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Decision

Matter of: Special Operations Group, Inc.

File: B-287013; B-287013.2

Date: March 30, 2001

J. Patrick McMahon, Esq., and William T. Welch, Esq., Barton, Baker, McMahon & Tolle, for the protester.

Dennis J. Gallagher, Esq., Department of State, for the agency.

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DIGEST

1. Agency improperly awarded a contract on the basis of the lowest priced proposal where the proposal failed to comply with a material solicitation requirement.
 2. Where solicitation provided for contract award on the basis of a cost-technical tradeoff emphasizing technical merit over cost/price, it was improper for the agency to evaluate technical proposals on a pass/fail basis and then make its source selection decision on the basis of what it perceived to be the lowest priced, technically acceptable proposal without advising offerors of this change in the source selection criteria.
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DECISION

Special Operations Group, Inc. (SOGI) protests the Department of State's award of a contract to Triumph Technologies, Inc. under request for proposals (RFP) No. S-LMAQM-00-R-0079 to provide personnel to safeguard classified material while that material is in-transit to diplomatic missions. SOGI protests that Triumph's proposal failed to comply with the solicitation requirements, and that the agency failed to make its source selection decision on the basis of the criteria specified in the solicitation.

We sustain the protest.

BACKGROUND

The RFP was issued on August 16, 2000 as a competitive set-aside for small disadvantaged businesses under the Small Business Administration's (SBA) section 8(a) program, see 15 U.S.C. § 637(a) (1994), and sought proposals to provide personnel "to protect and safeguard sensitive/controlled cargo and classified material that may be vulnerable to technical penetration and unauthorized access while the cargo/material is in-transit to U.S. Diplomatic Missions." RFP at 7.

As amended, the solicitation directed offerors to submit separate technical and price proposals and required that price proposals include fully loaded fixed labor rates applicable to various labor categories for a 1-year base period and four 1-year option periods.¹ The RFP identified the individual proposed to serve as project manager as the only "key personnel," requiring as follows: "The offeror shall provide a resume of the proposed Project Manager . . . If the offeror proposes a person that is not currently employed by the offeror then the offeror shall provide a signed copy of a letter of intent with that person."² RFP at 46-47.

Regarding the evaluation of technical proposals, the RFP established two evaluation factors--experience and past performance--and provided that experience was to be more important than past performance. RFP at 52. Regarding the relative importance of technical and cost/price factors, the RFP stated "technical merit is more important than cost or price," and advised offerors that "[t]he Contracting Officer shall determine what trade-off between technical merit and cost or price promises the best value to the Government." Id.

Six offerors, including SOGI and Triumph, submitted proposals by the October 6, 2000 closing date. Thereafter, a single evaluator assessed the technical proposals against ten evaluation criteria and made determinations as to whether the proposals were acceptable or unacceptable with regard to each criterion.³ At a

¹ The labor categories, along with the annual estimated hours for each of the contract periods, were as follows: project manager, 1,920 hours; control officer, 7,380 hours; driver/messenger (Washington, D.C. warehouse), 7,680 hours; driver/messenger (Miami/Ft. Lauderdale), 7,680 hours; logistics specialist, 1,920 hours. RFP at 2-5.

² As initially issued, the solicitation also identified a "senior control officer" as "key personnel"; however, RFP amendment No. 3 provided that "all references to a senior Control Officer in the solicitation are to be deleted." Agency Report, Tab 6, at 2.

³ The evaluator's handwritten worksheets indicate that proposals were rated with a "1" or a "0" against each of the following criteria: "managing couriers/control officers/experience"; "operating warehouse/experience"; "guarding classified material"; "past performance – 3 years; resume of project manager"; "TS [top secret]

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hearing conducted by the General Accounting Office (GAO),⁴ the technical evaluator testified that he established the 10 criteria based on the solicitation's statement of work and his knowledge of the prior contract's requirements, and that he was directed to evaluate proposals on an acceptable/unacceptable basis by the agency's contract specialist. Video Transcript (VT) at 10:02-03, 11:14; Declaration of Technical Evaluator ¶ 3.

Following the evaluation of initial proposals, the contracting officer established a competitive range consisting of Triumph, SOGI, and two other offerors, and thereafter conducted discussions with each competitive range offeror.⁵ Following discussions, final revised proposals were requested and submitted.⁶ In the final evaluation, each competitive range proposal was evaluated as acceptable (that is, received a score of 1 point) for each of the 10 evaluation criteria. Final evaluated prices were as follows: Triumph \$3,610,845; SOGI [deleted]; third competitive range offeror [deleted].

The contracting officer states that, following the final evaluation, no cost-technical tradeoff was performed and "[a]ward was based on lowest price, technically acceptable offer." Contracting Officer's Statement ¶ 18. On December 5, 2000, the agency awarded a contract to Triumph. This protest followed.

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clearances"; "positions 1 PM [project manager]/1 LSS [logistical security specialist]/8 warehouse/10 control officers"; "understands SOW [statement of work]/knows jobs, requirements"; "back-up people – qualified/clearance TS"; "first right of refusal." Agency Report, Tab 12.

⁴ In resolving this protest, GAO conducted a hearing on the record at which testimony was obtained from the contracting officer, the contracting specialist, and the technical evaluator involved in this procurement.

⁵ One of the four competitive range offerors withdrew from the competition prior to discussions, leaving a competitive range of Triumph, SOGI, and the third offeror.

⁶ Although the Federal Acquisition Regulation (FAR) requires a "common cut-off date" for submission of final revised proposals, FAR § 15.307, the agency established differing dates for submission of each offeror's final revised proposal. Agency Report, Tab 15; VT at 14:09-18. Further, contrary to the contracting specialist's representation that the differing submission dates were established to provide all offerors with a uniform period of time between final negotiations and submission of final revised proposals, VT at 14:12-13, Triumph was afforded more time than SOGI, and the contracting specialist specifically denied SOGI's request for additional time. Agency Report, Tab 15; VT at 14:14-15.

DISCUSSION

SOGI first protests that award to Triumph was improper because Triumph's proposal failed to comply with the solicitation requirements regarding its proposed project manager. We agree.

The record shows that Triumph failed to submit a letter of intent for the individual it proposed to serve as project manager even though that individual was not, and had never been, employed by Triumph.⁷ Further, Triumph withdrew its offer of employment to the proposed project manager immediately after receiving the contract award. Triumph, itself, describes the situation as follows:

On December 5, [the proposed project manager] was to join several Triumph staff members who were involved in this procurement, sign the offer letter, and then proceed to the kick-off meeting. . . . To everyone's amazement, [the proposed project manager] did not make the meeting nor call to say that he was having difficulty finding the location.

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After our kick-off meeting and upon returning to our corporate headquarters, [Triumph's] director of operations immediately started investigating the reason for [the proposed project manager's] failure to attend the meeting. After locating him, he was asked what happened and why no one at Triumph was contacted. [The proposed project manager] stated that he got lost and didn't think to call. Given the nature of the contract and the responsibilities of the project manager, [Triumph] found his response unacceptable and not proactive considering what was at stake. [Triumph] called [the proposed project manager] later that afternoon and retracted [Triumph's prior verbal employment] offer.

Letter from Triumph to State Department (Feb. 1, 2001).

It is well settled that, in a negotiated procurement, a proposal that fails to conform to one or more of the solicitation's material requirements is technically unacceptable and cannot form the basis for an award. Farmland Nat'l Beef, B-286607, B-286607.2, Jan. 24, 2001, 2000 CPD ¶ 31 at 8-10; Marine Pollution Control Corp., B-270172, Feb. 13, 1996, 96-1 CPD ¶ 73 at 2-3.

⁷ The record establishes that Triumph's proposed project manager had not even completed an application for employment until the day before Triumph was to begin contract performance. Letter from Triumph to State Department (Feb. 1, 2001).

Here, it is undisputed that the solicitation specifically mandated submission of a letter of intent for any proposed project manager who was not employed by the offeror at the time the proposal was submitted. Further the solicitation identified the project manager as the only “key personnel,” and described the role of the project manager as “essential to the work to be performed.” RFP at 20. Clearly, in light of the essential nature of this position, submission of the required assurance that a non-employee proposed as project manager would, in fact, be available to serve as such constituted a material solicitation requirement. Indeed, Triumph’s ultimate inability to provide the sole “key personnel” it proposed, and on which its proposal was evaluated, demonstrates the significance of this requirement. Accordingly, Triumph’s failure to comply with this requirement rendered its proposal technically unacceptable and, thus, could not form a valid basis for contract award.

SOGI also protests the agency’s decision to award the contract on the basis of the lowest cost, technically acceptable proposal. SOGI points out that the solicitation expressly provided that “technical merit is more important than cost or price,” and that the contracting officer would award on the basis of a “trade-off between technical merit and cost or price.” RFP at 52. SOGI maintains that, relying on these solicitation provisions, it submitted a proposal which emphasized technical merit rather than the lowest possible cost alternative.

In a negotiated procurement, an agency has broad discretion in determining the manner and extent to which it will make use of evaluation results. TRW, Inc., B-234558, June 21, 1989, 89-1 CPD ¶ 584 at 4. Agencies do not, however, have the discretion to announce in the solicitation that they will use one evaluation plan and then follow another; once offerors are informed of the criteria against which their proposals will be evaluated and the source selection decision made, the agency must adhere to those criteria or inform all offerors of significant changes. DynCorp, B-245289, B-245289.2, Dec. 23, 1991, 91-2 CPD ¶ 575 at 5. Specifically, it is improper to induce an offeror to prepare and submit a proposal emphasizing technical excellence, then evaluate proposals only for technical acceptability, and make the source selection decision on the basis of technical acceptability and lowest cost or price. Hattal & Assocs., B-243357, B-243357.2, July 25, 1991, 91-2 CPD ¶ 90 at 7-9.

As noted above, the agency does not dispute that it failed to adhere to the stated solicitation criteria for source selection which emphasized technical merit over cost or price. Specifically, the contracting officer acknowledges that no cost-technical tradeoff was performed, that the evaluation was based on essentially a pass/fail scheme, and award was then made on the basis of what the agency perceived to be the lowest priced, technically acceptable proposal.

Notwithstanding the agency's acknowledgment that various errors were made,⁸ it asserts that the protest should be denied on the basis that SOGI was not prejudiced. This assertion is based on a post-protest reevaluation performed by the agency's technical evaluator, which purports to support the conclusion that Triumph's proposal was technically superior to SOGI's. We reject the agency's assertion.

As noted above, Triumph's proposal failed to comply with a material solicitation provision and, thus, could not form a valid basis for award. Accordingly, on that basis alone, the agency's assertion that Triumph's technical proposal was, in fact, superior to SOGI's is clearly erroneous.⁹ On this record, it is clear that, but for the agency's improper award to Triumph on the basis of its proposal which failed to comply with the solicitation requirements, SOGI should have had a substantial chance of receiving an award. See Farmland Nat'l Beef, *supra*, at 10; McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

The protest is sustained.

RECOMMENDATION

Based on the record, it appears that the existing solicitation language, which emphasizes technical factors over cost or price, may not reflect the agency's actual requirements.¹⁰ Accordingly, we recommend that the agency review its

⁸ In responding to SOGI's protest, the agency states, "[GAO] may legitimately identify several errors in the conduct of the protested solicitation." Supp. Agency Report, Feb. 12, 2001, at 8.

⁹ The record also reflects various other flaws related to the technical evaluator's post-protest evaluation. Among other things, the reevaluation, again, reflected assessments against the individual evaluation criteria on a "satisfactory/unsatisfactory" basis, rather than on a qualitative basis. VT at 10:55-58. Further, the record shows that, in performing the reevaluation the technical evaluator assessed one aspect of SOGI's proposal as "unsatisfactory" because SOGI did not submit a resume for the logistics specialist position--yet the agency expressly acknowledges that "the solicitation as revised did not specify that a resume was to be provided for the Logistics Specialist." Supp. Agency Report, at 5. Finally, the overall "superiority" of Triumph's proposal is based on Triumph's representations regarding its experience in performing activities that are not required to be performed under this contract. VT at 10:59.

¹⁰ In addition to the agency's source selection based on the lowest priced, technically acceptable proposal, the agency's technical evaluator testified at the GAO hearing that an offeror's experience performing certain contract requirements was of

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requirements and amend the solicitation to reflect those requirements, if appropriate. In any event, since the agency conducted discussions, but failed to advise Triumph that its proposal failed to comply with a material solicitation requirement, it should reopen negotiations with all competitive range offerors, conduct meaningful discussions, request submission of final revised proposals, evaluate those proposals in a manner consistent with the solicitation provisions, and award a contract on the basis of the proposal offering the best value to the government. If an offeror other than Triumph is selected for award, Triumph's contract should be terminated. We also recommend that the agency reimburse the protester for its costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2000). In accordance with section 21.8 of our Regulations, SOGI's certified claims for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

Anthony H. Gamboa
General Counsel

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“minimal” importance, VT at 11:11—despite the solicitation’s identification of experience as the most important technical evaluation factor.