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Decision

Matter of: DevTech Systems, Inc.

File: B-284879; B-284879.2

Date: June 16, 2000

Alex D. Tomaszczuk, Esq., and Dennis E. Pryba, II, Esq., Shaw Pittman, for the protester.
Thomas K. David, Esq., David, Brody & Dondershine, for Creative Associates International, Inc., the intervenor.
John K. Scales, Esq., Agency for International Development, for the agency.
John L. Formica, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's discussions with the protester were meaningful and not misleading where the agency advised the protester of areas of agency concern with the protester's proposal, and the agency's evaluated concerns were reasonable and not the product of an agency miscalculation as asserted by the protester.

2. Protest that the agency improperly awarded a contract to the awardee on the basis of its lower-priced, lower technically rated proposal where the solicitation emphasized that technical merit was more important than price is denied where the agency reasonably determined that, despite the protester's proposal's 6 percent higher technical score, the proposals were equal with regard to technical merit.

DECISION

DevTech Systems, Inc. protests the award of a contract to Creative Associates International, Inc. (CAI) under request for proposals (RFP) No. M/OP-99-912, issued by the Agency for International Development (AID), for professional and technical services to support the agency in a number of education-related activities. DevTech contends that the agency failed to evaluate proposals in accordance with the evaluation criteria set forth in the solicitation, conducted misleading discussions, and acted unreasonably in selecting CAI's proposal for award.

We deny the protest.

The RFP was issued to acquire technical and professional services in support of the agency's stated objective for "Improved and Expanded Basic Education, especially for Girls, Women and Other Underserved Populations." RFP at 2. The contractor will collaborate with AID and host national entities to "carry out restorative and additive educational work in crisis countries." RFP at 12. Such activities may include the "conduct [of] rapid policy appraisals, the expeditious development of plans to meet basic education requirements, the effective involvement of parents and other local citizens in reviving and revitalizing community schools, the design and testing of educational materials that promote peaceful negotiation and the amelioration of differences, and to provide quality education for refugee or other transient, temporary situations." Id. In addition to supporting educational activities at nearly all levels, the contractor will also monitor and evaluate the results of the activities performed, and disseminate to the education research and development community "lessons learned" that "have direct implications for improved policy, basic education and work in crisis and non-presence countries." RFP at 17.

The RFP provided for the award of an indefinite-quantity contract for a base period of three years with two 1-year options, using both time-and-materials and fixed-price arrangements.[1] Id. at 2. The solicitation stated that award would be made to the offeror submitting the proposal determined to represent the best value to the agency based upon seven evaluation criteria that were listed in descending order of importance.[2] RFP at 113-14. The RFP added that in determining which proposal represented the best value to the government, technical merit would be considered "significantly more important than cost or price." RFP at 114.

The RFP included detailed instructions for the preparation of proposals. The solicitation requested that offerors submit separate price/business and technical proposals. With regard to the price/business proposals, the solicitation included 21 contract line items number (CLIN) to be completed by each offeror, 17 of which identified a functional labor category. RFP at 3-5. Each functional labor category CLIN was broken down into three sub-CLINs identifying that category by level (senior, mid, and junior).[3] Offerors were required to enter for each sub-CLIN a

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[1] The RFP specified that the agency would determine for each task order issued under the contract the type of arrangement (i.e., time-and-materials or fixed-price) to be used. Id. at 2.

[2] The evaluation criteria included, for example, "[k]nowledge and understanding of the overall activity and its objectives as specified in the SOW [statement of work]," and "past performance." RFP at 114-15.

[3] For each of the three levels identified, the RFP specified a combination of academic degree and years of experience required. For example, to be considered "senior level," an individual would have either a Ph.D./Ed.D. with 6 years relevant

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maximum fully burdened fixed hourly rate for years 1-3, and years 4-5, of the proposed contract. For example, CLIN 0012 appeared in the RFP as follows:

CLIN	Functional Labor Category	Maximum Fixed Hourly Rate	
		Years 1-3	Years 3-5
012	Education Policy Specialist		
012-A	Senior Level	_____	_____
012-B	Mid Level	_____	_____
012-C	Junior Level	_____	_____

RFP at 4.

The RFP listed the costs that were to be included by the offerors in calculating their burdened rates, and requested that offerors submit "specific information supporting components of the proposed burdened hourly rates," including "a detailed narrative explaining the components of [the] hourly rates offered." RFP at 110.

The RFP requested that technical proposals be organized to correspond to the evaluation criteria set forth in the solicitation. RFP amend. 1, § L.9. The solicitation's proposal preparation instructions noted that the "[p]rovision of qualified personnel is a critical element of the Contract," and stated accordingly that "the offeror should include a detailed plan for how it will acquire personnel." RFP at 107. The RFP added that this section of the offeror's proposal "must include an analysis of the expertise immediately available through the on-board staff of the offeror, individuals associated via retainers, as well as expertise on call or accessible through a database/roster of individual professional networks and consultants." Id. The RFP also added that because "many requests for services will require quick responses, the offeror must outline what steps will be taken to close existing gaps, and to overcome factors which limit the availability of individuals, such as academic schedules and prior commitments." Id. The solicitation requested that proposals include "an illustrative roster of employees and/or consultants" for each of the 17 labor categories by levels (senior, mid, and junior). Id.

The agency received four proposals, including DevTech's and CAI's, in response to the solicitation. The offerors' technical proposals were evaluated by the agency's technical evaluation committee (TEC), with DevTech's proposal receiving a score of 2,460 out of 3,000 points, and CAI's proposal 2,240 points.[4] Agency Report, Tab 5, Report of the TEC, Aug. 6, 1999.

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experience, a M.A./M.S. with 8 years relevant experience, or a B.A./B.S. with 10 years experience. RFP at 5.

[4] As explained in more detail later in the decision, the agency made a number of mathematical errors in calculating the offerors' technical scores and evaluated
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The offerors' price/business proposals were evaluated in accordance with the instructions set forth in the RFP, which provided, in essence, that the agency would calculate an average hourly burdened rate (comprised of the rates for the 17 labor categories) for the three skill levels (senior, mid, junior) set forth in the RFP, and would then apply a utilization factor for each level (senior at 50, mid at 30, junior at 15, CLINs 018-020, at 5) to determine a single evaluated hourly rate for each offeror. Using this approach, the agency calculated an average hourly burdened rate of [DELETED] for DevTech and [DELETED] for CAI.[5] Agency Report, Tab 6, Competitive Range Determination, at 3.

The proposals of DevTech and CAI were included in the competitive range, Id. at 4, and written discussions were conducted. Agency Report, Tabs 7 and 8, Letters from Agency to DevTech and CAI, (Aug. 13, 1999). The offerors each submitted questions to the agency regarding the discussion questions posed, and after receiving the agency's responses, submitted their final proposals. Agency Report, Tabs 10 and 12, Letters from DevTech (Aug. 19, 1999) and CAI (Aug. 20, 1999). The TEC evaluated the responses of the offerors, and after determining that DevTech had improved its proposal in a number of areas, added 125 points to DevTech's score, for a total of 2,585.[6] Agency Report, Tab 16, TEC Report, Oct. 29, 1999, at 2-3. The TEC found that CAI's proposal had also improved as the result of its submission, and added 200 points to CAI's score, for a total of 2,440 points. Id. at 1-2. The TEC concluded that it "truly feels that these two offerors are, for all intents and purposes, dead even," despite the 145 point (or approximately 6-percent) difference in technical scores between the proposals. Id. at 8. With regard to price, the agency calculated average hourly burdened rates based upon the offerors' revised proposals as [DELETED] for DevTech and [DELETED] for CAI. Agency Report, Tab 24, Memorandum of Negotiation, at 10. The agency, based upon the conclusion that the proposals were

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prices. For example, the TEC report of August 6, 1999, which includes a factor-by-factor narrative analysis of the TEC's determinations regarding the evaluated technical merits of the offerors' proposals, as well as an individual score for each proposal under each factor, erroneously reported DevTech's total score as 2,380 points (rather than 2,460).

[5] As pointed out by the protester and conceded by the agency, DevTech's average hourly burdened rate should have been approximately [DELETED] (the agency now calculates DevTech's initial average rate as [DELETED], and the protester calculates it as [DELETED]).

[6] Again, the TEC report reflects that in determining DevTech's proposal's total technical score, the TEC added the 125 points in increased score resulting from DevTech's proposal revisions to DevTech's initial score of 2,380 (as calculated by the TEC), and thus erroneously determined that DevTech's final score equaled 2,530. As indicated above, DevTech's final score actually totals 2,585 points (2,460+125=2,585).

essentially equal with regard to technical merit, awarded the contract to CAI because of its proposal's lower evaluated price.

The protester contends that the agency engaged in improper discussions, as a result of which the protester was misled into raising its price. Protest at 11-12. Specifically, the protester points out that the agency initially calculated DevTech's average hourly burdened rate as [DELETED], rather than [DELETED]. The protester contends that because of this, the agency posed written discussion questions to DevTech which DevTech "reasonably interpreted . . . as an indication that it needed to raise its prices in order to satisfy [the agency's] concern that [DevTech's] prices were unrealistic." Protest at 12. The protester asserts that the agency's concern was the result of the agency's "computational error," pointed out above, and argues that "discussions predicated on a significant computational error by [the agency] cannot be meaningful." Id. The protester claims that had it "known of the error in [the agency's] computation of its original price, that error could easily have been corrected." Id.

In negotiated procurements where discussions are held with offerors, the discussions must be meaningful. This means that sufficient information must be furnished to offerors in the competitive range as to the areas in which their proposals are believed to be weak so that offerors have a reasonable opportunity to address those areas of weakness that could have a competitive impact. The government does not satisfy its obligation in this regard by misleading an offeror or conducting prejudicially unequal discussions. Techniarts Science & Tech. Corp., B-280521.2, B-280521.4, Oct. 15, 1998, 98-2 CPD ¶ 97 at 5.

The agency explains that it calculated an average hourly burdened labor rate only to aid in its determination as to which proposals should be included in the competitive range. The agency asserts that because DevTech's proposal was included in the competitive range, DevTech could not have been prejudiced by the agency's initial miscalculation. Supplemental Agency Report at 1. The agency points to the record of its written discussions with DevTech in support of its position that its initial miscalculation of DevTech's average hourly burdened labor rate had no impact on its discussions with DevTech. Agency Report at 5, 8-9; Supplemental Agency Report at 1-4.

We agree with the agency. Consistent with the agency's explanation, the record does not evidence that the average hourly burdened labor rates calculated by the agency played any role in the conduct of discussions. That is, there is no mention in any of the discussion letters provided to DevTech of DevTech's proposed average hourly labor rates as calculated by the agency. Rather, the record demonstrates that the information provided by DevTech in its proposal was reviewed in detail by the agency, and that the discussion questions posed were based on specific aspects of DevTech's cost proposal that concerned the agency.

For example, in its discussion questions to DevTech, the agency pointed out that DevTech had not provided "specific information supporting components of the proposed burdened hourly rates" as required by the RFP (at 110), and requested that DevTech do so. Agency Report, Tab 7, Letter from Agency to DevTech at 2 (Aug. 13, 1999). The agency also pointed out that DevTech's proposed [DELETED] fee, and [DELETED] escalation rate, appeared high. Id. at 3-4. With regard to the offerors' labor rates, the agency stated in its discussion letters to both DevTech and CAI that because "quick responses" to the agency's needs will be required during contract performance, the offerors' "burdened hourly rate proposed should NOT be based on the illustrative roster of employees and/or consultants but on the market value for each labor category." Id. at 3; Agency Report, Tab 8, Letter from Agency to CAI at 4 (Aug. 13, 1999).

During a subsequent round of discussions, the agency pointed out a number of other areas of concern with DevTech's proposal. Specifically, the agency stated that there appeared [DELETED], and requested that DevTech explain the variances. Agency Report, Tab 17, Letter from Agency to DevTech at 2 (Dec. 3, 1999). The agency also questioned why under some CLINs, DevTech had proposed [DELETED], and informed DevTech that based upon "an informal labor market survey," the agency had "determined that [DELETED]." Id. at 2-3.

In sum, the record simply does not support the protester's assertion that the agency's initial miscalculation of DevTech's average hourly burdened rate resulted in the agency asking questions of DevTech that misled DevTech into raising its prices or that, for that matter, were misleading at all. Rather, the record evidences that the discussion questions reflected the agency's concerns with specific aspects of DevTech's cost proposal that required explanation.

The protester argues that the agency's determination that CAI's proposal represented the "best value" to the government "was flawed and unreasonable," given the mathematical errors made by the TEC in reporting the offerors' overall technical scores. Specifically, DevTech argues that, properly calculated, its "final score was 2,585, and [CAI's] final score was 2,440." Protester's Comments at 9. The protester states that, based upon these "corrections," its technical score "was nearly 6% higher than [CAI's] final score," and its "proposed price is approximately . . . 6% higher than [CAI's]," and therefore it should have received the award, given the RFP's statement that technical merit was more important than price. Id. at 9-10.

Source selection officials are vested with broad discretion to determine the manner and extent to which they will make use of evaluation results. Resource Management Int'l, Inc., B-278108, Dec. 22, 1997, 98-1 CPD ¶ 29 at 4. Although point scores are useful as guides, they do not mandate automatic selection of a particular proposal. PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 12. Whether a given point spread between two competing proposals indicates a significant superiority of one proposal over another depends on the facts and circumstances of

each procurement and is primarily a matter within the discretion of the procuring agency. Resource Management Int'l, Inc., supra, at 4. Where selection officials reasonably regard proposals as being essentially equal technically, cost can become the determining factor in making award, notwithstanding that the evaluation criteria assigned cost less importance than technical factors. Id.; The Parks Co., B-249473, Nov. 17, 1992, 92-2 CPD ¶ 354 at 4. Moreover, an agency may properly award to a lower-rated, lower-cost offeror, even if cost is the least important evaluation factor, if it reasonably determines that award to the higher cost offeror is not justified given the level of technical competence available at the lower cost. Resource Management Int'l, Inc., supra, at 4.

The TEC reports include detailed narratives setting forth the TEC's views as to the strengths and weaknesses of CAI's and DevTech's initial and revised proposals. As mentioned previously, despite the 145-point (or approximately 6-percent) difference in technical scores between the proposals, the TEC stated that "after concerted review, analysis, and scoring . . . [it] truly feels that these two offerors are, for all intents and purposes, dead even." Agency Report, Tab 16, TEC Report, Oct. 29, 1999, at 8. The memorandum prepared by the agency also includes narrative statements setting forth the evaluated technical strengths and weaknesses of both offerors' proposals, and based upon this narrative explanation the contracting officer determined that the proposals "are considered technically equal" and that award should be made to CAI on the basis of its lower price. Agency Report, Tab 24, Memorandum of Negotiations, at 6-7, 10. In this regard, the agency estimates the price difference between the two proposals to be $2.1 million over the contract's potential 5-year life. Supplemental Agency Report at 4.

Based on our review of the record, we find no basis to object to the agency's determination that the DevTech's proposal's 6 percent higher rating did not represent any meaningful superiority with regard to the technical merit of DevTech's proposal, and that CAI's proposal represented the best value based upon its lower overall price. See Harrison Sys. Ltd., B-212675, May 25, 1984, 84-1 CPD ¶ 572 at 5; Grey Adver., Inc., B-184825, May 14, 1976, 76-1 CPD ¶ 325 at 10-13 (proposals with, respectively, 14.4- and 15.8-percent scoring differentials reasonably found to be essentially equal technically for sources selection purposes). The record evidences that the proposals of CAI and DevTech received relatively close scores under each of the evaluation factors, with each proposal outscoring the other under certain factors. See Agency Report, Tab 5, TEC Report, Aug. 6, 1999, at 2-13. The point scores are supported by evaluation documentation, which provides thoughtful and detailed explanations of the relative strengths and weaknesses in the offerors' proposals. The protester, despite having access under our protective order to both proposals and all evaluation documentation, including the individual evaluator worksheets, the TEC reports, and the memorandum of negotiations, does not challenge these narrative evaluations or substantively respond to the agency's position that the proposals of DevTech and CAI were reasonably determined to be technically equal. Rather, the protester continues to point to the relatively slight difference in overall scores

received, and argue in general terms that because of its slightly higher technical score, it should have been awarded the contract. Under these circumstances, DevTech's challenge constitutes, at best, mere disagreement with the evaluation results and source selection decision, and does not provide a basis for finding the agency's actions in this regard unreasonable. Global Assoc., Ltd., B-275534, Mar. 3, 1997, 97-1 CPD ¶ 129 at 9.

The protester also contends that the agency failed to evaluate proposals in accordance with the evaluation factors set forth in the RFP. Protester's Comments at 10. In this regard, the protester notes that the agency, when it requested final revised proposals, also requested that the offerors submit, as a completely separate document, a 15-page technical proposal and a cost proposal in response to what was identified as "Task Order 1" in attachment No. 9 to the RFP. RFP attach. 9; Agency Report, Tabs 7 and 8, Letters from Agency to DevTech at 5 (Aug. 13, 1999) and CAI at 5 (Aug. 13, 1999). The protester points out that, according to the record, the TEC evaluated the offerors' responses to Task Order No. 1 under four evaluation factors that were not set forth in the RFP.

In response, the agency explains that the offerors' responses to Task Order 1 were "evaluated briefly to facilitate a quick start of the contract," and were not considered by the agency in determining who should receive award under the RFP. Supplemental Agency Report at 5-6.

We find from our review of the record that the agency did not consider the offerors' submissions in response to Task Order 1 or the agency's evaluation of those submissions in determining which proposal offered the best value to the government. Most importantly, the final negotiation memorandum, which describes the procurement, includes narrative explanations of the agency's evaluation of the offerors' proposals, and serves as the agency's source selection statement, simply does not mention the agency's evaluation of the offerors' submissions in response to Task Order 1. Rather, as indicated previously, it discusses in some detail the relative merits of the offerors' revised proposals as evaluated under the criteria set forth in the RFP, and the agency's rationale for selecting CAI's proposal for award. Given that the record supports the agency's claim that it did not consider the submissions of offerors in response to Task Order 1, or the agency's evaluation thereof, in determining which proposal represented the best value to the government, we fail to see how the protester was prejudiced by the agency's actions here. IGIT, Inc., B-275299.2, June 23, 1997, 97-2 CPD ¶ 7 at 6-8; ICF Kaiser Eng'rs, Inc., B-271079 et al., July 15, 1996, 96-2 CPD ¶ 15 at 6 n.6.

The protest is denied.

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of the United States