

Protest of)
) Date: July 31, 1989
DHL AIRWAYS, INC.)
)
Solicitation No. ANET-89-01) P.S. Protest No. 89-45

DECISION

DHL Airways, Inc. (DHL), timely protests the rejection of its proposal under Solicitation No. ANET-89-01 as outside the competitive range. The solicitation was issued on April 28, 1989, by the Air Contracts Management Division, Office of Transportation & International Services, Headquarters, with an offer due date of June 2, 1989. It sought proposals for the air transportation of Express and Priority Mail by means of a "hub-and-spoke" network which would link 30 cities to a single hub.

On June 2, DHL protested a provision of the solicitation which prohibited proposals from offerors whose 1988 gross revenues from the carriage of letters outside the mails under the suspension of the Private Express Statutes for extremely urgent letters was greater than 10 percent.^{1/} While its protest was pending, DHL submitted a timely proposal. On June 16, the contracting officer notified DHL that its proposal had been rejected as outside the competitive range. He noted that "the competition for this requirement is strong, and a thorough review of your proposal, considered in light of the other proposals received, indicates that your proposal has no real chance of selection for award."

In response to DHL's request for a debriefing, the contracting officer that he would be happy to hold one after award if DHL requested it in writing,^{2/} and noted, in light of DHL's then-pending protest, "my decision was not related to the contractor qualifications section of the solicitation. ... The 'competitive range' decision was made based solely on a technical evaluation of your proposal." DHL's timely protest followed. Subsequent to the protest, a contract was awarded to Air Train, Inc., on July 7.

DHL asserts that the contracting officer improperly established the competitive range in

^{1/}This protest was denied in part and dismissed in part. DHL Airways, Inc., P.S. Protest No. 89-36, July 7, 1989.

^{2/}There is no indication in the file that DHL requested a debriefing after award of the contract.

violation of PM 4.1.5 g.2.(a)^{4/} and has misapplied the evaluation and award factors listed at Part VI, Provision 2, of the solicitation. DHL alleges that its elimination from the competitive range was a ploy to avoid the issues it raised in its earlier protest.

In his report to this office, the contracting officer attaches a list of some four pages of deficiencies which the evaluations found in DHL's proposal. Among the most serious were that the proposal did not provide service for classes of mail other than Express Mail (which make up 70 percent of the solicitation's requirements), did not specify any tender times for seven cities, did not offer service to Miami, did not include any transportation between the hub and Jacksonville and Orlando, and did not meet the required minimum tender times in ten cities and the minimum delivery times at twelve cities. Because of these deficiencies, DHL's relative standing and overall low score, the contracting officer decided that it did not have a reasonable chance of being selected for award, and therefore eliminated DHL's proposal from the competitive range. (The contracting officer has given us the scores of the offerors, and it is apparent from that information that DHL's score was well below the score at which the competitive range was set.)

DHL's response to the contracting officer's report states that the report "failed to address" the basic issue raised by its protest: "the improper establishment of the competitive range from which DHL was excluded." While DHL does not dispute its low score, it contends that the contracting officer failed to exclude other offerors based on the 10 percent qualification prior to evaluating the proposals and setting a competitive range. According to DHL, this failure, in contravention of PM 4.1.5 g.2 (a) and the express provisions of the solicitation, serves to invalidate the competitive range decision. DHL hypothesizes that if offerors who were included in the competitive range had been excluded by prior application of the 10 percent prohibition, it would have not been excluded. Therefore, the contracting officer's error in considering proposals prior to applying the 10 percent restriction flawed the competitive range determination to the prejudice of DHL's "technically acceptable" proposal.^{1/}

^{3/} This section provides that:

- (a) The competitive range must be determined by the contracting officer following evaluation of proposals. The competitive range must be determined on the basis of the evaluation factors stated in the solicitation and must include all proposals that have a reasonable chance of being selected for award, either as submitted or as revised following discussions.

^{4/}The contracting officer has furnished comments on DHL's response which essentially argue that his determination that DHL was outside the competitive range was in accordance with the PM and the solicitation provisions and dispute the factual basis and logical argument underlying DHL's position. DHL has submitted further comments which restate its position without adding any new information. DHL has, however, requested that our decision is its protest be deferred until a pending protest and civil action by other offerors regarding Air Train's eligibility under the 10 percent restriction are resolved. It is not the practice of this office to suspend the issuance of a protest decision pending events extrinsic to the decision. Cf. Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984; E.B. Friel, P.S. Protest No. 82-8, May 4, 1982.

We have set forth the factors we consider in determining whether a proposal was properly excluded from the competitive range in Dwight Foote, Inc., P.S. Protest No. 87-90, September 28, 1987:

the extent to which the RFP called for detailed information, whether the deficiencies indicate a lack of understanding of the solicitation requirements, whether curing the deficiencies would require an entirely new proposal, the number of offerors remaining in the competitive range, and the cost savings afforded by the rejected proposal. See La Pointe Industries, Inc., Comp. Gen. Dec. B-222023, May 14, 1986, 86-1 CPD & 461.

See also Emerson Electric Company, P.S. Protest No. 75-37, July 29, 1975 ("An offeror can be eliminated from the competitive range unless it appears that its offer can be improved reasonably to the point where it would become the most advantageous offer.")

Based on these factors, it is clear that DHL's proposal was properly excluded from the competitive range. The RFP required detailed information dealing with tender and delivery times to thirty cities, as well as numerous other requirements. Curing DHL's defects would amount to allowing it to submit an entirely new proposal. It is difficult to see how a proposal as deficient as DHL's can be said to evidence an understanding of the solicitation requirements. See generally H & B Telephone Systems, P.S. Protest No. 83-61, February 6, 1984. Several offerors remained in the competitive range after DHL's exclusion, and any cost savings associated with DHL's proposal may well be attributable to its failure to meet substantive solicitation requirements. See Chamberlain Manufacturing Corporation, P.S. Protest No. 85-83, February 14, 1986 (procurement officials have wide discretion in the manner and extent to which they make use of the results of technical and cost evaluations). Therefore, DHL's proposal was properly excluded from the competitive range.

In addition, DHL's argument lacks an adequate factual predicate. As we stated in DHL Airways, Inc., supra,

There is an inconsistency between the solicitation, which indicates that offers will not be accepted or considered from offerors who fail to meet the 10% restriction, and the contracting officer's treatment of DHL's offer, which he accepted and considered without making a determination as to whether the restriction was met. However, we can discern no harm to DHL which arises from the contracting officer's failure to adhere to the strict mandate of the solicitation.

DHL only sets forth hypothetical situations in which it is "conceivable" that its deeply flawed proposal might have been deemed to be within the competitive range. However, to prove its case, even on this theory, DHL must prove at least two predicate factual assertions: the contracting officer erroneously allowed some offerors in the competitive range who would have been eliminated from competition by means of the 10 percent restriction, and that DHL would not have been excluded from the competition through the operation of that provision. DHL has offered only conclusory assertions as to both these points, falling well short of carrying the burden of proving its case. See Ericksen Textile Co., P.S. Protest No. 81-35, October 29, 1981. While we have not conducted

any rigorous analysis of the evaluation, a summary review does not suggest that even applying DHL's theory to the evaluated scores would have been sufficient to place it within the competitive range. Speculative injury does not suffice as a basis on which to sustain a protest. See, e.g., Chamberlain Manufacturing Corporation, P.S. Protest No. 85-83, February 14, 1986 (inadequate discussions did not prejudice protester's opportunity for award). DHL did not dispute that its proposal was correctly scored, so that its argument that the competitive range determination was inaccurate rests on inadequate factual support and must fail.

The protest is denied.

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[checked against original JLS 5/24/93]