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Henry Hafford  
Proc. II.

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE: B-186848**

**DATE: February 16, 1977**

**MATTER OF: Virgin Islands Business Association, Inc.**

**DIGEST:**

1. Alleged failure of Department of Commerce to send timely copy of RFP to offeror is not sufficient basis to question award in absence of probative evidence to indicate conscious or deliberate effort to impede offeror's participation in solicitation. Moreover, publication of procurement in Commerce Business Daily constitutes notice of intention to procure.
2. Failure to inform offeror before contract award of unacceptability of its proposal provides no basis to question award.
3. Protest filed after closing date for receipt of initial proposals is untimely because it is directed at improprieties in the terms of RFP and bid protest procedures require such protests to be filed prior to date for submission of initial proposal.
4. Contracting officer may revise downward technical evaluation panel's appraisal of protester's proposal and exclude proposal from competitive range and negotiation where it reasonably can be concluded that protester's proposal is not acceptable for reasons consistent with solicitation's evaluation factors notwithstanding technical panel's contrary conclusion.
5. Review of agency's proposal evaluation reveals that proposal reasonably was not construed as offering to provide services of local Chamber of Commerce but merely as an offer to attempt to work with Chamber and other resources, which is expected of a potential business development organization. Thus, allegation that the successful offeror's proposal deliberately misrepresented existence of a firm or contractual commitment by local Chamber to provide services is not supported by record.

B-186846

A protest was filed by the Virgin Islands Business Association, Inc. (VIBA) concerning the award of a contract to the National Training Systems Corporation (NTSC) by the Office of Minority Business Enterprise (OMBE), Department of Commerce under Request for Proposals (RFP) No. 6-36533. The RFP contemplated a cost-reimbursement type contract for a local business development organization to provide management and technical assistance to existing and potential minority businesses in the United States Virgin Islands. VIBA, which was the previous contractor, and NTSC were the only offerors. After receipt of their proposals, it was determined that VIBA's proposal did not fall within the competitive range. Thus, negotiations were conducted only with NTSC, to which award was ultimately made.

VIBA presents a number of arguments against the propriety of the award. VIBA states that it failed to receive an "official" solicitation prior to the closing date for receipt of proposals and that it utilized solicitation documents obtained just prior to the closing date for receipt of initial proposals. It contends that it learned of the distribution of the solicitation shortly before the closing date for submission of proposals and that it was not able to prepare a thorough proposal.

The record shows that notification of this procurement was published in the Commerce Business Daily more than one month prior to the solicitation's closing date. In this connection, the procuring agency states that a copy of the solicitation was mailed at time of issuance to VIBA's treasurer, who had been authorized to act in VIBA's behalf in all negotiations with the agency, and that a copy was subsequently mailed, upon request, to VIBA's project director under the previous contract. In the absence of probative evidence which would indicate a conscious or deliberate intention to impede VIBA's participation in this solicitation, we cannot find that VIBA's alleged failure to receive copies of the solicitation in a timely fashion constitutes a basis for objection by this Office. Coastal Services, Inc., B-182858, April 22, 1975, 75-1 CPD 350. Moreover, we regard publication in the Commerce Business Daily as constituting notice of procurement information to all concerned. Del Norte Technology, Inc., B-182318, January 27, 1975, 75-1 CPD 53.

VIBA also protests its exclusion from the competitive range. It states that because its response to the solicitation proposed negotiable conditions, the contracting officer should not have

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refused to negotiate with it. In addition, VIBA argues that negotiations were called for because only two responses to the solicitation were received and VIBA is a resident organization, whereas the awardee was not based in the U. S. Virgin Islands.

Two proposals were evaluated by an OMBE technical evaluation panel. Of a possible 100 points for its technical proposal, VIBA received 72.3 points, while NTSC received 79.3. As to price, NTSC's initial cost estimate was \$83,446 but subsequently was negotiated downward to \$60,000. VIBA presented alternative cost proposals of \$112,779 and \$79,774. Its higher cost estimate was based upon the maintenance of offices in both St. Croix and St. Thomas, with a total of six staff members, while its lower cost proposal provided only a single office in St. Croix and eliminated two staff personnel.

In summarizing its evaluation, the technical evaluation panel stated that VIBA's experience as a business development organization (BDO) was considered a positive factor. The following negative factors were also listed in the panel's summary:

"Although [the] RFP called for a professional staff of two, the proposal talks about four professionals. Position descriptions were not included and personnel policies, though summarized, were not included. Statements on techniques and resources are poor, especially considering that VIBA has operated as a BDO for nine months and has therefore benefitted from training and exposure to OMBE and its activities. Current proposal is mostly a copy of the proposal submitted last year. They should have used that experience to improve and update their first proposal."

Overall, the evaluation panel considered VIBA's proposal to be acceptable. However, our examination of the procurement file shows that the Director, OMBE, transmitted a copy of the review panel's evaluation to the contracting officer with the recommendation that VIBA not be considered an acceptable offeror. The Director stated that VIBA's performance as the incumbent contractor was marginal, at best, and that VIBA's reports frequently were quite late. In his opinion, the individuals proposed as Director and Deputy Director were unacceptable because under the prior contract they had "shown little understanding of what a business development program is about." We note that the

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agency's report to this Office, a copy of which was furnished the protester, is somewhat misleading because it fails expressly to mention the impact of the Director's views upon the selection process which became obvious to us only upon examination of the procurement file. In this connection, we are recommending to the Secretary of Commerce that appropriate action be taken to insure that protesters and this Office be furnished a full and accurate explanation of the basis for rejection.

Based upon this review of the technical evaluation and an analysis and comparison of its two cost proposals, VIBA was eliminated from the competitive range and from further discussions. VIBA's proposal which was evaluated by the technical evaluation panel was based on a staff of four professionals with offices on two islands, whereas the Government's estimate for accomplishing the minimum goals, as stated in the solicitation, was for only two professional man years. While VIBA's lower cost proposal eliminated two staff personnel, it provided for only a single office on St. Croix. The contracting officer considered that any significant reduction in VIBA's cost estimate would have resulted in a corresponding weakening of its technical proposal. In contrast, the successful offeror proposed to maintain offices on two islands and yet remain within the level of effort contemplated by the solicitation and available funds.

We have viewed numerical ratings as an attempt to quantify what is essentially a subjective judgment for purposes of realistic and fair proposal evaluation. B-174799, June 10, 1972. Whether or not a proposal is initially rejected, the contracting agency is not required to hold discussions with an offeror once it is determined that its proposal is outside the acceptable range. 52 Comp. Gen. 198, 208 (1972). Although our concern about excluding a proposal from the competitive range is more intense where only one proposal is considered for negotiation because of the preference for competition (Dynallectron Corporation, R-185027, September 22, 1976, 76-2 CPD 267), we are not convinced that further discussions with VIBA were required. The relative closeness of the scores given the two technical proposals could be properly judged in the light of other relevant considerations, provided such considerations are consistent with the solicitation's evaluation factors. The criteria for evaluation of proposals and contract award were stated in the solicitation as follows:

**"Evaluation Criteria**

**"Each proposal will be evaluated by use of numerical and narrative scoring techniques against the evaluation criteria specified below. As a result of the evaluation, the proposals determined to be technically acceptable will be evaluated by**

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the Contracting Officer to determine, on the basis of technical, cost and other salient factors, which proposals fall within the competitive range. The Contracting Officer will conduct oral or written discussions (negotiations) with all offerors within the competitive range.

"The evaluation factors and respective weights are as follows:

<u>Evaluation Factor</u>	<u>Weight</u>
[1] Proposed staffing pattern and qualifications of staff members in providing the required services to minority businesses and offeror's schedule for start-up of operations.	20
[2] Techniques and methods of soliciting, selecting, assisting, monitoring, and terminating clients.	20
[3] Awareness and understanding of principles involved in the acquisition and use of available resources in assisting clients.	20
[4] Understanding of the work to be done as reflected in the time performance plan and support of projected accomplishments.	10
[5] Awareness and understanding of current problems facing the minority business community in the area to be served and awareness of the cultural, socio-economic and civic (not political) activities of the community as they may affect the success of individual ventures or minority enterprise in general.	10
[6] Prior experience, either organizationally or individually, in successfully furnishing business assistance or business development services to minority businesses.	10
[7] Community base in the area to be served, particularly the minority business community, and responsiveness to the minority community.	10"

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It is evident that the opinions of the Director, OMBE and the contracting officer, which led to the exclusion of VIBA from the competitive range, come within the ambit of the above quoted evaluation and award criteria and could properly form the foundation for revising the initial conclusion by the technical evaluators concerning VIBA's acceptability. In this connection, the Director's views concerning the quality of VIBA's prior performance is covered under the third and sixth evaluation factors and the acceptability of its existing and proposed staff comes within the first and third factors. The contracting officer's concern regarding the staffing levels proposed was proper for consideration under at least the first factor. Because the officials reviewing the technical panel's evaluation had a rational basis for their different opinion concerning the technical acceptability of VIBA's proposal, we do not object to the selection process. Tracor Jitco, Inc., 55 Comp. Gen. 499 (1975), 75-2 CPD 344.

We have noted during the course of our review that the solicitation failed to provide guidance as to the relative importance of cost to the technical factors. As stated in numerous decisions, the trade off between cost and technical requirements should be articulated to achieve effective competition. Iroquois Research Institute, B-184318, February 23, 1976, 76-1 CPD 123. While offerors were not advised whether this procurement was intended to achieve a minimum standard at the lowest cost or whether cost was secondary to the level of effort, VIBA was not prejudiced by this deficiency because it did submit a lower cost proposal, which the contracting officer considered before rejecting the firm.

While VIBA also objects to the difficulty encountered in obtaining information regarding the status of the procurement, the failure to inform VIBA of the unacceptability of its proposal before contract award does not provide a basis for objection. Generally, notice that a proposal falls outside the competitive range should be furnished as soon as possible. However, pre-award notice is not mandatory and a delay in giving such notice is merely procedural and furnishes no basis for disturbing award. Federal Procurement Regulations § 1-3.805-1(b). Galler Associates, Inc., B-181728, November 11, 1974, 74-2 CPD 292 at 10; B-177822, July 16, 1973.

VIBA, which is based in the Virgin Islands, also contends that award to NTSC, whose corporate headquarters is located in New Jersey, would conflict with the expressed agency goals. According to VIBA, these goals emphasize "a thrust on the local level" and are in accordance with Executive Order (E.O.) 11625, 38 F.R. 19967, October 14, 1971. VIBA fears that because NTSC's offices are not located in the Virgin Islands, its services will not readily be accepted by local clients, and the services VIBA had provided during its previous contract will be interrupted.

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The drafting of specifications which describe the minimum needs of the Government and the choice of the offeror which best meets those needs are matters vested in the sound discretion of the agency involved. See Automated Systems Corporation, B-184835, February 23, 1976, 76-1 CPD 124, at page 9, and cases cited therein. The solicitation did not require that the contractor be a local entity beyond providing for a community base in the locality to be served. Thus, the mere fact that NTSC is not domiciled in the Virgin Islands is not controlling. Insofar as VIBA's argument pertains to an alleged inadequacy in the terms of the solicitation, the argument is untimely, for our bid protest procedures require such protests to be filed before the closing date for receipt of initial proposals, 4 C.F.R. § 20.2(b)(1) (1976). VIBA's protest was filed after the closing date for receipt of proposals and after award.

VIBA also argues that NTSC's proposal repeatedly misrepresented NTSC's relationship with the St. Thomas-St. John Chamber of Commerce (Chamber), emphasizing throughout a close, cooperative relationship with the Chamber when in fact the Chamber had never agreed to sponsor or cooperate with NTSC. VIBA further alleges that NTSC's primary professional person slated for performance under the contract was represented in the proposal as having served for the past six years as executive director of the Chamber, but the firm failed to reveal the material fact that this proposed staffer's employment had been terminated by the Chamber a month before submission of NTSC's proposal. VIBA states that NTSC's misrepresentation materially affected the agency's decision to select NTSC because of this individual's link to the proposed cooperative relationship between NTSC and the Chamber. In VIBA's view NTSC's alleged misrepresentations were designed to convince the procuring agency that the firm had sufficient local contacts and resources to guarantee a successful program even though, in the protester's opinion, NTSC does not possess a thorough knowledge of local business necessary for a successful development program. In this connection VIBA further states that NTSC's lack of knowledge of the islands and their needs is evidenced by NTSC's failure to mention in its proposal the construction of a \$400,000,000 oil refinery on St. Croix.

Initially, we note that NTSC's proposal states that "New industries, including the Hess Oil Refinery and Harvey Alumina, have led to expansion of the oil, bauxite, petrochemicals and plastics manufacturing concentrations." In our opinion this statement indicates awareness of the important and expanding role of the oil refinery industry on St. Croix.

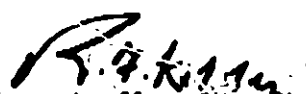
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Moreover, NTSC states that while it anticipated and continues to anticipate a cooperative relationship with the Chamber, at no time did NTSC's proposal indicate that the Chamber would assume any contractual obligation. NTSC states that it was unaware at the time it prepared its proposal that its proposed staff member was no longer employed as executive director of the Chamber.

The agency reports that during evaluation the NTSC proposal was never construed as providing a contractual arrangement with or firm commitment by the Chamber. In our opinion a firm or contractual commitment was not offered in NTSC's proposal and our review of the agency's evaluation of NTSC's proposal does not reveal that the agency believed otherwise. While NTSC's indication of cooperation from the Chamber was noted and well received by the evaluation panel members, the agency reports it was not a major consideration in rating the proposal because contractors are expected to attempt to work with the local chamber of commerce and other resources, and the panel knew that not all such resources do in fact cooperate, even when they have previously promised to cooperate. In our opinion, the record before us does not support the protester's allegation that the contractor deliberately made misrepresentations to the Government. Even though both NTSC and the Government may not have been aware of relevant facts regarding the employment history of the proposed staff member, our review of the technical evaluation convinces us that the agency's appraisal of NTSC's proposal would not have been altered materially had there been full awareness of the facts.

Accordingly, VIBA's protest is denied.

Deputy

  
Comptroller General  
of the United States



