



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Diverse Technologies Corporation

File: B-259546; B-259546.2

Date: April 3, 1995

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Paralee White, Esq., Cohen & White, for Planned Systems International, Inc., an interested party.

Victoria H. Kauffman, Esq., Department of the Navy, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency did not perform an adequate cost realism and risk assessment with respect to awardee's proposal of uncompensated overtime is denied where, although the Defense Contract Audit Agency had no data on awardee and therefore was unable to verify its proposed uncompensated overtime, awardee furnished (1) information which showed that it had a total time accounting system that was capable of adequately tracking and reporting uncompensated overtime, and (2) historical data which the agency concluded demonstrated that uncompensated overtime [DELETED].

2. Protest that agency was required to evaluate past performance and experience as a part of the technical evaluation is denied where solicitation did not state that an offeror's past performance and experience would be an evaluation factor.

DECISION

Diverse Technologies Corporation (DTC) protests the Department of the Navy's award of a contract to Planned Systems International, Inc. (PSI), under request for proposals (RFP) No. N00600-94-R-1920, for automatic data processing (ADP) support services for the Naval Air Warfare Center Aircraft Division, Naval Air Station Patuxent River, Maryland. DTC challenges the agency's evaluation of PSI's price and technical proposals.

We deny the protest.

BACKGROUND

The solicitation contemplated award of a 5-year--a base year with 4 option years--indefinite quantity, time-and-materials contract for ADP support services. The solicitation provided for award to be made to the responsible offeror submitting the lowest priced, technically acceptable proposal. The solicitation generally required the submission of a specific, detailed and complete technical proposal which clearly demonstrated that the offeror possessed a thorough knowledge and understanding of the solicitation requirements and had valid and practical solutions for technical problems. The solicitation specifically required the technical proposal to include resumes for all key personnel showing their compliance with specified education and experience requirements, a detailed management and staffing plan, a response to a sample task order, and a detailed commencement plan clearly demonstrating that the offeror could commence full contract performance within 1 week after award.

The solicitation required offerors to furnish fixed unit prices for each of the six specified labor categories; it provided that an overall evaluated price would be calculated by adding: (1) the proposed rate for each labor category times the estimated number of required labor hours for that category (as specified in the solicitation), and (2) the other direct costs specified in the solicitation (increased by any general and administrative (G&A) and material handling costs specified by the offeror). The solicitation cautioned offerors that their proposed prices would be subject to a risk assessment. According to the RFP, the risk assessment would consider:

"the degree to which there is a concern that the cost/price proposal is too low and not consistent with the technical proposal, and that the Offeror cannot provide quality services/personnel over the life of the contract at the prices proposed. Unrealistically low pricing which leads to such a concern may result in an unacceptable technical determination."

In addition, the solicitation provided that:

"[p]roposals which include unrealistically low labor rates, or which do not otherwise demonstrate cost realism, will be considered in a risk assessment and evaluated for award in accordance with that assessment."

The Navy received 16 proposals, 3 of which--including DTC's and PSI's--were found to be technically acceptable as is. However, the agency determined that discussions were necessary because of unresolved cost issues concerning the uncompensated overtime included in PSI's low technically acceptable offer. (The agency also found

that unresolved cost issues remained with respect to DTC's offer.) As a result, six offers—including PSI's and DTC's—were included in the competitive range for discussion purposes. At the conclusion of discussions, and after two rounds of revised proposals, the agency requested best and final offers (BAFO) from the three offerors—PSI, DTC and a third firm—remaining in the competitive range. Based upon its submission of the lowest-priced acceptable offer, PSI was selected for award. Upon learning of the resulting award, DTC filed this protest with our Office.

PRICE EVALUATION

Uncompensated Overtime

DTC first argues that because of solicitation provisions concerning working hours and place of performance, it was improper for the agency, in calculating the evaluated labor rates, to consider PSI's proposal of an average of [DELETED] hours of uncompensated overtime per week for its own staff, for a total workweek of [DELETED] hours, and [DELETED] hours of uncompensated overtime for the staff of one of its subcontractors ([DELETED]), for a total workweek of [DELETED] hours. Specifically, DTC notes that the solicitation provided in the statement of work (SOW) that "[t]he normal working hours on-site at the Naval Air Warfare Center Aircraft Division," which was listed in the solicitation as the place of performance, "are 0730-1600 . . . with a quitting time eight and one-half hours after the start time." In effect, DTC argues, the solicitation provisions concerning place of performance and working hours at the place of performance precluded the agency from taking advantage of the proposed uncompensated overtime.

DTC's argument is specious; the solicitation on its face clearly permitted the offer of, and specifically contemplated consideration of, uncompensated overtime. First, the solicitation included the standard Defense Federal Acquisition Regulation Supplement (DFARS) clause, entitled "Identification of Uncompensated Overtime," which provides for calculation of an "uncompensated overtime rate," taking into account hours worked in excess of 40 hours per week. DFARS § 252.237-7019. Second, in a question and answer incorporated into the solicitation by amendment, the agency responded with a simple, clear "[y]es" to an offeror's question, in view of the above SOW provision concerning quitting time, as to whether "the Government will allow Contractor employees to work an extended work week or uncompensated overtime on-site."

DTC next argues that the price evaluation was improper because PSI allegedly did not take into account holidays, vacations, and sick leave in calculating its labor rates. In this regard, DTC notes that the above DFARS clause on calculating an uncompensated overtime labor rate requires that "[c]ompensated personal absences, such as holidays, vacations, and sick leave, shall be included in the normal work week for purposes of computing uncompensated overtime hours." According to the protester, the agency therefore should have reduced the proposed amount of

uncompensated overtime considered in calculating PSI's uncompensated labor rate to take into account the hours not worked because of holidays, vacations, and sick leave. In addition, DTC notes that in its evaluation of initial proposals, the agency determined that discussions with PSI were necessary because its proposed uncompensated overtime could not be verified by the Defense Contract Audit Agency (DCAA) and PSI had not furnished supporting historical data. The agency specifically expressed concern that PSI's proposed uncompensated overtime "may affect the quality of services/personnel over the life of the contract." DTC generally questions the Navy's subsequent determination to consider PSI's proposal acceptable in this regard, arguing that the agency did not perform an adequate cost realism and risk assessment with respect to PSI's proposal of uncompensated overtime.

DTC's argument is without merit. DTC furnishes no support for its allegation that PSI's proposed rates and hours did not reflect holidays, vacations, and sick leave, and PSI's proposal specifically stated that its proposed labor rates included "fringe benefits" such as holidays, annual leave and sick leave. Further, although the DCAA had no data on PSI and therefore was unable to verify PSI's proposed uncompensated overtime, PSI did furnish in its revised proposals information on its current and proposed total time accounting systems. The agency found that PSI's accounting systems, which record all time worked, including uncompensated overtime, were capable of adequately tracking and reporting uncompensated overtime. Further still, PSI furnished historical data for a number of its employees for the first 8 months of 1994 showing that they worked an average of between [DELETED] hours of uncompensated overtime per week; the agency concluded that the historical data demonstrated that uncompensated overtime [DELETED]. In addition, the agency's analysis of PSI's and DTC's unburdened labor rates for those labor categories where they both proposed personnel showed that PSI's unburdened labor rates, even when adjusted to account for the uncompensated hours to be worked by its employees, were [DELETED] than DTC's for four of the five labor categories.¹

Given the additional information submitted by PSI establishing that [DELETED] uncompensated overtime [DELETED] which its proposed accounting system could track and report, and the fact that PSI's unburdened labor rates were [DELETED] than DTC's (and the third offeror's) even when adjusted to account for the uncompensated overtime to be worked, the Navy reasonably concluded that PSI had adequately resolved the agency's initial concern as to whether it would enjoy the

¹PSI's unburdened labor rates, after consideration of the uncompensated hours to be worked, were also evaluated as [DELETED] than those of the third offeror in the final competitive range in three of the above five labor categories and were in fact [DELETED] for an additional category as well.

benefit of the proposed uncompensated overtime without adverse effect on contract performance.

Indirect Rates

DTC challenges the price evaluation on the basis that the Navy failed to take into account PSI's allegedly unrealistically low indirect rates. Although PSI's evaluated price (\$17,385,328) was only approximately 1 percent (\$192,016) lower than DTC's (\$17,577,344), the indirect rates on which PSI's proposed labor rates were based were lower than DTC's (and the third offeror's). Specifically, while DTC indicated in its proposal a G&A rate of [DELETED] percent and an overhead rate of [DELETED] percent, the respective rates shown by PSI were [DELETED] and [DELETED] percent. According to DTC, the agency should have taken PSI's unrealistically low indirect rates into account in the risk assessment, and "normalized" the rates by increasing them to the level of DTC's indirect rates and increasing PSI's evaluated price accordingly.

As an initial matter, since the RFP called for fixed-labor rates and a ceiling on any indirect rate to be applied to the other direct costs specified in the solicitation--and did not provide any mechanism for an upward adjustment of prices in the event the agency considered an offered price too low for a particular element--the solicitation essentially contemplated the award of a fixed-price contract. The agency therefore could not properly make upward adjustments in the proposals. See Milcom Sys. Corp., B-255448.2, May 3, 1994, 94-1 CPD ¶ 339.

The solicitation did provide for a risk assessment with respect to whether "the cost/price proposal is too low and not consistent with the technical proposal," such that "the Offeror cannot provide quality services/personnel over the life of the contract at the prices proposed." However, since PSI's overall price was approximately 1 percent lower than DTC's, there was no basis for concluding that PSI would be any less able or have any less incentive, than DTC to satisfactorily perform over the life of the contract.

TECHNICAL EVALUATION

DTC generally alleges that the Navy's technical evaluation was superficial and arbitrary. DTC specifically notes that the agency's narrative evaluation of PSI's proposed commencement plan states only that "PSI has clearly demonstrated a commencement plan that is sound, logical and clearly demonstrates that they can assume full contract performance within one week after contract award." DTC, however, has pointed to no deficiencies in PSI's proposed commencement plan, and none are apparent from the record. In these circumstances, we cannot conclude that the agency acted unreasonably in determining that PSI's proposal was

technically acceptable in this regard. See Analytical Chemists, Inc., B-256037, Apr. 29, 1994, 94-1 CPD ¶ 283 (mere disagreement with agency evaluation does not render the evaluation unreasonable).

Finally, DTC challenges the technical evaluation on the basis that the Navy did not evaluate past performance and experience. DTC maintains that the agency was required by the Office of Federal Procurement Policy (policy letter 92-5) to consider past performance and experience in its evaluation. There was, however, no provision in the solicitation for evaluating past performance and experience as part of the technical evaluation, and it therefore would have been improper for the agency to consider it in determining the technical acceptability of the offers. See QuesTech, Inc., B-255095, Feb. 7, 1994, 94-1 CPD ¶ 82.

The protest is denied.

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