Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: Technical Support Services, Inc.

File: B-279665; B-279665.2

Date: July 8, 1998

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DIGEST

Protest is sustained where the agency disregarded the solicitation's stated best value evaluation scheme and awarded the contract to the offeror of the lowest-priced, technically acceptable proposal without weighing the awardee's low price against the benefits potentially associated with the protester's higher-rated proposal.

DECISION

Technical Support Services, Inc. (TSSI) protests the Defense Commissary Agency's (DCA) award of a contract for commissary services to Ace Services, Inc., pursuant to request for proposals (RFP) No. DECA01-98-R-0005. TSSI contends that the agency failed to inform it, either in the RFP or during discussions, that the contract was going to be awarded to the offeror of the lowest-priced, technically acceptable proposal. TSSI also contends that DCA did not evaluate proposals and select the awardee in accord with the RFP's stated evaluation scheme, and that DCA unreasonably induced it to increase its staffing levels and its associated prices during discussions and then improperly awarded the contract to Ace on the basis of its lowest-priced proposal. TSSI also alleges that the agency failed to conduct a meaningful price realism analysis of Ace's offer.[1] Initial Protest at 4; Supplemental Protest at 1, 11-12.

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[1]In its initial protest, TSSI also alleged that, during discussions, the agency did not allow it to address negative information DCA received regarding TSSI's past performance. The agency report on the initial protest included a detailed response to this allegation, but TSSI did not reply to the agency's response. We therefore consider the issue abandoned. Trijicon, Inc., B-244546, Oct. 25, 1991, 91-2 CPD ¶ 375 at 4 n.3.

We sustain the protests.

Issued on November 18, 1997, as a total small business set-aside procurement, the RFP solicited fixed-price proposals for performing shelf-stocking, custodial, and receiving/storage/holding area services at the Offutt Air Force Base commissary. RFP section C; RFP § L.14. The RFP contemplated a 1-year contract and included options for 4 additional years. RFP section B. Fifteen offerors timely submitted initial proposals, and six offers were determined to be in the competitive range. Discussions were held with all competitive-range offerors. During three successive rounds of discussions with TSSI, the agency raised concerns regarding low staffing levels in the firm's proposal. In response, TSSI increased proposed staffing, resulting in an increase in its proposed price. Best and final offers (BAFO) were received and Ace's BAFO [deleted] was the lowest-priced, while TSSI's [deleted] was the fifth-lowest.[2] Contracting Officer (CO) Statement at 4; Agency Report at ¶ I.2.

On March 20, 1998, the contracting officer notified TSSI that he intended to award the contract to Ace based upon its lowest price; on March 28, the contract was awarded to Ace. TSSI filed its initial protest on March 30, and, after receiving the agency's protest report, TSSI filed a supplemental protest on May 11. Finding performance to be in the best interests of the government, the agency authorized Ace to perform the contract notwithstanding TSSI's protests.

The protester contends that DCA did not evaluate proposals in accord with the RFP's evaluation scheme. TSSI asserts that the RFP required the agency to make award to the offeror whose proposal represented the best value to the government, and emphasized that technical merit--particularly proposed staffing--was more important than price. The protester also contends that DCA misled it during discussions by repeatedly telling it to raise its staffing levels, causing TSSI to increase its price as a result, and then awarding the contract to Ace on the basis of its lowest-priced, technically acceptable proposal.

The agency reports that it always intended to award the contract to the offeror of the lowest-priced, technically acceptable proposal, but concedes that "the solicitation inadvertently omitted the language that award would be made to the lowest technically acceptable offeror." Agency Report at ¶ I.3 and ¶ III.5. The agency reports, however, that the award decision was consistent with the agency's internal technical evaluation plan, which indicated that the contract was to be awarded to the "lowest technically acceptable offeror." Id. at ¶ I.3. The agency states that it has previously included lowest-priced, technically acceptable award criteria in solicitations for these types of contracts and awarded more than 40 contracts for similar services on that basis for the past several years, and the

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[2]Prices have been rounded to the nearest dollar.

agency reports that TSSI has participated in at least four of those procurements. Agency Report at ¶ III.5; CO Statement at 2; CO Supplemental Statement at 2.

The agency contends that, since TSSI participated in several previous DCA procurements for similar services where contracts were awarded on lowest-priced, technically acceptable bases, TSSI should have known that DCA intended to award the contract to the offeror of the lowest-priced, technically acceptable offer in the current procurement. CO Supplemental Statement at 2. DCA argues that, as an experienced offeror, TSSI should have noticed that the lowest-priced, technically acceptable award criteria had not been included in the current RFP. Id.; CO Statement at 2. Therefore, DCA contends that TSSI's protest is untimely because it alleges an impropriety in the RFP but was not filed until after the time set for receipt of initial proposals. Agency Report at ¶ III.5; see Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1998).

We do not consider previous DCA procurements to be relevant in this case. While DCA did not provide our Office with any of the previous solicitations, it appears that the previous solicitations each stated that award would be made on a lowest-priced, technically acceptable basis. Here, DCA failed to include the same or similar award criteria in the RFP. Since an agency must evaluate proposals only on the basis of the evaluation scheme set forth in the solicitation in response to which they were submitted, 10 U.S.C. § 2305(b)(1) (1994), the manner in which DCA evaluated proposals in other procurements is not relevant to the propriety of the selection process in the current procurement. Creative Apparel Assocs., B-275139, Jan. 24, 1997, 97-1 CPD ¶ 65 at 7 n.8.

In this case, the RFP's proposal evaluation provision listed five equally important technical evaluation factors as follows: (1) past performance; (2) staffing - shelf stocking function; (3) staffing - custodial function; (4) staffing - receiving/storage/holding (R/S/H) function; and (5) project manager/supervisory manhours for all services and functions. RFP § M.2. The RFP stated that price would not be scored but would be evaluated for realism, to assess an offeror's understanding of the work, and to determine an offer's acceptability and establish the competitive range. Id. The RFP, at § L.13(a), included a contract award provision that stated:

> The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, cost or price and other factors, specified elsewhere in this solicitation, considered.

The RFP also specifically reserved to DCA the right to "accept other than the lowest offer." RFP § L.13(b).

Thus, the RFP announced to offerors that the agency would use a best value evaluation scheme that would consider technical evaluation factors as well as price.[3] The RFP stated that the contract would be awarded on the basis of the most advantageous proposal after evaluation of both cost and technical factors, and the RFP listed the five technical factors that would be evaluated. TSSI reasonably concluded that a higher technically rated proposal could be selected for award even if it was not the lowest-priced offer.[4] Even though DCA reports that it always intended to select the lowest-priced, technically acceptable proposal, and, in fact, expressly included such an evaluation scheme in its internal (and undisclosed) technical evaluation plan, DCA was not free to disregard the RFP's stated evaluation scheme.[5] Trijicon, Inc., supra, at 6-7; see also Hattal & Assocs., B-243357, B-243357.2, July 25, 1991, 91-2 CPD ¶ 90 at 7.

The record shows that TSSI's and Ace's initial proposals were evaluated and given ratings (letter/adjectival/points) as follows:

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[3]To the extent the agency believes that the RFP language was ambiguous about the basis of award, this ambiguity was latent (rather than patent) and thus was not required to be protested prior to submission of proposals. See Niedermeyer-Martin Co., B-226623, July 8, 1987, 87-2 CPD ¶ 23 at 3 n.1.

[4]We note that, while the RFP clearly established a best value evaluation scheme, it did not state the relative importance of price versus technical factors as required by 10 U.S.C. § 2305(a)(3)(A).

[5]The agency contends that TSSI is not an interested party to protest DCA's selecting the lowest-priced technically acceptable proposal because there are other firms whose proposals would be better values under a technical/cost tradeoff. TSSI does not challenge the agency's right to select the awardee based on low price among the technically acceptable proposals; rather, it challenges the inconsistency between that method and the RFP criteria. TSSI is an interested party to allege that the RFP failed to accurately state the intended basis of award.

Evaluation Factor	TSSI	Ace
Past performance	[deleted]	[deleted]
Staffing (shelf stocking)	[deleted]	[deleted]
Staffing (custodial)	[deleted]	[deleted]
Staffing (R/S/H)	[deleted]	[deleted]
Supervisory	[deleted]	[deleted]

Using the RFP's equal weighting of evaluation factors, TSSI's proposal received a total score of [deleted] points and Ace's proposal received a total score of only [deleted] points. Price Negotiation Memorandum at 1-2; Evaluation Summary.

Discussions with all competitive-range offerors focused on staffing levels. CO Statement at 4. As a result, both TSSI and Ace increased their proposed staffing levels in their BAFOs. Id. The record reveals that DCA considered all BAFOs to be technically acceptable, but did not rescore proposals. Price Negotiation Memorandum at 2; CO Supplemental Statement at 2.

As noted above, Ace's BAFO was the lowest-priced at a proposed total price of [deleted] for the base plus all option periods, while TSSI's total price of [deleted] was fifth-low. The contracting officer determined Ace's prices to be fair and reasonable after comparing them to the prices of the next two lowest offers and because he believed that adequate price competition had been obtained. Price Negotiation Memorandum at 4-5. The record shows also that, although the contracting officer recognized that Ace's proposed staffing levels were more than [deleted] percent lower than the government's lowest estimate of the number of staff-hours that would be needed to perform the work, the contracting officer believed that Ace could successfully perform the work. Id. at 3-4. The contracting officer awarded the contract to Ace based upon its technically acceptable proposal and lowest proposed price. Agency Report at 1; Price Negotiation Memorandum at 3. Consistent with his intent to select the lowest-priced technically acceptable proposal, the contracting officer did not consider the relative strengths of the technical proposals and performed no technical/cost tradeoff.

It is clear that DCA disregarded the RFP's best value evaluation scheme in selecting Ace's proposal for award. TSSI's proposal received four "[deleted]" ratings and one "[deleted]" rating on the evaluation factors; Ace's proposal received one "[deleted]" rating, three "[deleted]" ratings, and one "[deleted]" rating. Based upon the total points given each proposal by the evaluation team [deleted], TSSI's proposal was rated approximately [deleted] percent higher than Ace's proposal. The evaluation documentation shows that the evaluation team considered TSSI's proposal to be

[deleted] to Ace's proposal on technical merit.[6] However, based upon the erroneous belief that the evaluation scheme set out in the agency's internal evaluation plan was controlling, the contracting officer simply treated all BAFOs as technically acceptable without any comparative evaluation of offers and made award to the lowest-priced offer from among them. This effectively negated any advantage in technical merit that TSSI's proposal had over Ace's proposal. See Trijicon. Inc., supra, at 6-7. In our opinion, by failing to weigh the extra increment of technical merit of TSSI's proposal (and other technically superior proposals) against the benefits of Ace's lowest price, DCA improperly converted the best value evaluation scheme in the RFP to one resulting in selection of the lowest-priced, technically acceptable proposal, thus prejudicing TSSI as well as other offerors that submitted proposals rated higher than Ace's. Id.

For the reasons set forth above, we sustain the protests.[7] Since DCA reports that it intended from the outset to award the contract to the offeror of the lowest-priced, technically acceptable proposal, we recommend that DCA: (1) amend the RFP to include a lowest-priced, technically acceptable award scheme, if that remains the agency's preference; (2) solicit revised BAFOs from all competitive-range offerors; and (3) evaluate and select the winning offer from among the revised BAFOs in accord with the RFP's amended evaluation scheme. If, after revised BAFOs are evaluated, an offeror other than Ace is the successful offeror, then the agency should terminate Ace's contract for the convenience of the government and make award to the successful offeror under the amended evaluation scheme. We also recommend that TSSI be reimbursed its costs of filing and pursuing the protests, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). TSSI should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

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[6]The record does not indicate the evaluation team's assessment of the offers' technical merit after proposals were revised in response to discussions, since, as noted above, BAFOs were not separately scored.

[7]Because we are sustaining the protest of award on the basis of the lowest-priced, technically acceptable proposal and recommending that the agency solicit and evaluate revised proposals, it is not necessary for us to address the allegations that DCA unreasonably induced TSSI to increase its staffing levels during discussions or that DCA failed to conduct a meaningful price realism analysis of Ace's offer.