of a COC, and on August 28, notified DLA that it had 10 days to formally appeal. On September 3, the contracting officer contacted the SBA Central Office and requested that DLA be given until September 11 to formally file its appeal because DLA was "review[ing] additional technical information received from AAA Engineering. . . ." This request was granted.

Meanwhile, in August, the TEP reconvened for the purpose of determining the impact of the manning chart AAA Engineering had submitted to the DCMAO. On September 8, consistent with the contracting officer's view, the TEP found that AAA Engineering was now offering [DELETED] positions and [DELETED] determined that AAA Engineering's proposal was technically unacceptable.

By letter of September 11, the agency informed AAA Engineering that its proposal had been rejected as technically unacceptable "[b]ased on the additional information submitted after [its BAFO] was received." The agency also notified the SBA on this date that it was withdrawing its COC referral. This protest followed.

AAA Engineering argues that DLA could not properly consider the manning chart submitted to DCMAO in connection with the technical evaluation of its proposal because the manning chart was provided only to demonstrate its responsibility, and was never submitted to DLA by AAA Engineering as part of its initial or revised proposals. The protester also contends that DLA's interpretation of the manning chart was incorrect. AAA Engineering explains that the identification of the same individual as the lead supply clerk and as a supply clerk was an obvious error, and that it fully intended to staff each of these positions on a full-time basis. The protester further explains that it had entered

⁵(...continued)
nonresponsible by the agency and that AAA Engineering could apply for a COC is dated August 4.

"part-time" under one of the supply clerk positions and one of the mail clerk positions because it intended to staff these positions on a full-time basis with part-time personnel. The protester notes that DLA never inquired as to whether the July 21 manning chart AAA Engineering had submitted to DCMAO was intended by AAA Engineering as a modification of its otherwise technically-acceptable proposal, never asked AAA Engineering to clarify the manning chart, and never informed the protester that its proposal was being reevaluated. VT 11:08:39; 11:09:01. The protester explains that while it was contacted by the DLA contracting officer concerning the July 21 manning chart on September 2, the contracting officer only asked that AAA Engineering verify that the manning chart submitted to DCMAO was the "latest manning chart submitted." VT 12:04:41.⁶

We agree with DLA that an agency may consider information bearing on a proposal that comes to light after the submission of proposals. Military Base Mgmt., Inc., 66 Comp. Gen. 179 (1986), 86-2 CPD ¶ 720; Pan Am World Servs., Inc., B-235976, Sept. 28, 1989, 89-2 CPD ¶ 283; Delta Data Sys. Corp. v. Webster, 744 F.2d 197, 203 (D.C. Cir. 1984); Department of the Navy--Recon., B-244918.3, July 6, 1992, 92-2 CPD ¶ 199. To require an agency to ignore information which it reasonably believes relevant to an offeror's proposal, or which suggests that an offeror may not perform or intends to perform in a manner different from that reflected in a technically acceptable offer, would be unfair to both the agency and other competitors, and thus inconsistent with the competitive procurement system. Id.

In this case, entries on the chart understandably raised concerns. The meaning of the revised manning chart was unclear; while the designation of the same person for two positions could have indicated a staffing decrease, it also could have been a clerical error. Further, while the part-time designations for two positions could have meant that there would be only part-time staffing of the positions, the fact that the term "part-time" was inserted where specific employees were to be identified could also have indicated what the protester intended--staffing the positions on a full-time basis with part-time personnel.

⁶The contracting officer testified that she asked AAA Engineering to verify that the manning chart that had been submitted to DCMAO on July 21 was "the most recent and accurate." VT 9:36:55; 11:07:37.

While the agency properly considered the chart submitted to DCMAO,⁷ DLA's rejection of the protester's offer as technically unacceptable, without further inquiry, was unreasonable. With its accompanying cover letter, neither the chart itself, nor a September 3 letter forwarding another copy of this chart to the contracting officer, identifies the chart as a proposal modification or states in any way that the chart was intended to change what AAA Engineering had offered in its BAFO. Submitted in response to DCMAO's request, the chart clearly was furnished to show how the staffing proposal would be realized rather than to effect a change to the proposed staffing. Thus, we do not believe that the agency could reasonably determine that the chart was intended to reflect lesser staffing than represented in the protester's proposal.

In the contracting officer's conversation with AAA Engineering on September 2, she only asked the protester to verify that the manning chart was the latest submitted. The contracting officer made no attempt at that time, or at any time after her receipt of the manning chart from DCMAO in late July, to clarify or discuss the manning chart with the protester. Where the merits of this offer in line for award were brought into question by information whose import and meaning was not clear, the contracting agency should have clarified the matter with the offeror to facilitate an accurate assessment of the actual and intended impact of the new information on the offer.⁸ Alternatively, if

⁷Contracting agencies may properly consider in their technical evaluations the manning levels proposed by offerors in order to determine whether offerors understand the requirements of a particular solicitation, and whether the offerors' proposed technical approaches, which include the numbers of personnel proposed and their respective utilization, are sufficient to provide the services required by the solicitation. See, e.g., Contract Servs. Co., Inc., B-246585.3, May 7, 1992, 92-1 CPD ¶ 427; Reflectone Training Sys., Inc., B-240951, Dec. 10, 1990, 90-2 CPD ¶ 472; Burnside-Ott Aviation Training Center, Inc.; Reflectone Training Sys., Inc., B-233113; B-233113.2, Feb. 15, 1989, 89-1 CPD ¶ 158.

⁸An agency does not have to go back to an offeror each time a new piece of information bearing on the merits of the offeror's proposal comes to the agency's attention. Delta Data Sys. Corp. v. Webster, 744 F.2d at 203. It is unreasonable, however, for an agency to reevaluate or reconsider the merits of an offeror's otherwise acceptable proposal without providing the offeror with an opportunity to clarify where "the new information is of uncertain import, is likely (continued...)"

considered relevant to the small business offeror's responsibility, the agency should have referred the matter to the SBA for its consideration.⁹ See Delta Data Sys. Corp. v. Webster, 744 F.2d at 203. DLA did neither.

We sustain the protest. If DLA now considers AAA Engineering's proposal to be questionable in light of the revised manning chart, it should obtain clarification from the protester, or if it considers the protester nonresponsible in light of the manning chart, it should refer the matter to SBA. We also find that AAA Engineering is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1992). AAA Engineering should submit its certified claim for its protest costs directly to the agency within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

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⁸(...continued)
to determine the award, and is of such a nature that the offeror is likely to be able to make a significant contribution to its interpretation." Id.

⁹The revised manning chart was not provided to the SBA during the COC.