



Comptroller General
of the United States

3101210

Washington, D.C. 20548

Decision

Matter of: DTH Management Group

File: B-252879.2; B-252879.3

Date: October 15, 1993

Frank M. Rapoport, Esq., Daniel I. Prywes, Esq., and Charles H. Carpenter, Esq., Pepper, Hamilton & Scheetz, for the protester.

Brian J. Donovan, Esq., Jones & Donovan, for Ameriko/Omserv, an interested party.

Paul Clay, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.

Jacqueline Maeder, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where contracting agency conducted misleading discussions by informing the protester that its initial price was too low when, in fact, the protester, which submitted the highest-rated technical proposal, did not receive the award because its price was considered to be too high.

DECISION

DTH Management Group protests the award of a contract to Ameriko/Omserv under request for proposals (RFP) No. N63387-93-R-5019 issued by the Department of the Navy, Navy Public Works Center for maintenance and operation of military family housing units in the San Diego, California area. The protester principally contends that the Navy misled it during discussions.

We sustain the protest.¹

The RFP, issued as a small business set-aside, contemplated the award of a firm fixed-price/indefinite quantity contract. The awardee is to provide all necessary personnel, equipment and supplies for facility, pool,

¹Since we sustain the protest and recommend conducting discussions and requesting best and final offers (BAFO), our discussion of the proposals is necessarily limited.

appliance and grounds maintenance, custodial and refuse collection services and change of occupancy maintenance for 4,783 military family housing units for 1 year with three 1-year options.

The RFP advised that award would be made to the responsible offeror whose offer was most advantageous to the government and that price and technical factors were weighted approximately equal. The RFP stated that price would be evaluated for realism and reasonableness and provided that the government could make award to other than the lowest-priced offeror. The RFP provided that technical proposals were to be evaluated under the following factors: (1) performance administration; (2) quality of workmanship; (3) timeliness; and (4) contractor experience.

Ten firms submitted proposals which were evaluated and rated by a technical evaluation board using an adjectival rating scheme.² DTH's proposal received a "very good" overall technical rating and was ranked technically first of the 10 proposals.

Seven proposals, including DTH's and Ameriko's, were included in the competitive range. The Navy conducted discussions by providing each offeror with a list of weaknesses and deficiencies in its technical proposal. Additionally, four offerors, including DTH and Ameriko, were notified that the agency considered their price proposals to be "UNREALISTIC (low) for the proposed contractual effort." Two other offerors were notified that their prices were too high and one offeror was given no notice concerning its proposed price. Along with the other offerors that were advised that their prices were unrealistically low, DTH increased its price when it submitted its BAFO.

After evaluation of the BAFOs, the agency determined that the BAFO submitted by FKW Inc. represented the best value to the government and notified all offerors that FKW was the apparent successful offeror. Subsequently, the Small Business Administration determined that FKW did not meet the small business standard applicable to this solicitation and was, therefore, ineligible for award.

The source selection authority then determined that Ameriko's BAFO, which was the lowest-priced offer and was ranked fourth in technical merit, offered the best value to the government. DTH's BAFO was ranked first in technical merit and was fourth low in price. The Navy notified

²This scheme included five ratings: excellent, very good, acceptable, marginal and unacceptable.

offerors of its intention to award to Ameriko. This protest followed.³

DTH first argues that it was misled during discussions since the Navy incorrectly informed it that its initial price was unrealistically low and then awarded the contract to Ameriko because DTH's price was considered too high to justify the technical superiority which the Navy recognized DTH would provide. The protester argues that, as a result of the Navy's unambiguous advice that DTH's price was too low, "DTH refrained from reducing its price to meet highly competitive market conditions."

We agree that DTH was misled. During discussions, the agency notified DTH and three other offerors that their prices were too low. The agency reports that this advice was based upon a comparison to the government estimate. Upon receipt of BAFOs, however, the SSB noted that, while the offerors' prices indicated a depressed market condition for facilities maintenance services, that depressed condition was not reflected in the government estimate. Therefore, although previously offerors had been advised that their prices were considered too high or too low based on the comparison to the government estimate, the agency reports that, due to the "inaccuracies of the [g]overnment estimate, the SSB evaluated the BAFO prices against each other." As a result of that comparison, the SSB recommended award to Ameriko because DTH's technical superiority did not justify its higher price. The source selection authority accepted that recommendation and awarded the contract to Ameriko primarily based on its lower price. Thus, both the SSB and the selection authority abandoned the earlier concern about the prices in relation to the government estimate. As a consequence, given the actual basis for award, the agency's advice to DTH during discussions that its price was too low was misleading.

³Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(1) (1988), a protest filed with our Office before award of a government contract imposes an automatic stay against the award pending resolution of the protest. In this case, pursuant to 31 U.S.C. § 3553(c)(2), the Navy overrode this statutory stay on the grounds that urgent and compelling circumstances significantly affecting the interests of the United States would not permit the Navy to wait for our decision. DTH filed suit in federal district court challenging this override and the court enjoined the Navy from awarding the contract until DTH's protest is resolved.

By law, agencies, in conducting discussions, must conduct discussions that are meaningful and that do not prejudicially mislead offerors. See Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424. The Navy, argues that even if the discussions with DTH were deficient, the protester was not prejudiced. According to the Navy, "[t]here is no evidence that the protester raised its initial proposed price to a noncompetitive level after being notified by the [a]gency that this price was considered to be unrealistically low."

The issue here is whether DTH was misled so that it declined to reduce its price. A DTH partner submitted an affidavit to our Office in which he states: "DTH was determined to take such steps as would be necessary, including a significant price reduction at the BAFO stage, to gain award." Nothing in the record contradicts this statement. Indeed, we have recognized that it is common for offerors to lower their prices in the later stages of negotiations, National Sys. Mgmt. Corp., 70 Comp. Gen. 443 (1991), 91-1 CPD ¶ 408 and, in this instance, the BAFO prices of the other offerors lend credibility to DTH's position. The two firms which were told during discussions that their initial prices were too high reduced their prices by approximately 11 percent and 22 percent and the offeror that was given no advice concerning its price reduced its price by approximately 6 percent. These circumstances strongly suggest that DTH might have significantly reduced its price had it not been misled.

While it is possible that DTH would not have reduced its price to less than Ameriko's BAFO had it not been misled, this does not demonstrate a lack of prejudice. DTH's proposal was the highest rated technically and it did not receive the award simply because its price was too high. It is possible that with a substantially lower price, albeit a higher one than Ameriko's, DTH would have been awarded the contract based on its technical superiority. We are not willing to conclude that there was no prejudice based on speculation that DTH would not have reduced its price to less than Ameriko's.

DTH also alleges that Ameriko, contrary to the RFP's requirements, never provided documentation that key personnel not currently employed by Ameriko would be available if Ameriko were awarded the contract. DTH refers to a provision in Section M of the RFP, which states under the contractor experience technical evaluation subfactor:

"Offerors should clearly demonstrate their overall experience in administration and management of commercial or government family housing. Offerors should address the corporate resources and the

plans to provide qualified personnel during the term of this contract. Key issues to address should include the following:

"(a) Specific corporate experience, specific subcontractor experience, specific inhouse workforce experience. This can be supplemented by the submission of resumes, however the offeror should indicate which persons are currently on the offeror's payroll and which are on the proposed subcontractors' payroll. For those persons not on either, the offeror should show evidence of employee commitment to work for that offeror if awarded the contract. The offeror should also identify, on its organizational charts, those employees which have submitted letters of commitment and which positions they will be filling."

DTH alleges that Ameriko did not provide commitment letters and that "Ameriko is attempting a 'bait and switch'-- offering one group of experienced managers in its proposal and then 'switching' after contract award to whomever it can hire. . . ." According to DTH, the Navy should have found that Ameriko's proposal was unacceptable because it did not include the required commitment letters.

The Navy on the other hand argues that the RFP does not require letters of commitment. According to the Navy, the RFP provision quoted above merely identifies issues which an offeror "should" address and that the use of the term "should," rather than, for example, "shall," demonstrates that this is not a mandatory requirement. In addition, the agency states that Ameriko's proposal was not misevaluated since it was marked down based on the failure to submit evidence of employee commitment.

Since, as discussed below, we are recommending that the Navy request another round of BAFOs and make another selection decision, we need not resolve these allegations. However, because of the uncertainty about the Navy's intention regarding whether or not commitment letters are required, before new BAFOs are requested it would be appropriate for the Navy to amend the RFP to clarify that evidence of commitments for proposed personnel is not required for a proposal to be acceptable.

We recommend that the Navy amend the solicitation, reopen discussions with all competitive range offerors, and request revised BAFOs, making award to the offeror whose revised BAFO is most advantageous to the government. DTH is

entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1988). In accordance with 4 C.F.R. § 21.6(f), DTH's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the Navy within 60 days after receipt of this decision.

The protest is sustained.

for *Milton J. Rowland*
Comptroller General
of the United States