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

REDACTED VERSION*

Decision

Matter of: Ebon Research Systems

File: B-253833.2; B-253833.3

Date: November 3, 1993

Janet M. Cook-Love, Esq., Ebon Research Systems, and Pamela J. Mazza, Esq., Andrew P. Hallowell, Esq., Antonio R. Franco, Esq., and Philip M. Dearborn, Esq., Piliero, Mazza & Pargament, for the protester.
Ruth Y. Morrel, Esq., and Stuart Young, Esq., DynCorp, and Paul Shnitzer, Esq., Crowell & Moring, for DynCorp, an interested party.
Harry L. Gastley, Esq., U.S. Department of Justice, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where agency has determined that no delegation of procurement authority (DPA) was required for an acquisition of administrative support services, and this view is confirmed by the General Services Administration, General Accounting Office has no basis to object to conduct of procurement without DPA.

2. Where protester's best and final offer contained compensation rates significantly higher than minimum rates under revised Service Contract Act wage determination not included in solicitation, agency's failure to provide protester with opportunity to prepare offer using revised wage determination was not prejudicial.

3. Protest allegations are dismissed as academic where protester would not be in line for award (because of high price) even if allegations were true.

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*The decision issued on November 3, 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]."

DECISION

Ebon Research Systems protests the award of a contract to DynCorp Government Services Group under request for proposals (RFP) No. JOJMD-93-R-0014, issued by the U.S. Department of Justice (DOJ) to acquire data entry and related support services for the agency's asset forfeiture program. Ebon makes numerous arguments, principally challenging the adequacy of discussions and the evaluation of its and DynCorp's proposals.

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

The RFP contemplated the award of a time and materials, labor hours contract and sought offers for a base period and five option periods. Essentially, the requirement involves providing administrative support services to DOJ in connection with its asset forfeiture program on a nationwide basis. Services under the contract may be ordered by any of DOJ's constituent agencies (such as the Federal Bureau of Investigation and the Drug Enforcement Agency) as well as certain other federal agencies participating in the program.

Section M of the RFP provided that proposals would be evaluated based on both technical and cost/price considerations. For award purposes, technical considerations were equal in weight to cost. The RFP further provided that technical proposals would be evaluated using six evaluation criteria, and that cost proposals would be evaluated to ensure that the offerors understood the requirement and offered adequate total compensation packages.

The RFP contained estimates for some 18 different labor categories of personnel, 14 of which were subject to the Service Contract Act (SCA), 41 U.S.C. § 351 et seq. (1988). The RFP included a wage determination issued by the Department of Labor (DOL) which contained wage rates for 76 different job categories, and the contracting officer prepared a table which correlated the RFP's labor categories to 14 of the job categories.

DOJ received four initial proposals. After evaluating and scoring them, DOJ conducted discussions with all four offerors and solicited best and final offers (BAFO). The agency then rescored the proposals, assigning scores for both technical merit and cost. The offerors' technical scores (which were supported by accompanying narrative statements from the technical evaluators) were based on a 100-point scale which was then converted to a 50-point scale (since technical considerations only carried 50 percent of the evaluation weight) and normalized, with the highest-rated firm receiving a score of 50, and each lower-ranked firm

receiving a proportionately lower score. The cost scores were also based on a 50-point normalized scale, with the lowest-priced proposal receiving the highest score. Based on BAFO scores, all firms were determined to be technically acceptable and were ranked as follows:

	Technical Score	Price Score	Total
DynCorp	50	48.7	98.7
Aspen Systems Corp.	45.5	50	95.5
Ebon	45.4	31.9	77.3
Maximus, Inc.	47	27	74

Based on these scores, DOJ concluded that award to DynCorp provided the greatest overall value to the government considering cost and technical factors. DOJ therefore made award to DynCorp.

After receiving notice of the award, DynCorp began its recruiting effort for the contract by interviewing and offering positions to current Ebon employees (Ebon was the incumbent contractor), because DynCorp had offered to retain the incumbent staff to the extent practicable. Ebon's employees began complaining to DOJ officials, apparently because of the salaries being offered by DynCorp; although DynCorp was offering salaries that were consistent with the wage determination in the RFP, these salaries were lower than the salaries previously paid by Ebon. In response to these complaints, DOJ officials brought the matter to the attention of DOL officials who, after evaluating the situation, found that they had made a mistake when preparing the original wage determination; DOL issued a revised wage determination that increased the compensation for 5 of the 14 SCA job categories.

DOJ prepared revised evaluated cost scores for DynCorp and Aspen (whose low proposed costs had been based on the erroneous wage determination in the RFP) to account for the additional cost (including general and administrative overhead) associated with the increased wages. As a result, Aspen's price increased from $118,927,038 to $144,048,896,[1]

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[1]DOJ actually calculated that the revised wage determination would have increased Aspen's offer to [deleted], but this did not include the general and administrative costs (G&A) and fee/profit that would be attributable to the increased wages. The price stated here reflects our addition of [deleted] in G&A and [deleted] in fee/profit to Aspen's offer since the firm would likely have included these amounts had it based its offered price on the revised wage determination. For the same reason, we have added [deleted]

(continued...)

and DynCorp's from $122,125,235 to $149,538,843. Aspen's cost score remained 50 points (the firm was still the lowest priced), and DynCorp's score was reduced from 48.7 to 48.1 points. DOJ did not upwardly adjust the cost proposals of Ebon or Maximus because both firms' offers included compensation rates that were higher than the minimum rates under the revised wage determination. The firms' point scores were revised, however, Ebon's being increased to 38.6, and Maximus's to 32.7. Based on these recalculations, DOJ concluded that the revised wage determination would not have affected its source selection decision because DynCorp still had the highest overall combined cost and technical score. DOJ concluded that it would have selected DynCorp over Aspen (the firm next in line for award) even if BAFOs had been based on the revised wage determination.

DELEGATION OF PROCUREMENT AUTHORITY

[redacted] argues that the procurement was void from the outset because the agency did not obtain a delegation of procurement authority (DPA) to conduct the acquisition. Since, according to the protester, the requirement here involves the acquisition of automatic data processing (ADP) services, a DPA was required under the Brooks Act, 40 U.S.C. § 759 (1988).

The record shows that prior to issuance of the RFP, DOJ did consider whether or not a DPA was required. The agency revised the draft RFP statement of work to make it clear that the RFP was soliciting administrative support services. DOJ concluded that a DPA was not required for the types of services being solicited.

Although GSA did not rule on the DPA issue before DOJ proceeded with the procurement (since DOJ did not consider this to be an ADP requirement), the matter was reviewed by the GSA Administrator--in response to a congressional request--after the fact. GSA found (in a report included in the record) that a wide variety of services will be required under the contract (including such things as data analysis, property custody, procurement assistance, and mail and file room operation), that all Federal Information Processing (FIP) resources to be used during performance will be government furnished property, and that personnel under the contract will not be required to develop or administer ADP

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[1](...continued)
to DynCorp's price, although the firm agreed to forego any [deleted] increase based on the wage adjustment. These changes also have necessitated a slight upward adjustment in Ebon's and Maximus's cost scores; the recalculated scores appear in the decision.

resources. GSA concluded based on its findings that DOJ correctly decided that no DPA was necessary for the procurement because the use of FIP resources will be incidental to performance under the contract. Based on the record, we have no reason to question DOJ's authority to conduct this procurement.[2] Ship Analytics Inc.; The Maritime Training and Research Center, B-230647, July 12, 1988, 88-2 CPD ¶ 37.

REVISED WAGE DETERMINATION

As stated above, the agency did analyze the cost impact of the revised wage determination issued after award on the competitor's cost proposals. While the agency made upward adjustments to the DynCorp and Aspen cost proposals, it did not make similar adjustments to the other two firms' cost proposals because their proposals included rates of compensation higher than the revised minimum wages. The agency concluded that the revised wage determination would not have affected the source selection.

Ebon argues that it was prejudiced because the agency improperly failed to provide it with an opportunity to submit an offer based on the revised wage determination.[3] Ebon's argument is premised on the position that Ebon would have lowered its price had it known of the correct wage determination. We see no logical reason why an offeror would lower its price in response to wage determination containing increased wages. This is particularly the case under the facts here. In its initial proposal, Ebon offered to retain its existing staff and compensate them at the rates contained in the original (incorrect) wage

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[2]This issue appears untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1993), since the RFP did not include a clause describing any type of DPA, as required under the Federal Information Resources Management Regulation, 41 C.F.R. § 201-39.106-4 (1993). Ebon knew or should have known from the absence of such a clause in the RFP that no DPA had been obtained.

[3]Ebon also argues that, during discussions, DOJ improperly led it to increase its price, and contends that this was the cause of its not receiving the award. We disagree. As noted, the offerors' compensation packages (and corresponding ability to recruit and retain staff) were considered during the technical evaluation. DOJ properly brought what it perceived as an inconsistency in Ebon's proposal to the firm's attention, since it was the incumbent and was proposing its existing staff. How Ebon resolved this perceived inconsistency was a matter of the firm's business judgment. Nothing in the record suggests that DOJ urged a particular approach to Ebon for resolving this inconsistency.

determination (the firm's initial offer was for $117,127,730). Noting that ability to retain staff was a technical evaluation consideration, the agency asked Ebon during discussions how this would be accomplished at the proposed wages, since the staff's current level of compensation was significantly higher than the RFP rates. In response, Ebon increased its compensation level significantly in its BAFO, to slightly less than its current compensation level, stating that:

> "Ebon has taken the position that a reasonable salary, and fringe benefit package will be offered to each qualified, experienced staff in order to retain the maximum number of existing trained staff and to attract well qualified new recruits to fill the new positions."

Thus, during discussions, when faced with a choice between keeping its proposed cost low and raising its cost significantly to possibly enhance its technical rating for staff retention, Ebon chose the latter. Ebon's compensation levels also were substantially higher than the revised wage determination. Thus, lowering its price to the level of the revised wage determination still would have required Ebon to accept the possibility of a lower staff retention score. As Ebon rejected this low cost/low score approach in its BAFO, there simply is no logical basis for concluding that Ebon would have made a different choice based on the revised wage determination.[4]

We conclude that Ebon was not prejudiced by DOJ's failure to afford it an opportunity to submit an offer based on the revised wage determination. See The Fred B. DeBra Co., B-250395.2, Dec. 3, 1992, 93-1 CPD ¶ 52.

EVALUATION

Ebon argues that DOJ improperly evaluated its and DynCorp's proposals, and failed to conduct meaningful discussions with Ebon. Additionally, Ebon contends that DynCorp engaged in an improper "bait and switch" tactic by allegedly including

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[4]In support of a claim that it could have reduced its offered cost substantially and still retained its current staff, Ebon states that it had some 825 letters of commitment from its staff stating that they would be willing to work for the firm at significantly reduced wages. These letters were not included in Ebon's BAFO and have not been presented as part of the protest record. Further, it is not clear why Ebon increased its BAFO price so substantially if it believed its staff could be retained at significantly lower wages.

in its proposal the resumes of key personnel that the firm knew were not committed to work on the contract.

We need not consider these allegations since Ebon would not be in line for award even if we found that they had merit. The agency points out, and the record clearly establishes that if DynCorp were eliminated from the competition and Ebon's technical score was raised to the maximum 50 points, Aspen, not Ebon, would be in line for award. The scoring scheme used by DOJ (in the original and revised evaluations) reflected the approximately equal weighing of the technical and cost factors, and for that reason was considered a valid indicator of the best value to the government for this requirement; the protester does not argue otherwise. Under this scheme, had Ebon received a perfect technical score, the total scores for award purposes (including the revised cost scores) would have been 92.3 points for Aspen and 88.6 points for Ebon. Although Ebon's technical score would be higher than Aspen's, 50 versus 42.3 (after applying the agency's normalization formula), in the final analysis, Ebon's proposed cost was so much higher than Aspen's cost even as revised--approximately $42 million--that even a perfect technical score could not offset Aspen's overall evaluation advantage. Ebon does not challenge the technical evaluation of Aspen's proposal.[5]

Since Ebon would not be in line for award even were this aspect of its protest sustained, these arguments are academic and we will not consider them. Aqua-Chem, Inc.; Gismo, Inc., B-249516.2; B-249516.3, May 18, 1993, 93-1 CPD ¶ 389.

The protest is dismissed in part and denied in part.

James F. Hinchman
General Counsel

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[5]Ebon's comments on the agency report include a number of generalized assertions regarding the evaluation of Aspen in the area of staff retention. Aside from the fact that these generalized assertions are not specific enough to constitute a valid protest (and thus amount to no more than general disagreement with the agency's evaluation conclusions), the matter is untimely raised under our Bid Protest Regulations. Ebon did not raise these assertions until more than 10 working days after receiving the agency's report which contained all of the evaluation and discussion materials relating to Aspen. 4 C.F.R. § 21.2(a)(2).