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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Drytech, Inc.

File: B-246276.2

Date: April 28, 1992

Richard K. Dryburgh for the protester,
Gena E. Cadieux, Esq., and David P. Metzger, Esq., Davis,
Graham & Stubbs, for ManTech Field Engineering Corp., an
interested party.
Herbert F. Kelley, Esq., and Robert W. Garrett, Esq.,
Department of the Army, for the agency.
Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Agency properly excluded proposal from the competitive range where the agency reasonably concluded that the offeror had no reasonable chance of award because of deficiencies in personnel experience and corporate experience.
2. Allegations of improper disclosure of protester's proposal information and of improper contact between agency and competitor are dismissed as untimely where raised more than 10 working days after protester knew or should have known of protest basis.
3. Where awardee was temporarily provided access to agency's electronic mail system in conjunction with contract performance, but gained no demonstrable advantage prior to or during protested procurement, protest that awardee had unfair advantage is denied.

DECISION

Drytech Inc. protests the award of a contract to ManTech Field Engineering Corp. under request for proposals (RFP) No. DAHC90-90-R-0027, issued by the Department of the Army Intelligence and Security Command (INSCOM), for software maintenance services. Drytech asserts that its proposal was improperly eliminated from the competitive range because the evaluation of its proposal was flawed, and the agency engaged in various improprieties.

We deny the protest in part and dismiss it in part.

The RFP sought proposals to provide services, materials, and qualified data systems personnel to maintain and generate necessary software and support documentation for the KALA/LA FINE WINE II system at the 701st Military Intelligence Brigade and Field Station Augsburg, Germany. Contract award was for 1 base year with four 1-year options.

Technical proposals were evaluated on the basis of three factors: Personnel Experience and Qualifications (65 percent); Technical Approach (25 percent); and Corporate Experience and Past Performance (10 percent). The RFP provided a statement of work (SOW) which detailed the contract requirements. The RFP also advised potential offerors that initial proposals reflecting less than their best potential could result in exclusion of proposals from further consideration.

Two offerors, Drytech and ManTech, submitted proposals by the September 3, 1991, closing date. During the week of September 4, a three-person agency evaluation panel reviewed, evaluated, and scored the proposals with respect to how well they met the RFP requirements in each factor. The evaluators' scores were combined to provide a total score for each proposal. Out of a possible total score of 1,600 points¹, Drytech's proposal received a score of 676, while ManTech's proposal received a score of 1,030.² Drytech's low score was based on a lack of personnel qualifications and necessary corporate experience. Based on these evaluations and the recommendation of the source selection evaluation board chairperson, the contracting officer found that Drytech's proposal did not have a reasonable chance of receiving the contract and, on

¹Under the source selection plan, the total possible score for each proposal was to have been 1,800. However, one evaluator's package did not advise him that points could be awarded for exceptional qualifications. Thus, two evaluators were able to award a maximum of 600 points, while the third was limited to only 400 points. Both offerors were evaluated on the same basis, and we find that no prejudice to the protester resulted.

²These figures represent the actual combined evaluators' scores of the proposals and not the totals indicated in the agency report. As the result of calculation errors, Drytech's actual score was 28 points higher than indicated, while ManTech's actual score was 74 points lower. Although Drytech asserts that it is entitled to relief as a result of these relatively small mathematical errors, we disagree. The differences had no effect on the relative standing of the proposals, and we do not find that the differences had any effect on the competitive range determination.

September 13, eliminated it from the competitive range. The agency conducted discussions with ManTech and awarded it the contract on September 30.

During the first week in October, the agency provided Drytech an oral debriefing. In a letter dated October 11, the contracting officer advised Drytech that its proposal had been eliminated because its proposed personnel were not qualified for the stated positions and the firm lacked any corporate or background experience supporting software engineering and maintenance contracts. Drytech then filed a protest with our Office.

As a preliminary matter, Drytech argues that it was improper for the agency to wait until after award to notify it of its elimination from the competitive range. Federal Acquisition Regulation (FAR) § 15.609(c) requires a contracting officer to notify an offeror of its elimination from the competitive range "at the earliest practicable time." See FAR § 15.1001 (promptly notify unless disclosure might prejudice the government's interests). Here, because the agency intended to make award within a short time, INSCOM did not notify Drytech of its elimination until October 1. See FAR § 15.1001(b). However, a failure to comply with the FAR requirement for a prompt debriefing where the contract is otherwise properly awarded, i.e., where no prejudice resulted from the violation, does not establish a basis to sustain a protest. See Pauli & Griffin, B-234191, May 17, 1989, 89-1 CPD ¶ 473.

Drytech next contends that the SOW was overly restrictive, providing an unfair advantage to the incumbent. Under our bid protest regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals, must be filed prior to the closing date. 4 C.F.R. § 21.2(a)(1) (1992); Manatts, Inc., B-237532, Feb. 16, 1990, 90-1 CPD ¶ 287. Since the alleged restrictions were apparent on the face of the RFP, but the protest was not filed until after award was made, we dismiss as untimely this basis of protest.

With regard to its proposal's evaluation, Drytech first argues that the agency's procedures were flawed. Citing the RFP's provision that the number of security clearances needed were "to be determined," Drytech argues that INSCOM improperly downgraded it for failing to propose anyone as a computer programmer and/or junior computer programmer. Drytech also contends that INSCOM eliminated it from the competition because the agency erroneously believed that some of Drytech's proposed personnel were obligated on other contracts and because they had not submitted letters of intent, even though the RFP did not require such letters. We find Drytech's arguments without merit.

Although offerors were free to propose the number of personnel they believed necessary to perform the contract, the SOW set forth the qualifications for seven categories of personnel. We believe that this list strongly suggested a minimum number of personnel necessary to perform, leaving it up to the offerors to determine how many people to propose for each position. Thus, it was reasonable for INSCOM to apportion the possible number of 65 points for this evaluation factor over the seven categories and to downgrade a proposal for failure to propose any employee for a particular position. In any event, since the computer programmer position in question carried a weight of only 3 out of a possible 65 under this factor, the point loss for its failure to propose anyone for the position in issue had only a minimal impact on Drytech's evaluation score.

With regard to whether the evaluators considered apparent conflicts arising from proposed employee obligations to other contracts, and the lack of letters of intent, the agency argues that these matters played no role in the Drytech proposal's evaluation as technically unacceptable. One evaluator noted the absence of any letters of intent, even though the RFP did not require them, but still found that Drytech's proposal met the requirement in issue. Further, while one evaluator noted that some of Drytech's proposed personnel appeared to be obligated to ongoing contracts, there is no indication that the evaluator scored Drytech's proposal lower as a result. In these circumstances, and in view of Drytech's proposal's substantial failure to set forth verifiable information concerning required qualifications of personnel and corporate experience (see below), Drytech suffered no prejudice.

The evaluation of proposals and the resulting determination whether an offer is in the competitive range is a matter within the discretion of the contracting agency since that agency is responsible for defining its needs and the best method of accommodating them. Delta Ventures, B-238655, June 25, 1990, 90-1 CPD ¶ 588. In reviewing an agency's technical evaluation, we will not reevaluate the proposal, but instead will examine the agency's evaluation to ensure that it was not arbitrary or in violation of the procurement laws and regulations. Id. Moreover, we closely scrutinize an agency decision which results, as here, in a competitive range of one. Institute for Int'l Research, B-232103.2, Mar. 15, 1989, 89-1 CPD ¶ 273. We find that the agency's evaluation of Drytech's proposal was reasonable and in accord with the RFP's evaluation criteria.

The evaluators found Drytech's proposal was neither well organized nor formatted in accordance with the RFP's requirements, making it difficult to locate required

information. Further, the evaluators concluded from Drytech's proposal that it was doubtful the protester understood the RFP requirements or could successfully perform the contract. The contracting officer also concluded that Drytech's proposal should be eliminated from the competitive range based on Drytech's proposed personnel's lack of qualifications and on the offeror's uncorrectable lack of corporate experience.

Under the most important evaluation factor, personnel, the evaluators found all six of Drytech's proposed employees to be lacking one or more of the experience qualifications required by the RFP. For example, none of Drytech's applications personnel had the required 12 months verifiable³ experience in IBM's information management system data communications module. The proposed project manager lacked the 3 years management experience on an automatic data processing (ADP) effort of the same magnitude as this contract. The project manager and proposed senior programmer lacked 12 months verifiable experience in particular database-oriented applications. The senior programmer also lacked 12 months verifiable experience in developing and/or maintaining applications programs designed for one of three listed systems. The proposed database administration (DBA) technician did not have 12 months DBA experience in specified areas and responsibilities. The proposed connectivity programmer/analyst lacked 12 months verifiable experience developing and/or maintaining communications interfacing applications on the IBM personal computer using the MS-DOS operating system.

In addition, some evaluators found that the DBA technician lacked particular desirable experience in a specified database management system and that the senior programmer lacked verifiable experience in the REXX programming language. Drytech argues that it is improper to exclude it from the competitive range since the experience its DBA technician lacked was only "desirable," not required, and since its senior programmer in fact has the appropriate REXX experience. The protester also notes that some evaluators gave these personnel credit for the experience in question.

While we agree that it would be improper to eliminate Drytech for these discrepancies alone, we do not agree that the agency improperly eliminated Drytech from the competitive range. Apart from the project manager and the connectivity programmer, Drytech does not explain or address

³In general, the protester's resumes claim that the proposed personnel hold the required experience, but the resumes do not provide information for verification of that experience.

the various other instances where proposed personnel lacked verifiable experience.

With regard to its proposed connectivity programmer, Drytech argues that the programmer's listing of a language associated only with MS-DOS indicated the required experience. While the resume states that the proposed programmer has the appropriate experience, Drytech does not identify what information there is to verify the experience. Under the circumstances, we find that the evaluators were not required to conclude that an ability to work with a particular language equated to 12 months experience in a particular operating system.

With regard to its project manager's management experience, Drytech relies on the proposed employee's Army experience as a contracting officer's representative and as chief of the software systems branch. The evaluators considered this experience, but based on their knowledge of the actual responsibilities involved in this acquisition found the experience insufficient to meet the SOW requirements. In response, Drytech emphasizes its view that the experience was sufficient. This is essentially a disagreement with the agency's judgment, which alone does not establish that an evaluation was unreasonable. United HealthServ Inc., B-232640 et al., Jan. 18, 1989, 89-1 CPD ¶ 43.

Under the corporate experience and capability factor, the evaluators gave Drytech's proposal no points for the subfactor regarding similar or related corporate experience and background. They gave the protester only partial credit for the subfactors concerning consistency of the management plan with the SOW; the project manager's experience; and the quality control plan. The evaluators found that Drytech provided information only for government contracts for custodial, escort, and document destruction services, and evidenced no relevant ADP experience. They also found that Drytech had not submitted a formal management plan, although required by the RFP; that instead of the required quality control (QC) plan, Drytech had devoted only one paragraph to QC; and that Drytech's QC plan did not address the SOW's mandatory elements. The evaluators also felt that the proposed project manager lacked sufficient experience to handle a project of this complexity. We agree with the evaluators that none of Drytech's experience applies to the RFP's requirement for a description of corporate background and experience relating to projects with "similar scope, software, systems and functional requirements as the support required at Augsburg."

Drytech, however, contends that its parent company, employees, associates, and nominees possess sufficient relevant experience. Drytech also argues that it was unfair

for INSCOM to give ManTech corporate experience credit based on the experience of its parent company, while denying such credit to the protester. This difference in evaluation is due to Drytech, not to disparate treatment by the agency. Unlike ManTech, the protester did not seek consideration of the experience of its parent in its initial proposal as a basis to satisfy the RFP's corporate experience requirement. An offeror must demonstrate affirmatively the merits of its proposal, and it runs the risk of rejection if it fails to do so. Vista Videocassette Servs., Inc., B-230699, July 15, 1988, 88-2 CPD ¶ 55.

Drytech also alleges that it was unfair to exclude it for lack of experience when, in response to Drytech's request to place it on the "qualified bidders list" (see FAR § 9.201), the agency sent it a copy of the RFP. There is no evidence that this procurement involved a qualification requirement for which a bidders list was compiled. Inclusion of a corporate experience requirement as an evaluation factor is not the same as the requirement for testing or other quality assurance demonstration involved in a qualification requirement. See FAR subpart 9.2. Further, we find no error or bad faith in the agency's decision to provide an RFP to Drytech, as it contends. See Milcare, Inc., B-230876, July 8, 1988, 88-2 CPD ¶ 29 (contracting officials presumed to act in good faith). The decision to submit a proposal was a matter of Drytech's own business judgment and provides no evidence that Drytech had somehow been pre-qualified.

We conclude that the contracting officer reasonably excluded Drytech from the competitive range. The purpose of a competitive range determination is to select those offerors with which the agency will hold written or oral discussions. FAR § 15.609(a). The competitive range consists of all proposals that have a "reasonable chance" of being selected for award; that is, it includes those proposals which are technically acceptable as submitted or which are reasonably susceptible of being made acceptable through discussions. Information Sys. & Networks Corp., 69 Comp. Gen. 284 (1990), 90-1 CPD ¶ 203. In determining the competitive range, it is an acceptable practice to compare the evaluation scores and consider an offeror's relative standing vis-a-vis its competitors and to exclude a proposal capable of being made acceptable, when, relative to other acceptable offers, it is determined to have no "reasonable chance of being selected for award. Id. In view of Drytech's relatively poor proposal, as exemplified by its personnel qualification deficiencies and low score, 676 out of 1,600 compared with ManTech's score of 1,030, we believe that the agency reasonably determined that the protester had no reasonable chance for award and, accordingly, its proposal was properly excluded from the competitive range. Id. While Drytech argues that it should have been provided an opportunity to

correct its deficiencies in discussions, since it was properly eliminated from the competitive range, it was not entitled to discussions.

Drytech also argues that since its price was the most advantageous to the government, INSCOM should have awarded it the contract. While Drytech may have offered to perform the contract at the lowest cost to the government, it also submitted a technically unacceptable proposal. Drytech's potentially lower price is therefore irrelevant, since once a proposal is found technically unacceptable, it cannot be considered for award. Johnson Energy Management Co., Inc., B-234730, June 8, 1989, 89-1 CPD ¶ 540.

Drytech next contends that the agency engaged in "serious improprieties" that "marred the selection process." Among other matters, Drytech alleges that INSCOM personnel divulged its status as an offeror under this RFP and revealed to a competitor the names of two individuals included in Drytech's proposal under a similar RFP. Drytech also alleges that a contracting official talked to a "senior official" of a competitor during the same week that proposals on the similar RFP were being evaluated. Drytech orally reported some of these allegations to INSCOM, but refused to put its complaint in writing or to disclose the name of its information source. The Army denies these allegations.

Protests not based upon alleged improprieties in a solicitation must be filed no later than 10 working days after the protester knew, or should have known, of the basis of protest. 4 C.F.R. § 21.2(a)(2). Here, Drytech first learned of the alleged disclosure of information from its proposal on August 27, 1991. It last received information concerning alleged improper actions by contracting personnel on September 11. However, Drytech did not file its bid protest until October 15, more than 10 working days later. Accordingly, we dismiss these allegations as untimely.

After commenting on the agency report, Drytech raised a new protest ground. According to Drytech, it discovered that an employee of ManTech, working on a separate contract effort known as TROUBLESHOOTER, had access to INSCOM's electronic message distribution system (EMDS). In view of the classified, "no contractor," and other messages on the system, Drytech speculates that ManTech's access provided it with an unfair advantage during this procurement.

According to the agency and an affidavit by the ManTech employee concerned, ManTech obtained no advantage due to the EMDS access. Access was not granted until September 18, after Drytech had been eliminated from the competition, and was withdrawn on December 20, and there were no messages

dealing with the LA FINE WINE II procurement on the EMDS to which the ManTech employee had access. Thus, it is clear that the employee did not receive any information concerning this procurement or any other information which would provide a competitive advantage to ManTech.

Drytech's allegations to the contrary are unsupported by any evidence and constitute mere speculation, which alone is insufficient to sustain a protest. Delta Ventures, supra. We reach the same conclusion with regard to Drytech's further allegation that an unnamed ManTech employee, also on the TROUBLESHOOTER contract, had EMDS access sometime prior to November and December 1990 when the access was removed. Drytech's unsupported speculation that the employee may have seen information regarding the instant procurement as it was being developed is insufficient to form the basis for a protest. Id.

Finally, Drytech argues that ManTech's access constituted a breach of contract and violated security regulations. These are matters of contract administration concerning the TROUBLESHOOTER contract and, thus, not for our consideration. Military Waste Management, Inc., B-240769.3, Feb. 7, 1991, 91-1 CPD ¶ 135.

The protest is denied in part and dismissed in part.



for James F. Hinchman
General Counsel