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**Comptroller General
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Decision

Matter of: DynCorp International LLC

File: B-294232; B-294232.2

Date: September 13, 2004

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Capt. Peter Dan DiPaola, Maj. Peter H. Tran, and Raymond M. Saunders, Esq., Department of the Army, for the agency.

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DIGEST

1. Protester's contention that its proposal was unreasonably evaluated and improperly excluded from consideration for award is denied where: the solicitation advised that the agency intended to make award without discussions if possible; the solicitation also advised that a marginal rating could mean that the proposal would be ineligible for award without significant revision; the record shows that the agency reasonably rated the protester's proposal as marginal, and ineligible for award without significant revision; and the agency reasonably limited its final award decision to the two offerors whose initial proposals were eligible for award as written.

2. Protester lacks the direct economic interest needed to challenge the evaluation of the awardee—as well as the interest needed to challenge the agency's affirmative determination of the awardee's responsibility—where the record shows that the protester's proposal was reasonably considered ineligible for award without discussions, and where, even if the protester's challenges were sustained, another offeror would be in line for award ahead of the protester.

DECISION

DynCorp International LLC protests the award of a contract to Aegis Defence Services Limited by the Department of the Army, pursuant to request for proposals (RFP) No. W911SO-04-R-0005, issued to procure security services for contractor and

government personnel in Iraq. DynCorp challenges the Army's evaluation of its and Aegis's proposals, argues that the Army was required to consider its proposal in the cost/technical tradeoff, and contends that Aegis lacked the requisite responsibility to perform this contract due, in part, to certain alleged activities of Aegis's principal director and largest shareholder.

We deny the protest.

BACKGROUND

The RFP here was initially issued by the Coalition Provisional Authority (CPA), Baghdad, Iraq, on February 13, 2004. Later that month, the CPA transferred responsibility for the contract to the Department of the Army, and on March 4, the Army reissued the solicitation under the above-referenced solicitation number. Specifically, the RFP sought security services, anti-terrorism support and analyses, movement escort services, and close personal protection services. The solicitation contemplated the award of a cost-plus-fixed-fee contract for a 1-year base period, with up to two 1-year options, to the offeror whose proposal "represents the Best Value (Cost Technical Trade-offs) to the Government." RFP amend. 5, at 42, 50. The solicitation also advised that the agency intended to award without discussions, but reserved the right to hold discussions if necessary. *Id.* at 50.

To determine which proposal offered the best value to the government, the RFP anticipated the use of three evaluation factors: technical/management, past performance, and cost/price. *Id.* at 50-51. The RFP advised offerors that technical/management would be slightly more important than past performance, and that these two factors combined would be more important than cost/price. *Id.* at 51. Due to the issues raised in this protest, a detailed recitation of the evaluation subfactors and rating schemes in the RFP is necessary, and is set forth below.

With respect to the technical/management evaluation factor, the RFP identified four equally important subfactors: technical/management methodology and responsiveness; the offeror's response to a hypothetical problem identified in the solicitation ("hypothetical problem"); staffing plan; and personnel qualifications. *Id.* at 52. Each of these subfactors, as well as the overall factor, was to be assigned a rating of excellent, good, marginal, or unsatisfactory. Of relevance here, the RFP reserved the ratings of "excellent" and "good" for proposals "that can be awarded 'as submitted' and [contain] no deficiencies and/or weaknesses." *Id.* at 51. In other regards, the ratings of "excellent" and "good" designate the extent to which a proposal exceeds the basic requirements of the solicitation, is low in risk, and presents a high likelihood of successful performance.

In contrast, the RFP reserved the ratings of "marginal" and "unsatisfactory" for proposals that, respectively, "may be correctable only with a significant re-write of the proposal," and "could only become eligible for award if it were substantially

revised.” Id. In other regards, the ratings of “marginal” and “unsatisfactory” designate the extent to which a proposal fails to meet the basic requirements of the solicitation, is high in risk, and presents a low likelihood of successful performance. Of particular importance to this dispute is the definition of a “marginal” rating in the RFP:

“Marginal” is defined as any proposal that contains significant deficiencies and/or weaknesses. The proposal fails to meet some of the objectives/requirements, contains significant deficiencies/weaknesses/disadvantages and substantial improvement is necessary. The proposal, however, may be correctable only with a significant re-write of the proposal. The proposal provides for a low probability of success. **Risk Level - High.**

Id. at 51.

Finally, the RFP contains two admonitions applicable to proposals rated “marginal” or “unsatisfactory” under the technical/management evaluation factor, or any of its subfactors. First, the RFP advises that “a ‘marginal’ or ‘unsatisfactory’ rating in any one subfactor, will result in a ‘marginal’ or ‘unsatisfactory’ rating for the factor as a whole.” Id. at 52. Second, the RFP advises that “[p]roposals determined to be Unsatisfactory will be eliminated from further consideration.” Id. at 51.

With respect to the past performance evaluation factor, there were no subfactors identified. Rather, the RFP advised that the agency would look to work performed within the past 3 years to determine whether the work was the same as, or similar in nature, size, and complexity to, the services being procured here. Under past performance, a proposal could receive any of the four ratings described above—excellent, good, marginal, unsatisfactory—or a rating of neutral, indicating no record of relevant past performance. With respect to the cost/price factor, the agency advised that it would calculate a probable cost for each offeror, and that this probable cost would be used for source selection purposes. Id. at 52.

By the March 31 closing date, the Army received seven proposals, one of which was withdrawn shortly thereafter. At the conclusion of the evaluation, DynCorp’s proposal was rated “good” under one technical/management subfactor (technical/management methodology and responsiveness), and “marginal” under the three remaining technical/management subfactors (hypothetical problem, staffing plan, and personnel qualifications); as provided by the RFP, these ratings resulted in an overall rating of “marginal” under the technical/management factor. When combined with DynCorp’s past performance rating of “good,” the overall proposal rating was “marginal.”

In contrast, Aegis’s proposal was rated “good” under the technical/management evaluation factor, and “neutral” under the past performance factor, resulting in an

overall proposal rating of “good.” In addition, a third offeror (designated “Offeror A” in the table below) was rated “excellent” under the technical/management factor, and “good” under the past performance factor, resulting in an overall proposal rating of “excellent.” A summary of the evaluation results for all six offerors is set forth below:

OFFEROR	OVERALL RATING	TECHNICAL/ MGMT. RATING	PAST PERF. RATING	TOTAL EVALUATED COST
Offeror A	Excellent	Excellent	Good	\$462.0 million
Aegis	Good	Good	Neutral	\$292.5 million
DynCorp	Marginal	Marginal	Good	\$201.0 million
Offeror B	Marginal	Marginal	Good	\$1.042 billion
Offeror C	Unsatisfactory	Unsatisfactory	Neutral	\$324.0 million ¹
Offeror D	Unsatisfactory	Unsatisfactory	Neutral	\$497.3 million

Agency Report (AR), Tab L, at 4, 15.

Given these results, the source selection authority (SSA) reached several conclusions. First, he reaffirmed the Army’s intent, stated in the solicitation, to make award without discussions. AR, Tab K, at 10. Second, he concluded that the two proposals with overall ratings of “unsatisfactory” were ineligible for award, and could be eliminated from further consideration. Third, he concluded that the proposals of DynCorp and Offeror B needed substantial improvements to be eligible for award, and decided that since there would be no opportunity to make improvements, the proposals could properly be “eliminated from further consideration.” Id. Fourth, he compared the strengths and weaknesses in the proposals of Offeror A and Aegis, and concluded that the added benefits and advantages offered by Offeror A’s proposal did not justify incurring the additional cost. As a result, the SSA concluded that “it was in the best interest of the Government to award this contract to [Aegis].” Id.

¹ The cost shown for the two offerors whose overall rating was “unsatisfactory”—Offerors C and D in the table above—is the total proposed cost. Since these proposals were evaluated as “unsatisfactory” overall, the agency did not calculate an evaluated cost for their proposals.

Finally, in the interest of “thoroughness,” the SSA noted that while the proposals of DynCorp and Offeror A were “ineligible for award” without discussions, even if the SSA considered those proposals, he would not select either of them over the Aegis proposal. Id. In addition, the SSA set forth his rationale for his conclusions. This protest followed.

ANALYSIS

DynCorp’s arguments fall into four categories—challenges to its own evaluation, challenges to the evaluation of Aegis’s proposal, a challenge to the SSA’s decision to exclude DynCorp’s proposal from the final selection decision, and a challenge to the agency’s determination that Aegis has the requisite responsibility to perform the contract here.

With respect to its own evaluation, DynCorp argues that the marginal ratings it received under three of the four technical/management subfactors were unreasonable, and hence its rating of marginal under the technical/management factor itself was also unreasonable. Our standard in reviewing such challenges is to examine the record to determine whether the agency’s judgment was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7.

The Evaluation of DynCorp’s Staffing Plan

One of the major alleged shortfalls in DynCorp’s proposal relates to its staffing plan. As indicated above, staffing plan was one of four equally-weighted subfactors under the technical/management evaluation factor, and under this subfactor DynCorp received a marginal rating.

Of relevance here, the RFP, under the heading of security escorts and movement control, required that the contractor

provide transportation and personnel protection of personnel from terrorist or criminal attacks during travel to/from secure project worksites for as many as an average of 75 roundtrips daily, anywhere in Iraq, which would entail personal protection for an average of two (2) [Program Management Office] travelers. Contractor services shall include all protective/defensive actions required to counter, deter, detect, and respond to threats to designated personnel through threat analysis, operations security (OPSEC), responsive communications, and integrated team support using armed vehicle escorts, as necessary. Armed vehicle escort will consist of contractor security personnel providing armed security utilizing armored vehicles. For planning purposes, there is no minimum number of security personnel specified for each escort mission.

RFP amend. 5, at 3.2.3 (p.13). This requirement sparked a number of clarification questions from potential offerors seeking additional guidance about matters such as the average roundtrip mileage of an escorted trip, the maximum number of travelers on a trip, the number of regions within Iraq involved in a trip, and the number of trips that might require motorcades. One questioner asked how many of the 75 trips per day would occur simultaneously. The answer: “This will be dependent on each day’s unique situation but use +/- 20 for a rough estimate.” RFP amend. 8, question 15.

In the portion of its proposal wherein DynCorp explained its approach to providing security escorts and movement control, under the heading “Staffing,” the proposal narrative made reference to the number of simultaneous trips, but not to the total underlying number of trips per day, as set forth below:

DynCorp made an assumption in computing the Regional Security Escort/Movement Control requirements, based on Amendment 0008, Response 15 that suggests for planning we use a rough estimate of +/- 20 missions per day of an unspecified duration. Our assumption led us to propose staffing 4 PSDs [Personal Security Detail] at the National, one PSD at each Regional level, and 16 Security Escort/Movement Control Teams at the Governorate level. All inclusive, DynCorp will provide 26 security escort teams—including PSD and Security Escort/Movement Control Teams—which meet the specified requirements (+/-20), allows for overflow personnel to meet unspecified missions and ensures the ability to meet motorcade operational needs throughout Iraq during Phase-In.

DynCorp Proposal, vol. II, at 24.²

In evaluating DynCorp’s proposal, the Army—and in particular, the SSA—was concerned that DynCorp had misread the solicitation and had not proposed a sufficient number of security escort teams to provide an average of 75 trips per day, with as many as 20 of those trips occurring simultaneously. AR, Tab K (Source Selection Decision), at 5-7. The Army explained this concern in detail during its debriefing of DynCorp. AR, Tab P-1, at 10-13.

In its protest, DynCorp argues that a rating of marginal for its proposal under the staffing plan subfactor is based on a misreading of its proposal by the Army. Specifically, it argues that it did not overlook the 75 roundtrip per day requirement;

² This language was repeated verbatim in DynCorp’s Administrative/Cost Proposal in the section wherein the company provided a “narrative explanation of the methodology used to develop its Direct Labor Rates, Other Direct Costs proposed, and assumptions.” DynCorp Proposal, Vol. 1, ¶ 2.1.

that the Army overlooked other places in its proposal where it explicitly acknowledged the requirement; and that the matter was, at best, ambiguous, and could have been resolved through clarifications. We disagree with DynCorp on each of these counts.

As an initial matter, we think DynCorp glosses over the fact that its proposal explains not once, but at least twice, that it is based on an assumption that the RFP here requires “+/- 20 missions per day.” In addition, the sections of the proposal where DynCorp sets forth this assumption are the crucial sections related to its proposed number of escort teams—*i.e.*, in the section explaining its proposed staffing, and in the section explaining how its direct labor costs were derived. While DynCorp correctly points out that the Transportation section of its proposal (see AR, Tab D-2, at 9) repeats the RFP’s requirement of 75 roundtrips per day, the Transportation section is ancillary to the more basic requirements of this RFP; in fact, Transportation is one of several subsections—the others are Clearances, Quality Control, Training, and Purchasing—lumped together under the heading “How Major Functions Will Be Accomplished.” Id. at 8. Given the unambiguous statements in DynCorp’s proposal—and the places where it made them—we see nothing unreasonable about the Army’s conclusion that DynCorp misread the RFP.

Nonetheless, even if we assume that DynCorp did not misread the RFP and that its narrative explanation of its assumptions merely contained an error, the agency concluded that DynCorp did not propose enough escort teams to meet the solicitation requirements. In this regard, the SSA calculated that DynCorp was offering 23 escort teams,³ and that even if the number of simultaneous missions never exceeded 20, DynCorp had not planned for enough escort teams “to allow for rest, refueling, refitting, planning, and unforeseen circumstances, while still

³ There is some confusion about the actual number of escort teams DynCorp proposed, but the evidence in the record suggests that the matter has no impact on the dispute here. As quoted above, DynCorp proposed 4 PSDs at the national level, 1 PSD at each regional level, and 16 security escort teams at the governorate level, which, the proposal explained, totals 26 teams. The Army points out that DynCorp apparently assumed that Iraq would be divided into 6 regional levels, rather than 4, and that using the proper number of regional levels, DynCorp proposed a total of 24 teams, rather than 26 teams. AR, Tab K at 6. In addition, the agency noted that 1 of the 4 national PSDs would be reserved for DynCorp’s own staff, leaving only 23 teams to meet the RFP requirements, which the SSA concluded was an insufficient number. Id. DynCorp never disputed the agency’s recalculation of the number of teams it proposed, but stated only that this concern “should have been addressed in clarifications.” Protester’s Comments, Aug. 2, at 11. Given that the protester raises no substantive challenge to the recalculation, we see no basis to second-guess the Army’s views on this matter. To be fair, we note that Aegis’s proposal [~~deleted~~]. See, e.g., AR, Tab E-2 at 19.

accomplishing the requirement of seventy-five (75) daily missions.” AR, Tab K, at 7. In our view, there is nothing about this conclusion that is unreasonable.⁴ In fact, other than a single response suggesting that “[i]t may even be possible that one escort team, by itself, could serve 75 missions in one day,” Protester’s Comments, Aug. 2, 2004, at 11, DynCorp has raised no challenge to the Army’s evaluation conclusion about its proposed number of escort teams. Instead, the protester complains that any issue regarding a shortfall in its proposed number of escort teams could have been remedied during clarifications. We disagree.

As defined in Federal Acquisition Regulation § 15.306(a), clarifications are exchanges between an agency and an offeror after receipt of proposals that are limited to clarifying some aspect of a proposal, or to resolving minor or clerical errors when award without discussions is contemplated; clarifications are not to be used to cure proposal deficiencies or material omissions, or materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. eMind, B-289902, May 8, 2002, 2002 CPD ¶ 82 at 5. Here, asking about, and allowing DynCorp to make an upward adjustment to, its proposed number of escort teams--and to make the corresponding upward adjustment to its proposed costs--would not have been a clarification; on the contrary, such an exchange would have constituted discussions. See, e.g., Baker Support Servs., Inc., B-257054.2, Jan. 20, 1995, 95-1 CPD ¶ 29 at 7-8 (protester sought opportunity to “clarify” inadequate staffing levels, our Office explained agency was not required to hold discussions); Colmek Sys. Eng’g, B-291931.2, July 9, 2003, 2003 CPD ¶ 123 at 7 (protester’s request for opportunity to clarify insufficient estimate of pre-production work would have been discussions, and agency was not required to hold discussions). As noted above, the RFP clearly indicated that the Army intended to make award without discussions, if possible; therefore, to the extent that other offerors’ proposals were acceptable as written, there was no requirement for the agency to hold discussions with Dyncorp, whose proposal reasonably was found to be ineligible for award. See generally Colmek Sys. Eng’g, supra.

Given our conclusion that the Army reasonably evaluated DynCorp’s proposal as marginal under the staffing plan subfactor, and given that the solicitation, on its face, advised that a marginal rating under any technical/management subfactor would result in a marginal rating for the entire factor, there is no reason for our Office to review DynCorp’s challenges to its other marginal ratings under the technical/management subfactors. Under these circumstances, DynCorp’s marginal rating for the technical management evaluation factor is consistent with the solicitation’s stated evaluation scheme.

⁴ We note that the awardee proposed [~~deleted~~] escort teams [~~deleted~~].

Marginal Proposals Excluded from Further Consideration for Award

We turn next to DynCorp's contention that since its proposal was rated marginal rather than unsatisfactory, the SSA was required to consider its proposal for award, given that its evaluated cost was lower than those of the two offerors whose proposals were considered in the trade-off decision. Again, we disagree.

As mentioned in the previous section, the RFP here clearly advised that the agency intended to make award, if possible, on the basis of initial proposals. RFP amend. 5, at 53. The RFP's definition of marginal also advised that it meant that a proposal so rated "may be correctable only with a significant re-write of the proposal." *Id.* at 51. In addition, the SSA here expressly determined that DynCorp's marginal proposal was ineligible for award as written due to its significant shortfall in proposed staffing. Put simply, since we find that the Army reasonably concluded that the proposal could not be accepted as written, there was no requirement to consider it further. Tomco Sys., Inc., B-275551 *et al.*, Mar. 13, 1997, 97-1 CPD ¶ 130 at 4-5.

We disagree with DynCorp's assertion that the situation here is similar to the situation we reviewed in A&D Fire Prot. Inc., B-288852, Dec. 12, 2001, 2001 CPD ¶ 201, wherein we sustained a protest after concluding that the agency improperly eliminated from the competition the protester's lower-priced and lower-rated proposal. In our view, the difference between these cases lies in both the assessment of the protesters' proposals, and the instant RFP's stated evaluation scheme. In A&D Fire Prot., there was no suggestion that the protester's lower-rated proposal was ineligible for award, and no supportable basis for excluding the proposal from the cost/technical tradeoff. *Id.* at 3. Here, in contrast, the SSA expressly concluded that DynCorp's proposal was ineligible for award as written, and we have reviewed that conclusion and found it reasonable. In addition, in the instant procurement, offerors were on notice that a marginal rating might result a determination that the proposal could only be corrected with a significant proposal rewrite, which would not be available if award was made without discussions. As a result, we do not agree that the decision in A&D Fire Prot. is controlling here.⁵

Evaluation of Aegis and Aegis's Responsibility

With respect to the remaining two areas of DynCorp's protest--its challenge to the evaluation of Aegis's proposal, and its allegation that Aegis is not a responsible contractor--we find that DynCorp is not an interested party to raise either issue.

⁵ As a final matter--and also unlike A&D Fire Prot., see p.4--the record here shows that the SSA actually made a contemporaneous tradeoff decision, as a matter of precaution. In it, the SSA concluded that he would not select DynCorp's proposal over the proposal of Aegis.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551 et seq. (2000), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2004), only an “interested party” may protest a federal procurement. Since we have concluded that the agency reasonably decided that DynCorp’s proposal was ineligible for award as written, and since there was another technically acceptable proposal in line for award (Offeror A’s), even if we were to sustain DynCorp’s challenges to the evaluation of Aegis’s proposal, or to the determination that Aegis is a responsible offeror, Offeror A would be in line for award, not DynCorp. Thus, DynCorp lacks the direct economic interest necessary to pursue these challenges. OMNIPLEX World Servs. Corp., B-282630.2, Sept. 22, 1999, 99-2 CPD ¶ 64 at 6.

The protest is denied.

Anthony H. Gamboa
General Counsel