Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Du & Associates, Inc.

File: B-280283.3

Date: December 22, 1998

Lucie Du for the protester.
Bruce M. Kasson, Esq., Department of Housing and Urban Development, for the agency.
Robert C. Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of technical evaluation is denied where it is merely based on protester's disagreement with the evaluators' conclusions.

2. Protest that discussions were not meaningful is denied where record establishes that protester was led into the areas in which the agency was concerned that the proposal needed amplification and improvement.

DECISION

Du & Associates, Inc. (D&A) protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. R-OPC-21184, issued by the Department of Housing and Urban Development (HUD) for multifamily real estate assessment and analysis services. D&A principally alleges that its proposal was misevaluated and that HUD failed to conduct meaningful discussions.

We deny the protest.

BACKGROUND

The RFP, issued on April 22, 1998, contemplated the award of five separate fixed-price, indefinite-quantity contracts for different geographic regions. Agency requirements were set forth in a detailed statement of work (SOW). RFP, Section C. Award was to be made on a best value basis considering technical merit and, secondarily, price. RFP amendment 1, Section M.IV.

The most important technical factor (worth 50 points out of a possible total of 120) is entitled Prior Experience and provides as follows:

> Offerors's proposal demonstrates experience, knowledge and ability to perform, and manage the services listed in the [SOW]. Offeror's proposal provides documented evidence of previous performance of similar or related work, as well as provides evidence of the qualifications of the professional staff proposed (including subcontractors and consultants) to perform the tasks identified in the [SOW].

RFP amendment 1, Section M.III.A (hereinafter "Factor 1").

Past Performance, the second most important technical factor (worth 40 points), is not at issue in this protest. See RFP amendment 1, section M.III.B.

The final technical factor (worth 30 points), entitled Management Capability and Quality Control, provides, in relevant part, as follows:

> The offeror's proposal provides evidence regarding the ability to perform all tasks under the contract in a quality and efficient manner, including the management of subcontractors, if any. The offeror demonstrates a clear understanding of the magnitude of the contract requirements and of organizational ability to manage the work required.

RFP amendment 1, section M.III.C (hereinafter "Factor 3").

With respect to Factor 1, the RFP's proposal preparation instructions cautioned offerors to provide evidence of qualifications of key staff performing the same or similar work to the SOW and specifically required the submission of job descriptions, resumes and/or organizational charts reflecting key personnel to perform "the tasks identified in the [SOW]," and provided that this experience was required to have been gained within the last 3 years. RFP amendment 1, Section L.1(c)(1).

On June 8, proposals were received from 19 offerors. Following an evaluation by the technical evaluation panel (TEP), competitive ranges were established for each geographic area. D&A was included in the competitive range for each of the five areas. On July 1, oral discussions were conducted with D&A. The protester was also provided with the following pertinent, written questions under the heading "Technical Concerns":

> 1. We realize that [D&A] is a newly form[ed] company. Please provide assurance that the company has the capacity and financial ability to perform the contract.
>
> . . . . .
>
> 4. It is our concern that the costs reflect the understanding of the solicitation and tasks that will be required by the contractor. Please provide a breakdown of costs supporting your proposed fees to assure that adequate resources will be dedicated to the contract(s).

Agency Report, Exh. 8, attachment.

D&A submitted a revised proposal on July 8. Upon evaluation of all revised proposals, the contracting officer (CO) made a second competitive range determination on August 14. The top five ranked proposals had technical scores ranging from 100 to 117; D&A's proposal, ranked sixth, had a final score of 78. D&A was not included in the final competitive range, which was limited to two offerors who were considered to have submitted the most highly rated proposals for all five areas considering technical merit and price. The CO's statement submitted as part of the agency report indicates that it was primarily technical considerations, rather than price, that led to D&A's exclusion.[1] Agency Report, Exh. 13 at 3. Following further discussions with the two finalists, award was made to Pinnacle Reality on August 28 for all geographic areas.

The protester received a written debriefing on September 5 which summarized the agency's concerns with its final technical proposal as follows:

> The Government's evaluation of the significant weakness[es] or deficiencies in the proposal, resulted in a lower rated technical score.
>
> Factor 1
>
> The proposal indicated experience of key personnel in multifamily housing and other HUD programs, however, the personnel identified in

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[1]D&A's total evaluated price was $28.1 million. The final competitive range offerors submitted prices of $10.4 million (eventual awardee) and $32.1 million. Agency Report, Exh. 12 at 1.

Although the protester's $28.1 million price was for all five geographic areas, Du's July 8 revised proposal stated that "[w]e would like to emphasize that we are presenting our proposed prices for all five areas but we are only bidding on two areas." Agency Report, Exh. 9 at 1.

> the proposal does not list the experience associated with the tasks to be performed. Most experience indicated in the proposal was of a general nature and did not provide specific details of the experience to determine if it was substantially similar to the tasks required in the RFP.
>
> Factor 3
>
> The panel had concerns on the proposal's organizational structure and ability to perform the contract. You were asked during oral discussions to provide assurance that your firm had the capacity and financial ability to perform the contract.
>
> The proposal is a "flat" organization and identified yourself as the Key Principle and Project Manager and using subcontractors as project managers. However, the proposal did not address how the work would be managed should you be unavailable or demonstrate that your firm's employees have the management capability to perform in your place. The panel considered your proposed organizational structure inadequate and depended on the subcontractors for the management of a majority of the tasks in the contract . . . .

Agency Report, Supplemental Exh. at 1.

This protest followed.

PROTEST

Based largely on the debriefing letter quoted above, D&A alleges that HUD misevaluated its proposal by not considering its contents and by failing to evaluate the proposal in accordance with the stated RFP evaluation criteria. Protester's October 27 Comments at 8. In its comments on the agency report, D&A invites our Office to review its proposal to determine whether the agency failed to properly consider the contents of its final proposal. Id. at 12.

D&A also alleges that the concerns expressed in the debriefing letter were not communicated during oral discussions or in the written discussion questions and argues, therefore, that the discussions were inadequate. In connection with the oral discussion session the protester further states that it was advised that in preparing its revised proposal the firm was to "solely rely" on the written discussion questions. Protester's October 27 Comments, Second Attached Affidavit at 1. Finally, D&A further alleges that it was prejudiced by advice, said to have been given by the CO in a conversation after the conduct of discussions, indicating that the firm's price was too low.

ANALYSIS

Alleged Misevaluation

Referring us to extensive portions of its proposal, D&A argues that its low overall technical score is unjustified and indicates that HUD ignored the contents of the proposal. D&A also argues that the findings summarized in the debriefing letter for Factors 1 and 3 indicate that the agency did not evaluate the proposal in accordance with those evaluation factors.

It is not the function of this Office to independently evaluate proposals. Rather, the determination of the relative desirability and technical adequacy of proposals is a matter of agency discretion, which we will not disturb unless it is shown to be without a reasonable basis or inconsistent with the stated evaluation criteria. Axion Corp., B-252812, July 16, 1993, 93-2 CPD ¶ 28 at 3. A protester's mere disagreement with the agency's evaluation is not itself sufficient to establish that the evaluation was unreasonable. ASR Management & Technical Servs., B-252611, July 15, 1993, 93-2 CPD ¶ 22 at 6.

As for D&A's argument that the contents of its proposal were ignored, the individual and consensus TEP scoring sheets, which contain detailed comments, indicate otherwise. It is clear that the evaluators read the proposal and did not regard it as highly as the protester believes is warranted. D&A's disagreement with the evaluators' conclusions does not serve to establish that they lacked a reasonable basis. Id.

For example with respect to Factor 1, the TEP downgraded D&A for a summary presentation of its staff members' experience. The factor requires significant detail relating that experience to the SOW tasks. D&A submits that the summary representative lists of "some" of the experience of its staff was necessitated by RFP page limitations and criticizes the TEP findings as merely a matter of form. While the lists contain some of the experience of some of D&A's staff, there is no direct tie of that experience to the specific SOW tasks. Accordingly, the agency's criticism reasonably reflects the contents of the protester's proposal and, at best, D&A disagrees with the evaluators with regard to this factor.

Likewise, the TEP criticized D&A's proposal for not indicating that the experience of its proposed key personnel was gained within the last 3 years as required by the proposal instructions in the RFP. D&A mistakenly reads the instruction as requiring a separate listing of recent contracts, not requiring evidence of experience gained in the last 3 years. As is clear from the language of the Factor 1 proposal instruction set forth above, D&A's disagreement is based on an erroneous reading of the instruction, which requires precisely the information which the agency downgraded D&A for failing to provide.

As for D&A's assertion that the findings relating to Factors 1 and 3 are inconsistent with those criteria, we disagree. Factor 1 expressly calls for relating the experience of proposed staff, contractors and subcontractors to their ability to perform the tasks set forth in the SOW and the TEP's findings that D&A failed to adequately relate experience to the ability to perform fall squarely within that factor. Similarly, where Factor 3 requires a demonstration of an ability to manage contractors and subcontractors, the TEP's concern that D&A had not adequately demonstrated this was consistent with the factor. Accordingly, we have no basis to disturb the evaluation.

Discussions

On July 1, HUD conducted oral discussions with D&A at which time written discussion questions were distributed. On the evening of that date, HUD and D&A had a follow-up telephone conversation. Because the written record of this protest contains divergent accounts of what transpired on July 1, we held a telephonic hearing on November 18 to resolve the apparent factual disputes.

At the outset, D&A alleges that at the oral discussion session the CO advised its representatives that they did not need to take notes because written discussion questions would be distributed upon which the offeror was to "solely rely" in preparing its revised proposal. D&A argues that it followed these instructions which caused it to respond only to the written questions in its revised proposal, to its detriment.

At the hearing, the CO categorically denied that he gave any such instructions to D&A on July 1 or at any other time. He also testified that he used the written questions, which he orally clarified, to structure the oral discussion session. In its comments on the agency report, D&A attached an affidavit from one of its participants at the July 1 session which states that the CO gave advice to "solely rely on the written questions." Protester's October 27 Comments, Second Attached Affidavit at 1. That participant further stated that "[w]e used the information from the meeting to interpret the [written] questions relating to HUD's technical concerns . . . ." Id.

The hearing officer requested the affiant's presence at the hearing but D&A reported that she was unavailable. At the hearing, one of D&A's witnesses testified that she recalled the CO giving the alleged advice and wrote a note to that effect. The hearing officer requested that D&A produce the note in its post-hearing comments but the protester failed to do so. Because of the failure to testify upon our request and the failure to produce evidence relating to whether the CO instructed D&A to "rely solely" on the written questions, we draw an inference adverse to the protester, Bid Protest Regulations, 4 C.F.R. § 21.7(f) (1998), and find that the record supports the conclusion that the CO did not give the advice alleged by the protester, and did use the written questions to structure the oral session as indicated by the

agency. In reaching this conclusion, in addition to drawing an adverse inference, we view the purported instruction as implausible because it would effectively have rendered the oral discussions meaningless, raising a question as to why they were being conducted. In short, we conclude that the protester was not instructed, and therefore was not free as it claims, to ignore the content of the oral discussion session when preparing its revised proposal.

D&A also asserts that it was not apprised of the agency's concerns about the experience of its personnel or its ability to manage subcontractors during oral discussions.

Solicitations issued after January 1, such as this one, are governed by the revisions to Part 15 of the Federal Acquisition Regulation (FAR) contained in Federal Acquisition Circular (FAC) No. 97-02. The Part 15 rewrite revised the rules that apply when an agency is contracting using negotiated procedures, including those rules governing exchanges with offerors after receipt of proposals. Section 15.306(d)(3) includes guidance with respect to the conduct of discussions and states, in pertinent part, that:

> The contracting officer shall . . . indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal . . . that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. The scope and extent of discussions are a matter of contracting officer judgment.

We view the statutory and regulatory mandate for discussions with all competitive range offerors, which was not changed in the FAR Part 15 rewrite, as requiring that such discussions must be meaningful, equitable and not misleading. See 41 U.S.C. § 253b(d)(1)(A) (1994); FAR § 15.306(d)(1). At issue here is whether the FAR Part 15 rewrite altered the rules governing the content of discussions in a way relevant to the outcome of this protest. We recognize that the FAR rewrite could be read to limit the discretion of the contracting officer by requiring discussion of all aspects of the proposal "that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." We do not believe, however, that it was the intention of the rewrite to limit the contracting officer's discretion in this manner. Cf. SDS Petroleum Prods., Inc. B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5 (intent of Part 15 rewrite was to give contracting officers discretion to establish a more limited competitive range than was permitted previously). Consequently, we do not view the rewrite as having changed the prior legal requirements governing discussions in a manner which affects this case. See MCR Fed., Inc., B-280969, Dec. 14, 1998, 98-2 CPD ¶___ at 10-11. The rule thus remains that, while an agency is required to conduct meaningful discussions leading an offeror into the areas of its proposal requiring amplification or revision, the agency is not required to "spoon-feed" an offeror as to

each and every item that could be revised so as to improve its proposal. See Applied Cos., B-279811, July 24, 1998, 98-2 CPD ¶ 52 at 8. This is especially the case where, as here, the RFP evaluation criteria and instructions to offerors on proposal preparation are detailed and clear with respect to the problem areas. Id.

The CO testified that, during oral discussions, he communicated HUD's concerns reflected by written question 4 (which is couched in terms of "cost" although listed as a "technical" question[2]), to indicate that he was concerned with D&A's technical capacity to perform, including whether the protester had the appropriate staffing to perform the contract. This testimony was echoed by the testimony of the contracting specialist who attended the discussion session; she testified that the discussion started with capacity concerns and shifted to cost. D&A's witnesses did not directly contradict these accounts, rather they stated that the "focus" of the oral session was "cost." In our view, this testimony does not contradict the agency's account. Moreover, it is logical to infer that the agency communicated a concern about staff experience because, as both parties testified, the firm's president did address her staff's experience in oral discussions--albeit not, in HUD's estimation, to the degree required by the RFP. Accordingly, since the record supports a conclusion that the protester was led into the area of the agency's concern about tying experience to performance of specific SOW tasks, we have no basis to conclude that discussions were not meaningful in this regard. Id.

With respect to D&A's challenge to the adequacy of discussions concerning its organizational structure and ability to manage subcontractors--a concern of the agency's under Factor 3--while it appears that no specific mention of the concern occurred during oral discussions, the factor itself expressly requires (indeed emphasizes the need for) a demonstrated ability to manage subcontractors. In light of this, we believe that written technical question 1 requesting assurances that the firm has the "capability" to perform the contract served to sufficiently lead D&A into the area of organizational structure and subcontractor management so as to support a conclusion that discussions were meaningful in this regard. Id.

Finally, D&A alleged in its comments on the agency report that the contracting officer advised the protester that its price was too low thereby misleading the protester into significantly raising its price in its revised proposal. At the hearing, D&A's president testified that this advice occurred during a follow-up conversation to the oral discussion session on the evening of July 1. The CO specifically denied

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[2]Although couched in cost terms, the question itself relates to the agency's concern that an offeror has an "understanding of the solicitation and tasks" and seeks to determine whether an offeror has "adequate resources" to perform. In our view, even without the oral amplification of the CO at the discussion session, the question could not be reasonably read in the restrictive manner urged by the protester.

that he gave such advice. The contracting specialist, who was a participant in the conference call, corroborated the CO's testimony.

Irrespective of the actual advice that was given, this argument is essentially irrelevant because technical concerns, not whether the protester's final price was too high, provided the basis for the elimination of D&A's proposal from the competitive range. In any event, a preponderance of the evidence supports the agency's position in this regard and we deny this aspect of the protest.

The protest is denied.[3]

Comptroller General
of the United States

[3]We have reviewed the various ancillary issues raised by D&A and, although they do not warrant discussion here, we find them to be without merit.