

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

DECISION AND ORDER

FAA Order Number: ODR-97-29

Matter: Protest by AERO TECH SERVICES INCORPORATED of Award Pursuant to Solicitation No. DTFA02-96-R-60517R1

Docket: 96-ODR-00017

Served: July 16, 1997

DECISION AND ORDER

Appearances:

For the Protester: John M. Howard, President, Aero Tech Services, Inc.

For the Agency: A. L. Haizlip, FAA Aeronautical Office, Oklahoma City.

For the Interested Party: Greg Wadley, DataCom Sciences, Inc.

I. Introduction

Aero Tech Services, Inc., protested to the FAA's Office of Dispute Resolution for Acquisition, (ODR), the award of an engineering support services contract under solicitation DTFA02-96-R-60517R1. The contract had been awarded on October 21, 1996, to DataCom Sciences, Inc., for engineering services in support of its Aviation System Standards Division. Aero Tech alleges that its price of [* * * *] was significantly below DataCom's, at [* * * *], and that the technical scores assigned to its proposal by the evaluation team are inconsistent with the narrative descriptions provided by the team.

The protester claims that its numerical scores should have been higher, and that had its proposal been properly scored, the combination of technical and price would have dictated award to Aero Tech. The protester seeks termination of the DataCom contract and award to itself. For the reasons set forth below, the protest is denied. All document references are to the attached list of exhibits, Tabs (1) through (7).

II. Findings of Fact

Solicitation DTFA02-96-R-60517R1 was issued by the FAA's Aeronautical Center, Oklahoma City, on March 7, 1996. The solicitation called for the acquisition of engineering and technical services in support of Aviation Systems Standards. Contract type was to be "Time and Materials," with fixed hourly labor rates.

Section "M" of the SIR contained the award scheme, which read, in pertinent part:

- • (a) Proposals will be evaluated and contract award made on the basis of "Greatest value to the Government."

- (b) Each proposal will be evaluated on the basis of its technical and price/cost proposal, technical being significantly more important than price/cost.

See Tab (1), page 117

Section "M" then went on to list the four technical factors, which were, in descending order of importance:

- 1. Understanding the Requirement
- 2. Contract/Staffing/ Human Resources
- 3. Experience and Performance
- 4. Contract Management & Quality.

Subfactors were also listed, as well as the possible scores: 4= Excellent, 3= Good, 2= Satisfactory, 1= fair, 0= Unsatisfactory.

See page 118 of Tab (1)

An amendment was issued on April 24, 1996, and twenty offers were received by the closing date of June 7, 1996. The range of competition was narrowed to ten firms. The technical portions of those ten proposals were forwarded to a Technical Evaluation Team (TET), while the contracting officer conducted a price reasonableness analysis on the price proposals. The members of the TET were provided with a copy of the solicitation, as well as with a Technical Evaluation Plan. That plan spelled out and gave definitions of the terms "Excellent," "Good," "Satisfactory," "Marginal," and "Unsatisfactory," as ratings to be assigned in the evaluation. Tab (2), the contracting officer's statement of February 25, 1997, contains both the rating definitions, as well as the narratives for each of the 10 offerors.

Because Section "M" stated that the four factors and the subfactors were listed in descending order of importance, weights were assigned at the subfactor level to account for the difference among factors. Tab (3), the contracting officer's statement of February 28, contains the factor/subfactor matrices for each offeror which show that, out of a total of 100 points, factor 1 accounted for 37, factor 2: 25, factor 3: 21, and factor 4: 17. Thus, each offeror's raw subfactor scores were multiplied by the weight assigned at the subfactor level, yielding weighted scores for each factor. The weightings at the subfactor level were designated on the score sheets as follows:

Subfactor #1- Average Rating #2- Subfactor Weight #3- Weighted Subfactor

Total (Form B) Score (#1 x #2)

Factor 1. Understanding the Requirement:

Subfactor 1-1 _____ 15 _____

Subfactor 1-2 _____ 13 _____

Subfactor 1-3 _____ 9 _____

Factor Total **37** _____

Factor 2. Contract Staffing/Human Resources:

Subfactor 2-1 _____ 14 _____

Subfactor 2-2 _____ 11 _____

Factor Total **25** _____

Factor 3. Experience and Performance:

Subfactor 3-1 _____ 12 _____

Subfactor 3-2 _____ 9 _____

Factor Total **21** _____

Factor 4. Contract Management and Quality

Subfactor 4-1 _____ 9 _____

Subfactor 4-2 _____ 8 _____

Factor Total **17** _____

Offeror's Technical Evaluation Score (TS/100) = ____ of 4.0

See Tab (3)

Evaluation of the technical proposals was completed on August 2, 1996. The results are tabulated for each offeror at the subfactor level in Tab (2), however, the summarized total weighted scores were as follows:

Offeror Total weighted Technical Score

I (DataCom) 3.25

G 2.94

N 2.88

P 2.80

O 2.74

Q (Aero Tech) 2.65

B 2.63

C 2.62

K 2.41

A 2.30 See Tab (2)

As noted, DataCom, designated offeror "I," received the highest score at 3.25, while Aero Tech, offeror "Q," achieved sixth place with a score of 2.65.

The contracting officer also conducted an analysis of the offerors' prices to ensure that they were reasonable in light of the complexity of the work to be performed. The explanation of that analysis, with accompanying charts, is also contained in Tab (3).

Contract award was made to DataCom on October 21, 1997. A debriefing was offered to Aero Tech and held on October 28, 1997. The protest to the ODR followed on

November 1, 1997. Tab (4). On December 31, The agency submitted a motion to the ODR arguing that Aero Tech's protest, which was not received in the ODR until November 7, should be dismissed as untimely. Tab (5). That motion was denied by the ODR on February 6, 1997. Tab (6).

Several communications between the ODR and the parties ensued, and the determination was made that the contracting office would submit a report addressing the protester's allegations, followed by a rebuttal from Aero Tech. The agency report of February 28, Tab (3), was received on March 7, and the protester's response was received on March 13.

III. Issues Presented.

1. Has the protester demonstrated that the agency was inconsistent in the way it applied numerical scores to the evaluation of Aero Tech's technical proposal.
2. Has the Protester demonstrated that the agency's technical findings were unreasonable.
3. Was the contracting officer's price/technical trade-off rationally based.

IV. Analysis

The protester has raised a number of issues, each of which is addressed in detail below. At the outset, however, we should note that this was a "best value" acquisition, in which technical factors were stated as being "significantly more important than price." Solicitation, section "M," page 118. This is important, because Aero Tech's November 1 protest letter to the ODR states that its offer "was the lowest responsible, responsive bid."

The term "lowest, responsible responsive bid" has meaning only in the context of procurements where award is based strictly on low price. In this case, the agency's clear indication of the relative importance of technical merit indicated that it was not obliged to award to the lowest, responsive, responsible offeror. On the contrary, Section "M" conveyed the unambiguous intention that the Aeronautical Center was willing to pay a premium for technical superiority. The issue was not whether Aero Tech's proposal was acceptable, but how it compared with the other nine competitors under the solicitation's evaluation scheme.

An additional preliminary matter relates to Aero Tech's standing to protest. As indicated in the findings above, Aero Tech scored sixth place technically, and at least one of the intervening four offerors had a lower price, that, under the award scheme of the solicitation, would have placed that offeror "in line" for award ahead of the

protester. Under prior law, Aero Tech would have lacked standing as an "interested party," because it was not next in line for award. 4 CFR 21.0(a), Concrete Systems, 95-1 CPD 15, U.S. v. International Business Machines Corp., 892 F. 2d 1006, 1011 (Fed. Cir. 1989).

While the FAA will apply the "not next in line" doctrine where appropriate, it also recognizes the exception that when the protester challenges the evaluation that determined its relative standing, the fact that the protester was not "in line" will not defeat its standing. Telecom Design Group, GSBCA 13025-P, 1995 BPD 3. Here, Aero Tech has challenged the numerical scoring of its proposal, and accordingly, I will not question its standing to protest.

1. Inconsistency between narrative descriptions and numerical scores.

The crux of Aero Tech's argument is that the evaluation's numerical scores are inconsistent with the narrative text. The protester says that its scores, ranging from 2.22 to 3.26 over the four technical factors, are "substantially inconsistent" with the laudatory language used by the evaluators to explain their scoring. Aero Tech argues that to be consistent with the narrative, its scores in all factors should be closer to a perfect 4.0. The agency responds by stating that the scores are accurate, and that although they may be characterized as "conservative," the evaluators were consistent in their conservative scoring with all the offerors, and thus there is no prejudice.

Given the nature of the allegation and the defense, I think it is necessary to examine the actual narratives and scores of the several offerors to determine whether the evaluators were, in fact, consistent in their scoring. If the grading was equally "conservative" with respect to all 10 companies, then I would agree that the protester has not been prejudiced because everyone competed under the same system, and the selection was rational. Aero Tech's argument has merit only if it demonstrates that the scoring was particularly severe with respect to it, but not to others.

The parameters of the technical evaluation were as follows: Ten companies were evaluated under four factors, with possible scores of: 0: Unsatisfactory, 1: Fair, 2: Satisfactory, 3: Good, 4: Excellent. See Tab(2). Since the four factors were stated as being in descending order of importance, a weight was assigned to each at the subfactor level, and the total weighted average of those factors for each offeror ranged from 2.30 to 3.25. Tab(3). Aero Tech achieved weighted scores on the individual factors ranging from 2.22 to 3.26; its total, weighted average was 2.65, putting it in sixth place. By comparison, the awardee, DataCom, achieved the highest total weighted average, at 3.25. No one achieved a perfect 4.0 in any factor; the highest single score was a 3.41 for DataCom under Factor 3.

Aero Tech's narrative, like the other nine, consists of one page, with the strengths listed for each factor, followed by the weaknesses. See Tab (2), offeror "Q." Under "weaknesses," factor #2 notes:

Organizational structure is overly complex, unclear where AVN technical support fits.

Additionally, a comment appears in the "strengths" category under factor #3, which reads:

Past recruitment experience exceeds requirements, but is somewhat limited in technical areas directly related to this requirement.

Together, these represent two narrative criticisms that the evaluators leveled against the protester's proposal. Consistent with that narrative, Aero Tech received its two lowest scores in those factors, 2.22, and 2.48, respectively. See Tab (3) In contrast, DataCom, (offeror "I"), the highest scorer, had no weaknesses noted, nor negative comments of any sort in any of the factors.

In factors 2 and 3, DataCom scored a 3.38 and a 3.41. This trend was consistent through all of the offerors; in fact, none of the three highest scoring offerors, (I, G, N), have *any* weaknesses or criticisms in their narratives. Reading the narratives from highest to lowest, the first weakness or negative comments of any sort appear in the fourth rated offeror, (P), whose scores in each factor were only slightly above Aero Tech's. In fact, there is a distinct symmetry in the way "strengths" decrease and "weaknesses" increase as one reads the narratives from offeror "I" (Highest rated), to offeror "A," (lowest rated). In sum, the technical evaluation is entirely consistent insofar as the numerical scores are proportional to the negative comments noted in the narrative.

There is also a consistency within the narratives of relative *strengths*. For example, again comparing Aero Tech with DataCom, although both had a paragraph detailing strengths under Factor #1, DataCom's is altogether more strongly worded. The following comparisons bear this out:

- • **Subfactor 1-1**

Aero Tech: "Offeror demonstrates an in-depth understanding of the requirement. Plan to administer and manage contract/tasks is well defined. Interface with CO/COTR/TM is well defined and in concert with the PWS."

DataCom: "Extensive knowledge of AVN's mission and scope of work to be accomplished including complexities and difficulties that may be encountered in accomplishing task requirements. Interface/relationships with CO/COTR/TM and other government personnel are well defined and appropriate."

- • **Subfactor 1-2**

Aero Tech: "Provided a realist (sic) approach to meet fluctuating, short lead time or emergency requirements. PM to monitor performance at remote locations."

DataCom: "Provided examples of short turnaround recruiting for rare skills. Individual task requirements at remote locations will determine requirements for task supervision/monitoring."

- • **Subfactor 1-3**

Aero Tech: "All major elements of sample task were addressed."

DataCom: "Sample tasks include all required elements and demonstrate a comprehensive understanding of task order types."

The conclusion I reach is that narrative description of DataCom's strengths is more forceful and complementary than Aero Tech's. The same is true of the intervening four offerors, and of the other technical factors. There is a correlation between the strength of the narrative descriptions, and the numerical scores. While no one achieved a score higher than 3.41 in any factor, there is a noticeable change in the verbal descriptions as one reads from best to worst. The relative ranking of the ten offerors is roughly discernible by reading the narratives alone; there is a marked change in substance and tone from offeror "I" to offeror "A."

In sum, I find the scoring was in fact "conservative" across the board, but consistent. There were five offerors with fewer weaknesses and more complementary narratives than Aero Tech, yet none of them achieved better than a 3.41 in any factor. This simply reflects a strict scoring regime which was not prejudicial to Aero Tech nor anyone else because it was consistent. In comparing the ten offerors against the factors in

Section "M," the relative order was unaffected by the "conservativeness" of the grading. The numerical scores are rationally based because they reflect the relative merits of the ten competing proposals against the factors announced in the solicitation.

2. The technical findings.

Aero Tech also alleges that "it would not seem possible to be rated anything less than good to excellent in all other factors." Tab (4). I interpret this to mean that, separate from its argument about consistency between numerical scores and narratives, the agency was simply wrong in its evaluation. Stated differently, the protester is arguing that *both* the narratives and the scores should be higher. This is accompanied by quotes from the technical evaluation cited above, where positive comments were made about various aspects of its proposal. No evidence is cited to show why the evaluation was mistaken or improper with respect to particular aspects; rather, a blanket assertion is made that the protester must have deserved a better rating overall.

This is a mere disagreement with the agency's evaluation, which does not render the evaluation unreasonable. Barton ATC, Inc. 96-2 CPD 58. The relative merit of competing proposals is primarily a matter of agency discretion, and the FAA will review a evaluation only to ensure that it was rationally based and consistent with the stated criteria. Macon Apparel Corporation, 96-2 CPD 95. As noted above and in Tab (2), the evaluators cited at least two concerns that they had with Aero Tech's proposal. This resulted in scores which, while acceptable, were not as high as five other companies. I find that the agency has provided a rational basis for its grading; the protester's mere assertion that it deserves better scores is not a basis to sustain a protest.

3. The price/tech trade-off.

Aero Tech also made the assertion that it "bid a substantially lower price/cost than the current identified awardee." I interpret this to be a challenge to the ultimate price/tech trade-off which award was based. As explained above, the issue is whether the contracting officer rationally balanced the price of the competing proposals against their technical merit, under an award scheme that said technical merit was "significantly more important" than price. Since DataCom received the highest technical score, the issue then becomes whether award to DataCom was justified over some other, lesser rated offeror whose price was lower.

DataCom's price represents a premium of approximately \$3.2M, or 28% over Aero Tech's proposal. In contrast, DataCom achieved a technical score of 3.25, compared with Aero Tech's 2.65, for a technical superiority of approximately 23%. Given the solicitation's statement that technical was "significantly more important than price," I believe that the contracting officer was justified in awarding to DataCom.

4. Final issues.

In its rebuttal of March 13, Aero Tech raises two additional issues which should be briefly addressed. First, the protester challenges the composition of the technical team, asking "what were the criteria/qualifications used to select a team of this caliber?" No particular member is challenged as to personal qualifications, nor is any particular allegation made; rather, the interrogatory is posed in the abstract for the agency to answer.

The selection of individuals to serve as proposal evaluators is a matter within the discretion of the agency; the FAA will not review allegations concerning the qualifications of evaluators or the composition of the technical team absent a showing of possible fraud, conflict of interest, or actual bias. Solid Waste Integrated Services, 95-1 CPD 23, American CASA, 96-1 CPD 251. The protester has not even alleged, much less demonstrated any such fraud, conflict, or bias.

Lastly, Aero Tech states in its rebuttal that some 70 -75% of the labor categories are in areas normally considered to be "administrative," and thus "a better understanding of the Best Value determination process is

obviously needed." I interpret this statement as questioning the agency's basis for designing an award scheme whereby technical considerations were "significantly more important" than price.

Such an argument is untimely at this point. Clause 3.9.1-3 of the solicitation, (p. 88), specified that protests must be filed within 5 days of the date the protester was aware, or should have been aware, of the basis of the protest. Here, Aero Tech is challenging the entire award scheme of section "M," which it understood since March 1996. The protester cannot be permitted to compete under a "best value" solicitation for half a year, only to challenge the selection criteria three months after award.

V. Conclusion

For the reasons stated above, I find that the numerical scores were consistent with the technical narratives, and that Aero Tech was not in any way prejudiced. I also find that the agency's evaluation was rationally based. Finally, the contracting officer's determination to pay an additional 28% for DataCom's technically superior proposal was entirely consistent with Section "M" of the solicitation.

It is my determination that the FAA complied with the Acquisition Management System and all applicable provisions of law. Pursuant to section 3.9 of the FAA Acquisition Management System, this protest is denied.

This is the final agency order in this matter. To the extent that this decision is subject to review, such review shall be sought in accordance with 49 U.S.C. §46110. A petition for review must be filed with the United States Court of Appeals for the District of Columbia Circuit, or in the court of appeals of the United States for the circuit in which the petitioner resides or has its principal place of business. The petition must be filed not later than 60 days after the date that this order is issued.

_____/S/_____

BARRY L. VALENTINE

ACTING ADMINISTRATOR

Issued this *15th* day of July 1997