S. Riback

Comptroller General
of the United States

Washington, D.C. 20548

430217

Decision

Matter of: Counter Technology Inc.

File: B-260853

Date: July 20, 1995

Leonard J. Levy, Esq., for the protester.
Roger J. Phaneuf, for Phaneuf Associates Inc., an interested party.
Rowena H. Conkling, Esq., Department of Transportation, 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. Protest allegations relating to terms of solicitation and agency's actions prior to the submission of proposals are dismissed as untimely; solicitation improprieties must be raised prior to the deadline for submission of offers, and allegations relating to agency's actions must be raised within 10 working days of when they occurred.

2. Protest challenging evaluation and resultant elimination of protester's proposal from competitive range is denied where record shows that protester's proposal was properly found technically unacceptable, and nature of deficiencies was such that the proposal would have to be almost entirely rewritten to be acceptable; since agency may not properly make award on the basis of a technically unacceptable proposal, alleged cost advantage of proposal is immaterial.

DECISION

Counter Technology Inc. (CTI) protests the elimination of its proposal from the competitive range, and the award of a contract to Phaneuf Associates Inc., under request for proposals (RFP) No. DTRS-57-94-R-00027, issued by the Department of Transportation (DOT) for technical support services for regulatory studies in the development of aviation safety regulations. CTI principally maintains that its proposal was not properly evaluated.

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

The RFP contemplated the award of a cost-plus-fixed-fee, level-of-effort contract to deliver approximately 65,000 labor hours of technical/professional services over a 5-year period. The requirement involves providing the agency with support services in connection with its function of issuing aviation safety regulations and includes a wide variety of technical tasks such as the development, evaluation and analysis of regulations; systems design, development and integration; the performance of requirements studies and concept definition studies; cost/benefit and effectiveness analyses; and air transportation analyses. Offerors were instructed to submit technical proposals divided into three parts: (1) information relating to staff qualifications for key personnel, including the expertise and recent experience of the proposed individuals, as related to work areas identified in the statement of work (SOW); (2) information relating to the firm's capabilities, specifically, the offeror's experience in the SOW's work areas within the past 4 years; and (3) responses to three hypothetical tasks where firms were required to outline their approach to the problems presented. Offerors were also required to submit management and cost proposals.

For technical evaluation purposes, the RFP provided that proposals would be considered under four criteria: staff qualifications, work area capabilities, hypothetical task responses, and management program. The first three criteria were of equal importance, while the fourth was less important than the other three. Cost proposals were to be reviewed for accuracy, completeness, appropriateness, and realism. For award purposes, the RFP advised that technical considerations would be more important than cost.

DOT received two proposals. After performing a technical evaluation, DOT found CTI's proposal to be technically unacceptable. The agency found primarily that (1) neither CTI as an organization nor its proposed personnel had recent experience that was sufficiently relevant to the contract requirements; (2) CTI's management proposal lacked adequate detail; and (3) its responses to the hypothetical tasks reflected only a superficial understanding of the contract requirements. Based on these conclusions, the agency found CTI's proposal, with a score of only 36 (out of a possible 100) points (the awardee's proposal received a score of 98 points), to be outside the competitive range, as CTI would have to rewrite its proposal and replace most of its personnel to become technically acceptable.

SOLICITATION TERMS AND PRE-PROPOSAL ACTIONS OF THE AGENCY

CTI maintains that the solicitation's evaluation criteria were not clearly stated and that various other aspects of the RFP (such as the requirement that prior experience be

from only the past 4 years) improperly favored the incumbent, Phaneuf. CTI also alleges that certain actions of the agency during the acquisition process (such as limiting the time during which questions about the RFP could be submitted to the agency) also improperly favored the incumbent. We dismiss these allegations as untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1995), solicitation improprieties that are apparent on the face of a solicitation must be protested prior to the deadline set for the receipt of proposals. Most of CTI's allegations in this respect relate solely to the terms of the solicitation.[1] Since CTI did not raise these contentions prior to the deadline for submitting proposals, the allegations are untimely; we therefore dismiss them without consideration of their merits.

TECHNICAL EVALUATION

CTI principally argues that the agency's determination that its proposal was technically unacceptable was improper. According to CTI, its proposal showed that the firm had a broad array of experience in the required work areas, that its offered personnel are in fact qualified to perform the contract based on their prior experience, and that its responses to the hypothetical tasks were adequate. CTI maintains that it is one of the leading firms in the area of airport security issues, and that its experience is more than adequate to perform under this contract.

In reviewing challenges to an agency's technical evaluation and competitive range determination, we do not independently evaluate proposals or substitute our judgment for that of the agency. STS Strategic Technologies & Sciences, Inc., B-257980; B-257980.2, Nov. 17, 1994, 94-2 CPD ¶ 194. Rather, we will review an evaluation only to ensure that it was reasonable and consistent with the solicitation's evaluation criteria; mere disagreement with the evaluation conclusions does not render them unreasonable. Id. In addition, while our Office will closely scrutinize a determination, such as the one here, that results in a competitive range of one, such determinations are primarily

[1]To the extent that CTI is protesting the agency's actions (as opposed to the terms of the RFP) occurring prior to the submission of proposals, these allegations also are untimely. Protests not relating to solicitation improprieties must be filed within 10 working days of when the protester knows or should know of its basis for protest. 4 C.F.R. § 21.2(a)(2). CTI's allegations relating to the agency's pre-proposal submission actions--such as limiting the time in which firms could submit questions to the agency--are therefore also untimely.

within the discretion of the agency and are not per se illegal or improper. Id. For the reasons discussed below, we find the agency's evaluation here unobjectionable.

Qualifications and Experience

CTI's proposal was found technically unacceptable largely because it did not reflect any recent, relevant experience--on the part of the firm or its key personnel--in performing regulatory rule-making support contracts. With respect to the firm's proposed key personnel, the evaluators found that none of the individuals in question had any experience in writing regulatory materials for either DOT or any other agency and that, to the extent that these individuals had experience in the regulatory rule-making and development process, it was limited to interpreting regulations and proposed regulations for private constituencies such as airports and air carriers. The agency also found that the subject-matter expertise of the proposed key personnel (as well as the firm itself) was not particularly relevant to performance of this contract. The evaluators downgraded CTI (under both the Staff Qualifications and Work Area Capabilities criteria) because its experience was in the area of airport security, management, and operations rather than in the area of aviation safety, and thus was not especially relevant.[2]

CTI has not shown that the agency's conclusions were erroneous by, for example, demonstrating that its personnel in fact have recent, relevant experience in the SOW areas. Rather, the firm maintains that the evaluators' judgments arose from an improperly narrow reading of the RFP experience requirements and improper favoritism towards the awardee.

We disagree. Agencies properly may take into consideration specific, albeit not expressly identified experience in making qualitative distinctions between competing proposals, so long as the specific experience is logically encompassed by or related to the RFP's requirements and stated basis for evaluation; accordingly, it is not objectionable for an agency to rate a firm that has previously performed the exact work called for under the RFP higher than a firm with more general experience. Fidelity Technologies Corp., B-258944, Feb. 22, 1995, 95-1 CPD ¶ 112. The RFP here sought proposals demonstrating the offerors' experience in

[2]The record also shows that, in many instances, the agency was unable to determine the recency of CTI's experience, or the experience of its personnel because, although the firm's proposal referred to previous contracts, it did not state when the work was performed.

work areas relating to the performance of aviation safety regulatory rule-making support activities, and the record shows that the agency gave high evaluation scores to the awardee based on its extensive experience in the area of aviation safety regulatory rule-making support services; the agency's conclusions relating to the awardee were due in large part to the fact that it had been the incumbent for this contract, and thus had actually performed in the areas of work outlined in the SOW. We think that the agency reasonably could consider the former incumbent's proposal superior in this respect, since its experience was in performing precisely the type of work contemplated under the SOW. See generally id. (agency properly scored firm with prior experience in performing exact work called for under RFP higher than protester where, although protester had experience that related generally to the work areas outlined in RFP, awardee's experience was more relevant, and therefore superior). This does not reflect an improper narrow reading of the RFP's experience provisions; it reflects only the relative assessment of the experience offered by the competing firms.

Hypothetical Task Responses

The agency also downgraded CTI because it viewed the firm's responses to the hypothetical tasks as lacking in detail and thus reflecting the firm's unfamiliarity with the required work. We have reviewed the agency's evaluation with respect to all of the hypothetical task responses and find nothing improper in its scoring of the proposals. We discuss one of these tasks below for illustrative purposes.

The second hypothetical task involved creating a work statement laying out the tasks and scheduling for the development and issuance of a notice of proposed rule-making statement. (In general, a notice of proposed rule-making is the first document an agency publishes during the enactment, amendment, or repeal of rules and regulations. See The Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq. (1994)). The evaluators criticized CTI's proposal because its response to this hypothetical task reflected a lack of detail, did not consider the relevant data requirements or sources, and contained only a generic set of "concept definition" steps. The evaluators also found that CTI's response did not demonstrate an understanding of the paper flow requirements associated with the issuance of a notice of proposed rule-making, and often proposed to perform the steps involved in an order that was impractical; the evaluators viewed this as reflecting negatively on CTI's experience and familiarity with the regulatory rule-making process. In contrast, the awardee's response to this hypothetical task was found to be extremely detailed, properly ordered, and reflective of the firm's intimate

familiarity with the regulatory rule-making process. The evaluators therefore gave the firms widely disparate scores for this task.

Our review of the firms' responses to this hypothetical task confirms the agency's conclusions that CTI's response, in comparison to the awardee's, was lacking in detail. CTI's response does in fact appear to include, for the most part, only generic concept definition steps. CTI's response also fails to include a complete performance work schedule discussing all of the steps involved in the promulgation and issuance of a notice of proposed rule-making. Finally, the response fails to discuss some of the more basic, yet important, aspects of the regulatory rule-making process; for example, it did not even reference the APA, the primary statute governing the rule-making process.

CTI has not shown that the evaluators' judgments as to the content of its responses were unreasonable. Rather, CTI maintains that only the incumbent would have the detailed knowledge necessary to respond in what the agency would view as adequate detail. However, while the incumbent here perhaps did enjoy a competitive advantage in responding to the hypothetical tasks, this is not a basis for finding the agency's actions unreasonable or improper. Incumbent contractors often enjoy a competitive advantage by virtue of their incumbency, and agencies are not required to equalize that advantage, so long as it is not the result of preferential treatment or unfair action by the agency. Complere Inc., B-257946, Nov. 23, 1994, 94-2 CPD ¶ 207. There is no indication in the record that Phaneuf's advantage resulted from preferential treatment or unfair action on the part of DOT; rather, the firm scored better simply because it was able to provide--due to specific experience in the area--a more comprehensive response to the hypothetical tasks. This superior response entitled the awardee to a superior evaluation rating. We thus conclude that there was a reasonable basis for the agency to draw a qualitative distinction between the firms based on their responses to the hypothetical tasks.

Miscellaneous Deficiencies

In addition to the major deficiencies discussed above, the agency found numerous minor bases for downgrading CTI. As with the hypothetical task responses, we have reviewed all of CTI's allegations in this respect and find them to be without merit. We discuss one of the minor deficiencies noted for illustrative purposes.

The agency found that CTI's proposal did not include a resume for a technical writer even though the RFP required the services of such an individual for 11,000 hours over the

course of the contract. CTI maintains that it did not include a resume for a technical writer because it did not view this individual as among the key personnel; CTI maintains that the RFP permitted offerors to include only the resumes of key employees with their proposals. CTI notes that it did include the cost for a technical writer in its cost proposal.

While the RFP did limit offerors to discussing their key employees in the Personnel Qualifications portion of their proposals (and limited the number of pages that could be included in that section), there was no indication that the resumes of other employees should not be included, and the resumes did not count toward the page limitation.

We think the agency reasonably downgraded CTI for failing to include a technical writer resume. This individual, whether or not a key employee, was nonetheless an important employee expected to perform 11,000 hours of work. The agency therefore had a legitimate interest in ensuring that the individual proposed was adequately qualified. CTI's failure to include its technical writer's resume left the agency unable to review that individual's qualifications. In contrast, the awardee's proposal, while discussing the qualifications of only its key employees within the Personnel Qualifications section, contained resumes for all individuals that would be working on the contract, including a resume for its technical writer. (Phaneuf's proposal discussed only 5 key employees but included resumes for all 10 of its proposed employees.) The record thus shows that the proposals differed materially in this area, and this difference provided a reasonable basis for the agency to distinguish between the two firms in the evaluation.[3]

[3]CTI also objects to the agency's scoring of its management proposal. The record shows that in this evaluation area, which was worth only 10 out of the possible 100 evaluation points, the evaluators awarded CTI a score of 6.5 points. Since there was such a wide difference in the scores of the two firms--CTI received a score of 36 points while the awardee received a score of 98 points--we need not decide whether the evaluators properly rated the firm under this criterion; even if CTI had received the additional 3.5 points in this area, its proposal clearly still would have been technically unacceptable--and outside of the competitive range--for the other reasons discussed. See TAMS/Fluor Daniel, B-251068; B-251068.2, Mar. 2, 1993, 93-1 CPD ¶ 199.

COMPETITIVE RANGE EXCLUSION

CTI contends that its proposal should not have been eliminated from the competitive range because it offered significant cost savings to the agency as compared to the awardee's proposal and could have been clarified during discussions. According to the protester, it has shown in its protest pleadings that, at a minimum, there was a reasonable doubt as to whether it should have been included in the competitive range, and this doubt should have been resolved in its favor.

Agencies are required to include in the competitive range proposals that have a reasonable chance of being selected for award; where there is doubt as to whether a proposal is within the competitive range, that doubt should be resolved in favor of including the proposal. Federal Acquisition Regulation § 15.609. Aid Maintenance Co., Inc.; TEAM, Inc., B-255552; B-255552.2, Mar. 9, 1994, 94-1 CPD ¶ 188.[4]

The agency concluded that, regardless of any potential cost advantage from the firm's proposal, CTI had no reasonable chance of receiving award without essentially rewriting its proposal and offering entirely different personnel. We find no basis for disagreeing with the agency's determination; as discussed above, we think the agency properly downgraded CTI's proposal and concluded that it was technically unacceptable. Under these circumstances, the agency was not required to include CTI's proposal in the competitive range, notwithstanding its cost advantage. Id.

The protest is dismissed in part and denied in part.

Ronald Berger
for Robert P. Murphy
General Counsel

[4]CTI also maintains that the agency improperly evaluated its cost proposal for cost realism purposes. We need not consider this allegation, since CTI would not be eligible for award even if this contention were correct. Aid Maintenance Co., Inc; TEAM, Inc., supra.