



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Digital Imaging Acquisition Networking Associates, Inc.

File: B-285396.3

Date: November 8, 2000

Leonard J. Benyak for the protester.
Vickie L. Audette for Control Telecom, Inc., an intervenor
Barbara H. Vail, Esq., U.S. Customs Service, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency unreasonably evaluated protester's offer is denied where record supports reasonableness of agency's evaluation and source selection.

DECISION

Digital Imaging Acquisition Networking Associates, Inc. (DIANA) protests the award of a contract to Control Telecom, Inc. (CTI) under request for proposals (RFP) No. CS-00-010, issued by the Department of the Treasury, U.S. Customs Service (USCS) for mobile x-ray services. DIANA argues that the agency's evaluation was flawed and that its offer should have been selected for award.

We deny the protest.

The RFP explains that current procedures require that when USCS officers have reason to believe that a passenger entering the United States is carrying contraband such as drugs, concealed in their body, these passengers are escorted to nearby medical facilities for x-rays.¹ Since these facilities typically are located away from the USCS officers' duty stations at international airports, the officers leave their work location, travel to the medical facility and remain with the passenger until an x-ray is performed and interpreted by qualified medical personnel. USCS has

¹ The agency explains that smugglers swallow pellets containing narcotics or in other ways hide packets of narcotics in their bodies.

determined that the interests of the government would be better served if screening of passengers suspected of internally carrying illegal narcotics were performed at the airport terminal. The contractor is to provide services and mobile equipment to take x-ray photographs. If the contractor provides an on-site board-certified radiologist, the images will be read at the airport; otherwise, the x-ray images will be digitally transmitted to a medical facility for “digital remote read” by board-certified radiologists there. The x-ray process will take place within a fully equipped mobile facility capable of being moved among the various terminals at the airport.

The RFP, issued as a total small business set-aside, provided for the award of a fixed-price contract for a base year with 4 option years. The RFP did not require submission of a written technical proposal; instead, firms were asked to submit specified pricing information, a contractor qualifications statement with references, and other written information such as an implementation plan, a project management plan, and past performance information. The RFP called for oral presentations in the form of interviews and performance demonstrations after the submission of offers and stated that the “sole purpose of the interview is to test [the offeror’s] knowledge of the requirements of the prospective contract.” RFP § L.7.3.2. Detailed instructions were provided for the oral presentation, which was to be limited to 2 hours. The RFP further provided that the agency would not engage in discussions, as defined by Federal Acquisition Regulation (FAR) Part 15, at the oral presentations.

The amended RFP provided for award, without discussions, using a best value determination based upon (1) the merits of the offer (acceptability and price reasonableness) and (2) the offeror’s capability. An offeror’s capability would be determined based on the firm’s organizational experience, its organizational past performance, its understanding of the government’s requirements, and its compliance with the RFP instructions. Each of the non-price evaluation factors was stated to be equally important, and when combined, were significantly more important than price.

Under the organizational experience subfactor, the agency would assess each firm’s relevant experience in providing mobile x-ray services, equipment, and personnel, to meet the solicitation requirements described in the statement of work (SOW). For past performance, the RFP required customer references for no more than 10 prior contracts (government or private sector) that were related to the work required here and stated that only some of these customer references would be contacted. The RFP advised that past performance information for key personnel and proposed subcontractors with relevant experience would also be considered. Understanding the government’s requirements would be evaluated on the basis of the offerors’ oral presentation/interview during which the offeror would address its technical approach to providing mobile x-ray services to meet the agency’s drug screening. The RFP indicated that the agency would use its assessment of an offeror’s capability to develop a level of confidence assessment rating (LOCAR) to reflect how well the firm would comply with the terms and conditions of the solicitation. In

determining the best value, the RFP provided that an offeror's capability was more important than price, and in making comparisons between offerors, if one offeror had both the better capability and the higher price, the agency would determine whether the difference in capability was worth the difference in price.

On February 10, 2000, the extended closing date, five offers were received, of which two were from large businesses that were ineligible for award under this small business set-aside. Oral presentations were scheduled, and all three small business offerors made presentations. Each offeror's written documentation and oral presentation was separately evaluated and scored by each of the three members of a technical evaluation team (TET).² The TET prepared an evaluation matrix for the contracting officer, who served as the source selection official, which included the average of the scores assigned by the evaluators and a summary of the strengths and weaknesses of each offer. Agency Report (AR) exh. 9B, Technical Evaluation Team Summary; and exh. 9C, Individual Evaluator Score Sheets.

CTI's offer received the second-highest total score of 91.3 out of 100 points,³ with an evaluated total price of \$32,839,074. CTI's evaluation score reflected the evaluators' judgment that CTI offered a number of strengths including its documented experience in providing mobile x-ray units across the country, its highly successful past performance record, and its oral presentation/interview which addressed every aspect of the RFP and reflected CTI's clear understanding of the government's requirements.⁴ In contrast, DIANA's offer received a total evaluation score of 71.1 points and its evaluated total price was \$42,902,078.20. DIANA's

² Contrary to the solicitation requirements, CTI and DIANA each submitted written technical proposals. The agency reports that the contracting officer removed all material in the written proposals except for the information required by the RFP and that the evaluators reviewed only this required material. AR exh. 10, Addendum to Technical Evaluation Team's Summary, at 1.

³ The capability subfactors--experience, past performance, and understanding the government's requirements--were averaged to calculate the LOCAR; the resulting LOCAR was then multiplied by 10 to arrive at a total point score based on a 100-point scale. AR exh. 9B, Technical Evaluation Team Summary, at 1.

⁴ DIANA was not represented by counsel, and our Office therefore did not issue a protective order. DIANA was provided only redacted versions of the agency report and supporting documents. However, in resolving the protest, we reviewed in camera unredacted copies of all evaluation and source selection documents in light of the protest arguments raised by DIANA. As much of the information reviewed by our Office is source selection sensitive and proprietary in nature, our discussion of the evaluation will necessarily be limited. For example, our decision here is deliberately general in describing the actual contents of CTI's offer because of its proprietary nature.

evaluation score was based on the evaluators' finding that there were a number of weaknesses in DIANA's offer. Among other things, the evaluators considered the protester's lack of mobile diagnostic experience a significant weakness, noting that USCS would be the firm's first mobile equipment customer; they also considered DIANA's proposed equipment layout poor and not conducive to an efficient flow of personnel. In addition, the protester's oral presentation was evaluated as weak and its offer was downgraded under this capability subfactor because there was some doubt that the firm understood the solicitation's requirements. More specifically, the evaluators noted that the firm's representatives "had a poor understanding of [the] requirement," that their approach to "maintain[ing] [the] transporter was vague," that their answers to questions were not specific or not pertinent, and that the firm's representatives "asked us a lot of questions." AR exh. 9C, Individual Evaluator Score Sheets.

The contracting officer reviewed the evaluation results and in making comparisons between CTI and DIANA, she determined that CTI's capability was better and its offer was lower in price.⁵ Accordingly, the contracting officer concluded that CTI's offer represented the best overall value to the government and selected CTI for award based on initial offers. A preaward survey was performed to ensure that CTI was financially capable of performing the contract and a recommendation for award was made on June 5. Thereafter, on June 26, prior to receiving the notice of proposed award, DIANA submitted an unsolicited price proposal in which the firm reduced its initial price from \$42,902,078.21 to \$27,515,164. The contracting officer did not consider DIANA's unsolicited price reduction because it was submitted after the closing date for receipt of offers and DIANA was not in line to receive the contract award. On June 30, DIANA was notified of the proposed award to CTI and DIANA filed an initial protest prior to receiving a debriefing; our Office dismissed the protest as premature. DIANA filed this supplemental protest after its scheduled debriefing.

DIANA generally protests that the evaluation of its technical solution was arbitrary and inconsistent with the SOW, which the protester reads as requiring a different level of performance than that described at the debriefing. According to the protester, it learned at the debriefing that the agency "intended this specification to be a screening such as baggage screening and/or passenger clothing screening," yet the minimum requirements in the SOW for the mobile x-ray unit--such as the requirement for image storage, image printing, and upgraded resolution--indicate that the solicitation called for more than "mere screening" of passengers. Supplemental Protest at 2. From this DIANA speculates that the agency did not

⁵ Although the third small business offeror received the highest evaluation score, with the lowest evaluated price, the agency found this firm was nonresponsible and the Small Business Administration declined to issue a certificate of competency (COC) under its COC procedures.

evaluate its technical capability under the SOW requirements as written, or relaxed the SOW requirements for the other offerors.

While DIANA's argument is not entirely clear, its point seems to be that the evaluation should have been weighted more toward "law enforcement issues" rather than technical and medical issues, in accordance with the language of the SOW and oral instructions allegedly given by the contracting officer's representative at the pre-proposal conference. As support, DIANA identifies four "law enforcement issues" allegedly required by the SOW--body cavity search procedures, evidence tampering, protection of the evidence once obtained, and transportation of the evidence to the interpretation facility. Protest at 7. The protester maintains that its offer would have been selected for award had the agency properly evaluated its offer (rather than, presumably, "relaxing" the requirements to focus on technical and medical issues), since the protester, in its view, offered the only known solution that would meet USCS's law enforcement requirements. Id.

We find the protester's reading of the solicitation unreasonable. The SOW does not identify any specific law enforcement requirements and nothing in the RFP commits or requires the agency to consider any "law enforcement issues" in evaluating an offeror's technical capability.⁶ As stated in the solicitation, "the purpose of [the procurement] is to enable USCS to perform effective and efficient inspection of personnel for contraband such as drugs. The services shall be capable of detecting contraband concealed in the torso of persons" RFP § C.1.2. We see no evidence that the agency deviated from the solicitation's terms or relaxed the requirements in selecting the awardee.

Moreover, DIANA has not, in fact, produced any specific allegations of impropriety in the evaluation process. Although the protester received a formal debriefing and the agency report in response to the protest contained material and documents setting forth and supporting the agency's position that the evaluation was in accordance with applicable statute and regulation, as well as the evaluation factors listed in the solicitation, DIANA elected not to file a substantive response to the agency report. In accordance with our Bid Protest Regulations, 4 C.F.R. § 21.3 (i) (2000), DIANA has requested that our Office consider its protest on the basis of the existing record--the materials supplied by the agency and DIANA's protest submissions. We have reviewed the record to ensure that the evaluation was reasonable and consistent with the stated evaluation factors and applicable statute

⁶ To the extent the protester believes that something the agency personnel said at the pre-proposal conference misled the firm, oral advice, even if given, does not operate to amend the solicitation or otherwise legally bind the agency. Nomura Enter., Inc., B-271215, May 24, 1996, 96-1 CPD ¶ 253 at 4; Materials Management Group, Inc., B-261523, Sept. 18, 1995, 95-2 CPD ¶ 140 at 3-4. Consequently, the protester's reliance on any oral instructions was at its own risk.

and regulation. Similarly, to the extent DIANA contends that the agency relaxed the SOW requirements or otherwise treated the awardee more favorably than DIANA, we have reviewed the record to determine whether there was unfair treatment.

We focus our discussion on the evaluation of technical responses under the understanding the government's requirements (oral interview) evaluation subfactor since, based on the evaluation points assigned under that subfactor, DIANA was rated weakest in relation to the other offers. Section L.7.3.2 provided detailed instructions concerning the oral presentation; for example, offerors were allocated 15 minutes to discuss their design of the mobile x-ray unit describing its major elements such as the transporter, medical x-ray source/detector and housing subsystem and to address their proposed personnel, indicating where they would be located, how the x-rays would be read and by whom. According to the contemporaneous evaluation documentation, the evaluators found DIANA's oral presentation to be "very weak," "not specific" and "not effective." As described earlier, the evaluators' score sheets contain numerous critical comments about the protester's oral presentation.

The record indicates that most of the evaluation criticisms were attributable to DIANA's failure to describe in detail its approach to meeting the SOW requirements in its oral presentation as required by the RFP instructions. In essence, the agency found that DIANA's presentation failed to adequately demonstrate why the agency should have confidence in DIANA's understanding of the solicitation requirements, and the protester has offered no meaningful rebuttal of the agency's position. We therefore find reasonable the agency's conclusion that the protester's oral presentation was weak, especially in comparison to the awardee's, which was judged comprehensive and which more clearly described how the awardee would accomplish the SOW requirements.

DIANA also claims that the evaluators were biased against it. DIANA claims the bias is established by the contracting officer's request prior to oral presentations that DIANA withdraw its offer because the contracting officer considered the protester's price to be very high and her subsequent refusal to consider DIANA's unsolicited price reduction. Protest at 9; Supplemental Protest at 3. Government officials are presumed to act in good faith; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Trataros/Basil, Inc., B-260321, May 30, 1995, 95-1 CPD ¶ 265 at 3. In addition to producing credible evidence showing bias, the protester must demonstrate that the agency bias translated into action that unfairly affected the protester's competitive position. Pearl Properties, Inc., B-277250.2, Sept. 18, 1997, 97-2 CPD ¶ 80 at 5.

Here, there is no evidence of bad faith or bias. The agency explains that the contracting officer gave DIANA the option to withdraw its offer before it incurred the expense of attending the oral presentation because the firm's price was 19% higher than the average price proposed by its competitors and the agency intended to make award without discussions. The contracting officer's action was reasonable

under the circumstances. As discussed above, the record establishes the propriety of the agency's evaluation of DIANA's offer, and there is simply no basis to support DIANA's allegation that the evaluation was biased.

In particular, we find without merit the protester's argument that the agency's failure to consider its unsolicited price reduction indicates bias on the part of the agency. Under FAR § 15.208(b)(2), a modification of an offer which is received after the exact time specified for receipt of offers will not be considered, except, as relevant here, where it is "a late modification of an otherwise successful proposal, that makes its terms more favorable to the Government." Here, DIANA was on notice that the agency would make award on the basis of initial offers and the record shows that the protester's price reduction was submitted on June 26, more than 4 months after the February 10 closing date for receipt of offers. By the time DIANA submitted its price reduction, the contracting officer already had made her determination to award the contract to CTI; that is, the otherwise successful offeror was CTI, not DIANA. Accordingly, the contracting officer had no legal basis to accept DIANA's price reduction. See Schuerman Dev. Co., B-238464, Apr. 25, 1990, 90-1 CPD ¶ 423 at 5-6.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel