



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: VR Environmental Services
File: B-246917
Date: April 15, 1992

J. Brent Rowland for the protester.
Jewel L. Miller, Esq., Defense Logistics Agency, for the agency.
M. Penny Ahearn, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency was not required to refer rejection of protester's offer as technically unacceptable to Small Business Administration for certificate of competency determination where rejection encompassed the firm's failure to propose an offer in compliance with material and mandatory solicitation requirements and was not based solely on pass/fail evaluation of traditional responsibility-type criteria; under these circumstances, the rejection was not a responsibility determination.
2. Protester's proposal was properly rejected as technically unacceptable and excluded from the competitive range where the protester failed in its proposal to submit information sufficient to demonstrate compliance with material and mandatory solicitation requirements.

DECISION

VR Environmental Services (VR) protests the rejection of its proposal as technically unacceptable under request for proposals (RFP) No. DLA200-91-R-0072, issued on a small business set-aside basis by the Defense Logistics Agency (DLA) for removal and disposal of hazardous wastes at military installations. VR contends that the agency should not have rejected its proposal without referring the matter to the Small Business Administration (SBA) for consideration under certificate of competency (COC) procedures, and that, in any event, contrary to the agency's determination, the firm submitted information sufficient to show compliance with the RFP requirements.

We deny the protest.

The RFP contemplated award of a requirements contract to the offeror submitting the technically acceptable proposal that represented the best value to the government. To be determined technically acceptable, offerors had to demonstrate acceptability under the entirety of three criteria-- treatment, storage, and disposal facility (TSDF) plan, hazardous waste transporters, and management plan. Under the management plan, which bears on the protest here, the RFP required offerors to furnish the following specific documentation: (1) a training program that would assure compliance with federal training requirements for hazardous waste handling (i.e., Resource Conservation and Recovery Act (RCRA), Department of Transportation (DOT), and Occupational, Safety, and Health Administration (OSHA) training requirements); (2) a description of the step-by-step procedures to be followed in performing a delivery order, in sufficient detail to demonstrate the offeror's ability to perform within the required time schedule (e.g., 10 calendar days for special wastes at one installation and 30 calendar days for general removals), and its understanding of the scope of the work required; (3) references and description of comparable experience; and (4) evidence of established working relationships with TSDFs and transporters. The RFP provided for the determination of best value, based on, in descending order of importance, price and past performance.

DLA received five initial offers and, after technical evaluation, it determined that none was technically acceptable as submitted. Offerors were advised of, and requested to respond to, specific deficiencies in their proposals. With respect to its management plan, upon which DLA ultimately based its rejection of the protester's offer, the agency requested VR to furnish the following documentation: (1) "proof that the training has been accomplished; transcripts, class listings, certificates, or on-the-job training sheets will suffice as proof; also, submit the credentials of the trainer for key employees"; (2) "revised procedures that demonstrate your ability to meet the requirements" with respect to the required schedule for performance; (3) information as to which references applied to VR and which applied to a related company; information as to the quantities and type of waste streams on each contract, the contract number and approximate dollar value per year; and (4) proof of working relationships with all TSDFs and hazardous waste transporters.

Upon evaluation of VR's response to the deficiency notice, DLA determined that VR's proposal remained technically unacceptable and therefore should be excluded from further consideration. Specifically, the agency determined VR's proposal technically unacceptable based on the following deficiencies in the firm's management plan: (1) failure to show compliance with training requirements; (2) failure to

address the 10-day removal requirement at the one installation; (3) failure to show comparable service in terms of type and value of contract; and (4) failure to show required working relationships with transporters. VR thereupon, filed this protest with our Office. After obtaining and evaluating best and final offers from the remaining offerors, the agency made award to American Environmental Services, Inc.

VR first complains that DLA should have referred the rejection of the firm's proposal to the SBA because DLA's technical evaluation was in essence a responsibility determination. In this regard, the Small Business Act, 15 U.S.C. § 637(b)(7) (1988), provides that the SBA has conclusive authority to determine the responsibility of a small business concern and that when a procuring agency finds that a small business is nonresponsible it must refer the matter to the SBA for a final determination under the COC procedures. While procuring agencies may use responsibility-type factors, see Federal Acquisition Regulation § 9.104-1, for the technical evaluation of proposals in a negotiated procurement, they may do so only if based on a relative assessment comparing offerors in those areas. Flight Int'l Group, Inc., 69 Comp. Gen. 741 (1990), 90-2 CPD ¶ 257; Sanford and Sons Co., 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266; F&H Mfg. Corp., B-244997, Dec. 6, 1991, 91-2 CPD ¶ 520. Otherwise, a technical evaluation that finds offerors acceptable or unacceptable, i.e., on a pass/fail or "go no-go" basis, with regard to traditional responsibility criteria in effect would be a determination of offeror responsibility which, since it was done under the guise of a technical evaluation, would allow an agency to avoid the requirements of the Act. See Clegg Indus., Inc., 70 Comp. Gen. 679 (1991), 91-2 CPD ¶ 145.

We find that DLA's technical evaluation included the pass/fail consideration of traditional responsibility-type criteria, e.g., company experience. Id. However, as discussed below, VR's offer was reasonably determined not to demonstrate compliance with material, mandatory solicitation requirements--concerning training and special removals at one installation--which are not traditional responsibility-type factors. Demonstrated compliance with these requirements was a prerequisite to a determination of technical acceptability. Consequently, the agency was not required to refer the firm to SBA for consideration under the COC procedures because VR's offer was unacceptable under other responsibility-type factors. See Pais Janitorial Serv. & Supplies, Inc., 70 Comp. Gen. 570 (1991), 91-1 CPD ¶ 581.

The RFP required compliance with federal training requirements for hazardous waste handling, i.e., RCRA, DOT, and OSHA training. The agency determined that the training information provided by VR for its employees did not show compliance with OSHA requirements because the training listed was outdated and only one of VR's key employees had taken any RCRA refresher courses. The record supports this conclusion. Moreover, although the protester argues that proof of training was provided for the site manager in the form of a completion of training certificate for a hazardous waste operations course, this does not rebut the specific deficiencies cited by the agency, i.e., failure to update training and lack of RCRA refresher courses for other than one key employee. Consequently, we have no basis to question the agency's determination that the protester failed to establish that it had a training program in compliance with the requirements for federal hazardous waste handling.

Although VR suggests that it was misled by the agency into not submitting additional documentation concerning training, we find no merit to this argument. DLA's deficiency notice clearly requested specific documentation concerning training, including such proof that training had been accomplished as transcripts, class listings, certificates, or on-the-job training sheets. Given this specific request for additional information, we have no basis to conclude that the protester was misled.

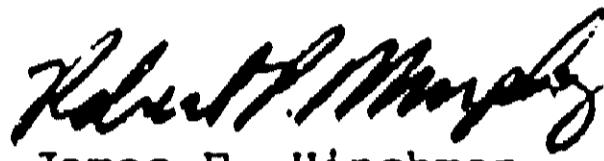
With respect to the required performance schedule, the RFP mandated the removal of certain wastes at one installation within 10 calendar days of notice rather than the 30 calendar days generally allowed. DLA found that VR's offer did not specifically address the removal within 10 days at the one installation, as required. In this regard, the agency reviewed the required contract procedures submitted by VR and determined that while they generally provided for disposal of wastes within 30 days of receipt, they were ambiguous as to whether they provided for the special 10 calendar day removal at the one installation. For example, while VR's procedures stated that "staging and documentation can begin within 3 hours," and "transporter will dispatch truck for pickup within 48 hours," they also stated that "the total time frame from receipt of delivery order to [disposal facility] is generally 10 work days" (emphasis added), rather than the 10 calendar days required at the one installation. Consequently, the procedures did not clearly establish that removal would occur as required.

Although VR generally claims that its proposed schedule "provided sufficient detail" to show compliance with the removal requirement, nowhere in its proposal did it specifically address the required 10-calendar day removal. Given the protester's failure to specifically rebut the agency's

finding that it did not in fact establish that it had procedures to provide for the required 10-day performance, we have no basis to question the evaluation in this area.

In sum, the protester has failed to present facts that reasonably indicate that the agency's determination as to technical unacceptability was anything other than reasonable. As there is no disagreement that the requirements at issue were material and mandatory, we find no basis to object to the agency's evaluation and exclusion of the proposal from the competitive range.¹

The protest is denied.


for James F. Hinchman
General Counsel

¹Although VR raised other arguments during the course of the protest, e.g., that agency's 2-day response time to the technical deficiency notice was insufficient, the protester failed to respond to the agency's rebuttal in this regard notwithstanding having been afforded an opportunity to do so. Accordingly, we consider the firm's additional arguments to have been abandoned. Herman Miller, Inc., B-234704, July 10, 1989, 89-2 CPD ¶ 25.