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**Comptroller General
of the United States**

**United States General Accounting Office
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Decision

Matter of: Citrus College; KEI Pearson, Inc.

File: B-293543; B-293543.2; B-293544; B-293544.2; B-293544.3; B-293544.4

Date: April 9, 2004

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DIGEST

1. Protest that agency improperly made award to firm that submitted proposal that did not comply with solicitation's computer hardware requirement is denied where nothing in the solicitation required a detailed description of offered hardware and awardee did not take exception to requirement in its proposal.
 2. Protest that agency engaged in unequal discussions by having negotiations with awardee, but not with protester, about acceptable aspects of their proposals is denied where record shows that agency's query to awardee was a clarification request, in response to which awardee did not change its proposal.
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DECISION

Citrus College and KEI Pearson, Inc. protest the award of two contracts to Central Texas College (CTC) under request for proposals (RFP) Nos. N00140-03-R-2734 (RFP 34) and N00140-03-R-2735 (RFP 35), issued by the Department of the Navy to acquire educational services for service personnel stationed aboard ships and at other remote locations. The protesters assert that in both acquisitions the agency misevaluated proposals and made an unreasonable source selection decision.

We deny the protests.

Both solicitations are for post-secondary educational services to be provided to sailors stationed either on board ships or at remote locations. RFP 34 was for the provision of instructor-led course work and contemplates the contractor furnishing personnel to travel on board Naval vessels to teach courses. RFP 34 was set aside for participation by historically black colleges and universities and minority

institutions (HBCU/MI set-aside). RFP 35 was for the provision of “distance learning” services; essentially, the coursework is to be provided through multimedia delivery using primarily compact discs (CD) and video teleconferencing, as opposed to live instructors. RFP 35 was issued on an unrestricted basis. Previously, the agency met the two requirements using a single solicitation, and KEI was the incumbent contractor. Both of the current solicitations contemplate the award of indefinite-delivery, indefinite-quantity contracts under which courses will be paid for on a fixed-price-per-credit-hour or per-course basis.

Award under the RFPs was to be made to the firms submitting the proposals deemed to offer the “best value” to the government considering technical and price factors. Under the technical evaluation schemes, proposals were to be evaluated using four equally-weighted criteria (management plan, technical approach, past performance and corporate experience), and one additional criterion (extent of participation of small businesses, small disadvantaged businesses, women-owned small businesses and historically black colleges and universities and minority institutions) that was deemed significantly less important than each of the other four criteria. RFP 34 at 56-57; RFP 35 at 63-64. Both RFPs also indicated that technical considerations would be more important than price. RFP 34 at 56; RFP 35 at 63. Prior to the submission of initial proposals, the agency amended the RFPs to permit the submission of alternate offers whereby firms could propose to meet the requirements of both RFPs. AR, exhs. 6, 19. Thereafter, following the submission of initial proposals, the agency amended the RFPs again to clarify its intentions relating to the submission of alternate proposals. Agency Report (AR), exhs. 7, 23.

In response to the solicitations, the agency received numerous initial proposals. The agency evaluated the proposals and established a competitive range for RFP 34 comprised of Citrus’s and CTC’s proposals, and for RFP 35 comprised of CTC’s, Citrus’s and KEI’s proposals. AR, exh. 31. The agency then engaged in discussions and solicited and received final proposal revisions (FPR). After evaluation, the agency assigned the following adjectival ratings to the proposals:¹

Offeror	Mgmt. Plan	Tech. App.	Past Perf.	Corp. Exp.	Small Bus.	Overall Rating	Price
CTC (RFP 34)	HA	HA	HA	HA	A	HA	\$35,425,577
Citrus (RFP 34)	A	A	A	A	A	A	\$37,145,703
CTC (RFP 35)	HA	HA	HA	HA	A	HA	\$32,299,442

¹ The agency assigned adjectival ratings of either highly acceptable (HA), acceptable(A), unacceptable (a), unacceptable (b), or (for past performance only) neutral (N).

KEI (RFP 35)	A	A	HA	HA	A	A	\$28,065,331
CTC (RFP 34 and 35)	HA	HA	HA	HA	A	HA	\$33,814,955 (RFP 34) \$26,144,095 (RFP 35) \$59,959,050 (Total)
Citrus (RFP 34 and 35)	A	A	A	A	A	A	\$64,728,331 (Total)

AR, exh. 53, at 6. On the basis of these evaluation results, the agency awarded both contracts to CTC, finding that its combined alternate offer represented the technically superior, lowest priced alternative.

HARDWARE

Both protesters allege that CTC’s proposal for RFP 35, as well as CTC’s combined alternate offer, did not meet a solicitation requirement relating to furnishing computers. RFP 35 contemplates that the successful contractor will provide laptop computers for the delivery of courses by CD. RFP 35 at 32. The RFP further outlines the agency’s requirements in terms of the laptops to be furnished and requires, in particular, that the contractor furnish laptops with CD read only memory (CD-ROM) drives that operate at 48X (the speed at which the CD-ROM drive transfers data from a CD to the computer). The protesters assert that laptops with 48X CD-ROM drives are not commercially available, and that they had to specially equip their computers with auxiliary CD-ROM drives in order to meet this requirement, a matter specifically referenced in their proposals. AR, exh. 29, at 25 (KEI proposal); AR, exh. 46, at 40 (Citrus proposal). The protesters maintain that the CTC proposal does not affirmatively discuss the 48X CD-ROM requirement, and therefore is noncompliant with this requirement. In support of their position, the protesters note that the solicitation required offerors to prepare technical proposals in sufficient detail to demonstrate that they can accomplish the requirement.

This argument is without merit. Nothing in the RFP required offerors to include in their proposals specific information relating to the laptops that they intended to furnish during performance of the contract. Indeed, contrary to the protesters’ position, it appears that the specifications relating to the laptop computers were intended by the agency only as performance requirements, to be met by the contractor during contract performance. In this regard, the RFP provides “[t]he contractor shall provide laptop computers to participating commands for [distance learning] courses ordered by the Navy.” RFP 35 at 32. The use of the term “contractor,” as opposed to offeror, generally indicates that the requirement at issue is a performance requirement to be met by the successful firm after award. Buckeye Park Servs., Inc., B-282282, Apr. 27, 1999, 99-1 CPD ¶ 88 at 2. Under these circumstances, and in light of the fact that the CTC proposal did not take exception

to any aspect of the laptop specification, there is no basis to conclude that CTC's offer failed to meet the 48X CD-ROM specification.²

DISCUSSIONS

The protesters assert that the agency engaged in unequal discussions. In this regard, according to the protesters, the record shows that, although they offered [deleted], the Navy did not consider this an enhancement to their proposals. The protesters assert that, while the Navy did not downgrade their proposals for offering [deleted], the Navy should have advised them during discussions that the [deleted] were not considered an enhancement, thereby allowing them to [deleted]. The protesters argue that the agency's failure to provide them with this opportunity was unfair because the agency did provide CTC with such an opportunity, advising CTC during discussions that it had overstaffed the administrative function in its proposal; according to the protesters, this consideration did not make CTC's proposal unacceptable, but did potentially result in CTC's having a higher price.

This argument is without merit. First, the record indicates that the agency's question relating to CTC's proposed administrative staffing was in the nature of a clarification of an acceptable area rather than a discussion question. In this regard, in its initial proposals under each RFP, CTC included a manning chart showing 30 full-time employees (FTE). AR, exh. 11, at 15; AR, exh. 26, at 23. The discussion letter to CTC did not identify this as a deficiency, but noted that the evaluators felt that CTC had overstaffed the program management requirement for both RFPs. *Id.* at 3. In response, CTC did not alter its proposed manning, but instead clarified that the 30 FTEs on the manning charts were for performance under both contracts—21 FTEs for RFP 34 and 9 for RFP 35. CTC did not alter its price proposal based on this clarification. Because discussions were not conducted with CTC on this point, it follows that the agency did not engage in unequal discussions with the parties as alleged by the protesters.

In any case, even if we agreed that the communication constituted discussions with CTC, the record shows that the agency engaged in similar communications with the protesters. In this regard, the discussions letters sent to the protesters identified areas where their proposals were deficient (in the case of Citrus's proposals), and

² The protesters also assert that the agency failed to notice, in the course of its price analysis, that CTC's computer costs were lower than KEI's; the protesters maintain that this should have indicated to the agency that CTC could not comply with the 48X CD-ROM requirement at the price it proposed. However, in light of the fixed-unit-price nature of the acquisition, as well as the absence of any exception to the 48X CD-ROM requirement in the CTC proposal, there was no basis for the Navy to infer from CTC's lower computer cost that it did not intend to meet the 48X CD ROM requirement.

then also identified areas that were acceptable, but could be improved. AR, exh. 33, at 5; AR, exh. 34, at 3. These concerns regarding acceptable areas of the firms' proposals are similar to the manning issue the agency brought to CTC's attention; there is no indication or reason to believe that the questions to any of the firms were exhaustive of the acceptable areas in their proposals, and the mere fact that the Navy did not ask the protesters about a particular area of their proposals found acceptable ([deleted]) does not show that the agency treated them unequally.

LIMITATION ON SUBCONTRACTING REQUIREMENT

Citrus maintains that the agency evaluated proposals disparately under RFP 34 by questioning Citrus's, but not CTC's, ability to meet the limitation on subcontracting requirement, despite the fact, according to Citrus, that CTC would be using subcontractor personnel to perform most of the effort.³ Citrus concludes that the agency improperly assigned a risk to its proposal.

The record shows that there was a reasonable basis for the agency to distinguish between the CTC and Citrus proposals in this area. Citrus's initial proposal appeared on its face to draw into question the firm's ability to meet the limitation on subcontracting requirement. Specifically, in discussing its ability to provide qualified personnel, the Citrus proposal referred consistently to the "Citrus Team," which was comprised of [deleted]. AR, exh. 12, at 4. Indeed, all references to proposed staffing were couched in terms of the Citrus Team rather than in terms of Citrus employees. AR, exh. 12, at 4-5, 8, 13, 20-21, 28. In light of these references, the agency questioned Citrus during discussions about its ability to meet the limitation on subcontracting requirement. In response, Citrus changed its proposal, so that its FPR stated, for example, that:

[deleted]

AR, exh. 36, at 8; see also AR, exh. 12, at 13. Since Citrus' FPR still was written in terms of the "Citrus College Team," as opposed to Citrus as the prime contractor--the proposal refers to the "Citrus College Team" offering employment--the agency's concerns about compliance with the limitation on subcontracting requirement remained. In light of the language of Citrus' initial proposal and FPR, we find nothing unreasonable in the agency's reservations, and its evaluation of this aspect of the Citrus proposal therefore was reasonable.

In contrast, CTC's proposal at all times referred to CTC employees or personnel as the individuals being offered to perform the requirement. AR, exh. 10, at 7-11.

³ Federal Acquisition Regulation (FAR) § 52.219-14, incorporated into the RFP, requires that at least 50 percent of the contractor's personnel cost be expended for the contractor's own personnel.

Accordingly, Citrus' assertions to the contrary notwithstanding, there was no reason for the agency to question CTC's ability to meet the limitation on subcontracting requirement. Citrus has offered no support for its assertion that CTC will use subcontractor employees to staff the requirement, beyond a self-serving statement included in an affidavit from a KEI employee. We conclude that the evaluation of this aspect of the CTC proposal was reasonable.

ALTERNATE PROPOSAL

Strategy "Leak"

Citrus alleges that the agency improperly "leaked" its strategy of submitting a lower-priced alternate proposal for both requirements. According to the protester, CTC, which did not submit an alternate proposal initially, was essentially prompted by the agency to do so. Specifically, Citrus points to the terms of the amendments issued subsequent to the receipt of initial proposals (noted above) as evidence that the agency was trying to persuade CTC to submit an alternate proposal. The amendments provided in pertinent part:

It is anticipated that offerors may be able to provide additional price benefit to the Navy through the submission of alternate proposals based on the Government's acceptance of the offeror's proposals under both [RFPs]. Alternate offers shall only be considered if they propose discounted prices contingent upon the award of contracts under both RFPs to the same firm or team of firms without altering the technical approaches proposed in the offeror's responses to the individual RFPs.

AR, exhs. 7, 23. Citrus notes as well that in its request for FPRs the agency specifically pointed out that CTC could submit an alternate proposal.

This argument is without merit. The agency never requested that CTC submit an alternate proposal for the combined requirement. In tendering initial proposals, Citrus submitted a proposal under RFP 34 and also an alternate proposal for both requirements combined. CTC submitted a proposal under RFP 34 and also submitted a proposal under RFP 35 that was conditioned upon its receiving award under RFP 34. The agency viewed CTC's combined proposal in this form to be unacceptable because the offer for RFP 35 was conditional. The agency therefore brought the matter to the firm's attention during discussions, the discussion letter to CTC stating as follows:

Alternate proposal. Your proposal submitted on behalf of RFP [35] is a qualified offer; it is requested that you remove any such qualification and submit an unqualified offer on this RFP. You are also hereby given the opportunity to submit an alternate proposal as well.

AR, exh. 32, at 3. CTC then submitted an alternate proposal for the combined requirement in its FPR. Nothing in these communications from the agency indicated that it had received an alternate proposal from Citrus, or revealed any information from that proposal. Rather, the communications were prompted by CTC's attempt to submit an alternate proposal initially, and were aimed at informing CTC of the nature of the initial deficiency. There was nothing improper in these communications, and we find no other evidence that the agency acted improperly.

Waiver of Restriction

Citrus asserts that the Navy impermissibly waived for CTC the solicitations' restriction against alternate proposals making changes to the offeror's technical approach. As noted above, the amended RFPs provided that alternate offers would only be considered if they proposed discounted prices "without altering the technical approaches proposed in the offeror's responses to the individual RFPs." AR, exhs. 7, 23. According to Citrus, CTC made changes to its technical approach in its alternate proposal, and this was improper under the terms of the solicitations. Citrus specifically notes, for example, that CTC offered in its alternate proposal [deleted], an approach not provided for in the firm's stand-alone proposals. Citrus asserts that it was competitively prejudiced by the waiver of the restriction because, had it known that enhancements were permissible, it would have offered a host of enhancements that would only be available if the firm were performing both contracts together.

This argument does not warrant sustaining the protest since, even if Citrus is correct that the RFPs did not permit CTC's proposed enhancements, the agency's actions were not prejudicial to Citrus. Competitive prejudice is an essential element of every viable protest, and even where an agency's actions may arguably have been improper, we will not sustain a protest where the record does not reflect that the protester was prejudiced. Computer Assocs. Int'l., Inc., B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 7. Citrus submitted its alternate proposal prior to the time the agency issued the amendment containing the language restricting enhancements. There thus is no reason to believe that Citrus' initial alternate proposal did not include all enhancements Citrus was inclined to offer or, viewed another way, that the absence of any particular enhancement from Citrus' alternate proposal was the result of the restriction. We therefore deny this aspect of the protest.

DISPARATE EVALUATION

Citrus maintains that the agency evaluated the offerors' proposals disparately, giving CTC evaluation credit for proposal features Citrus also offered, but for which Citrus did not get credit. However, even if Citrus were correct that the two firms essentially should have received the same highly acceptable ratings under the

technical approach and management plan evaluation criteria, CTC's proposal would remain technically superior under the past performance and corporate experience criteria (where Citrus received acceptable ratings and CTC received highly acceptable ratings), and lower in price.⁴ Consequently, Citrus was not prejudiced by the alleged evaluation errors.

The protests are denied.

Anthony H. Gamboa
General Counsel

⁴ In its final pleading, Citrus asserts that it raised a challenge to the agency's evaluation of past performance. Citrus's initial letters of protest did raise a challenge to the agency's evaluation of past performance, but in its comments responding to the agency's detailed response to the allegation, Citrus did not substantively respond to the agency's position; at the end of its pleading, Citrus merely states that its other protest bases "are maintained." Merely referencing or restating a protest basis without substantively responding to an agency's detailed rebuttal amounts to abandonment of the protest basis. Energy and Env'tl. Servs. Corp., B-258139.4, May 15, 1995, 95-2 CPD ¶ 32 at 7-8. In any case, raising Citrus's past performance rating to highly acceptable still would leave CTC in line for award based on its superior corporate experience rating and its lower price.