

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF.)	
)	
EDUCATIONAL IN-ROADS,)	
a division of SYLVAN LEARNING)	CAB No. P-552
SYSTEMS, INC.)	
)	
Under RFP No 028-NS-0-6-X)	
(Special Education Assessments))	

For the Protester: Keefe B Clemons, Esquire, Goodwin, Proctor & Hoar, LLP. For the Government. Warren J. Nash, and Chris Malone, Assistants Corporation Counsel.

Opinion by Chief Administrative Judge Lorilyn E Simkins with Administrative Judge Claudia Booker, concurring

OPINION AND ORDER

Educational In-Roads, a division of Sylvan Learning Systems, Inc ("In-Roads") protests the District of Columbia Public Schools' (DCPS) decision to exclude In-Roads' proposal to provide certain educational services to the Division of Special Education under RFP No. 028-NS-0-6-X ("RFP" or "Proposal") from the competitive range. The District filed a motion to dismiss challenging the timeliness of the protest. We deny the District's motion to dismiss because In-Roads filed its protest in accordance with the guidelines given in the RFP. We also find that the DCPS's decision to exclude In-Roads' proposal from the competitive range was unreasonable. Accordingly, we sustain the protest.

BACKGROUND

On June 10, 1997, DCPS issued RFP No. 028-NS-0-6-X to engage the services of one or more contractors to provide an array of professionals to perform psychological, speech and language evaluations and social histories of students for the Special Education Branch of the Public Schools.¹ In-Roads had been an incumbent provider of these services since 1995. Proposals were originally

¹The letter mailed to prospective offerors states:

[T]he District of Columbia Public Schools Division of Special Education is seeking services of Contractors who can provide the services of qualified state licensed certified school psychologists, clinical psychologists, psychiatrists, neurologists, occupational and physical therapists, social workers, and audiologists to perform initial, triennial and/or requested re-evaluations, and to participate in the admission and review process of special education services beginning July, 1997 through August, 1997

due on June 20, 1997. On June 19, 1997, DCPS issued Addendum No. 1 which expanded the category of professionals to include speech therapists and changed the date of submission to June 27, 1997. (Agency Report ("AR"), Exhibit 2). DCPS issued a second Addendum on June 25, specifying the required number of slots that DCPS would need, and informing prospective contractors that the contract, including options, would not exceed five years. (AR, Exhibit 3) DCPS received 13 proposals on June 27, 1997. (AR, Exhibit 4).

By memorandum dated June 27, 1997, the Chief of Contract Administration for DCPS forwarded to the Director of Special Education, a technical evaluation plan ("TEP") delineating responsibilities and providing basic procedures for evaluation committee activities (AR, Exhibit 5). The TEP provides

Each member of the EC [Evaluation Committee] shall evaluate every technical proposal independently and without consultation with other EC members. Members shall evaluate one proposal at a time, shall assign a numerical score to each evaluation criteria and shall write a narrative justifying that score and identifying strengths and weaknesses. Upon completion of the individual evaluations, the EC Chairperson will compile and summarize the independent scores of the committee members and then obtain a consensus score for each offeror, thus ensuring that the end result represents the consensus scores of the panel as a whole. The EC Chairperson is responsible for the review of numerical scores and narratives to ensure that they are compatible. [Emphasis added]

The TEP sets forth the following evaluation criteria: (A) Experience, demonstrated ability, and reputation in similar projects – 30 points; (B) Qualifications, experience and competence of key and other personnel to undertake project – 30 points; (C) Equipment and facilities available – 10 points; (D) Cost proposal – 30 points. The evaluation criteria also included the following formula which DCPS indicated it would use in the evaluation of offeror's price proposals:

$$\frac{\text{Lowest Price Proposal}}{\text{Price of Proposal Being Evaluated}} \times 30 = \text{Points Awarded}$$

The TEP provides that the competitive range is to include all proposals that have a reasonable chance of being selected for award and determined on the basis of cost or price and other factors stated in the solicitation (AR, Exhibit 5)

On July 28, 1997, the Director of Special Education submitted the completed technical evaluations to the Contract Administration Chief. The EC consisted of eight members, none of whom evaluated all of the proposals. Some EC members evaluated two or three proposals, others evaluated five or six, and one evaluated eleven proposals. One proposal was not evaluated by any EC member. (AR). The EC members did not evaluate cost or determine the competitive range. (AR, Exhibit 7) Two EC members rated In-Roads and based on the average scores of all of the offerors, In-Roads was the second highest offeror. (AR, Exhibit 7).

On August 29, the Office of Contract Administration requested best and final offers ("BAFO's") from all offerors by September 3, 1997. (Exhibit 8). All thirteen contractors submitted BAFO's (See Consensus Matrix for Technical Evaluation, AR, Exhibit 9). Between August, 1997 and January 1998, there was apparently no activity concerning the selection of an offeror for these services. However, in January of 1998, the Special Education Branch conveyed its urgent need for these services to the Office of Acquisitions and Contracts Management (OACM).² (Exhibit 13) A Memorandum of Negotiations, dated April 20, 1998, outlines the course of action that DCPS undertook. *Id* Recognizing that the initial evaluation was flawed, DCPS decided that it could correct its errors by having another Technical Evaluation Panel made up of three staff members of Special Education Division review each proposal.

The TEP evaluated each proposal using the criteria set forth in the RFP. The TEP discussed the proposals, agreed upon a composite evaluation score for each proposal, and established that the competitive range was 80 to 100. The second TEP evaluated the proposals as follows

Firm	Experience	Qualifications	Equipment	Cost	TOTAL
Joan E Gildemeister	27	25	9	27	88
Institute for Life Enrichment	27	26	8	22	83
Hospital for Sick Children	25	24	6	26	81
WATS	22	25	6	16	69
American Therapy Services	20	24	9	19	72
Georgetown Univ Child Development	24	30	10	24	88
Riverside Health Care	24	24	8	24	80
Therapist Unlimited	22	29	6	26	83
Blackwood-Ellis & Campbell	25	26	9	23	83
Sunspectrum	27	26	7	24	84
Sylvan Learning Systems	24	24	8	16	72
Psychological Assessment & Services	10	25	8	6	49
Therapy Management Services	9	10	0	16	35

The second TEP recommended the award of contracts to: (1) Joan Gildemeister (2) Institute for Life Enrichment; (3) Hospital for Sick Children; (4) Georgetown University Child Development Center; (5) Riverside Health Care; (6) Therapist Unlimited; (7) Blackwood-Ellis and Campbell, and (8) Sunspectrum. (AR, Exhibit 9). In a memorandum dated February 27, 1998, the Special Education Division requested that the OACA also consider awarding contracts to American Therapy Services, In-Roads, and Washington Assessment and Therapy Services, "given the myriad of assessments that are in our backlog" (*Id*)

On March 16, 1998, the Contracting Officer sent letters to the eight potential awardees

²The Agency Report contains documents from two different DCPS offices, the Office of the Chief Operating Officer/Director of Facilities Contract Administration, and the Office of Acquisitions and Contracts Management, which relate to the supervision of the RFP. There is no clear distinction between the roles of these Offices. The Board has therefore used the name of the Office which appears on the letterhead of the document under discussion.

requesting that they respond to a second BAFO by March 20, 1998.³ (AR, Exhibit 10). Only seven of the eight contractors responded. On March 30, 1998, the Contracting Officer sent another letter to the seven potential awardees requesting information on costs and inquired about their definitions of the required services. While assuring the contractors that DCPS was not attempting to change their cost proposals, the letter states.

As we reviewed the cost proposal, we found that offerors used several definition for the required services. This made cost evaluation difficult. As a way of assuring that everyone uses the same definitions, we are requesting that you provide cost information using the enclosed format.
(AR, Exhibit 11).

Attached to the March 16 letter is a form requesting information on contractors' hourly cost for each type of evaluation and the estimated number of hours per evaluation. The form also requests information about the cost of various kinds of consultation services, and other direct costs. *Id* Following submission of the third BAFO, DCPS conducted negotiations with the seven contractors. Four of the seven contractors were selected in April, 1998 to provide services. DCPS determined that they would "best meet DCPS' minimum needs at the best value cost-wise." (AR, Exhibit 13). Requirement contracts were executed in May of 1998 with Therapist Unlimited, Riverside Health Care, Drs. Blackwood-Ellis and Campbell, and Joan Gildemeister (AR, Exhibit 14)

By letter dated March 31, 1998, the Procurement Officer informed the five offerors who scored less than 80 points that their proposals were found to be outside the competitive range (AR, Exhibit 12). Apparently In-Roads' exclusion from the competitive range was based on its costs relative to the other proposals. While its costs rating was low in comparison to other proposals, its technical scores were relatively high. In-Roads' technical proposal scores were in fact the same as Riverside's, one of the eventual awardees. By letter dated April 8, 1998, In-Roads protested DCPS' finding that its proposal was outside the competitive range and requested that the Procurement Officer reconsider the decision. Having received no response to its April 8 letter, on May 15, 1998, In-Road's attorney penned another letter to the Procurement Officer requesting a response by May 22, 1998. Again DCPS did not respond. On May 29, 1998, In-Roads filed a written protest with the Superintendent of Schools based on the dispute and protest procedures set forth in the RFP (Section 7 of the General Provisions, Protest, Exhibit A). In-Road's protest received no response from the Superintendent. On July 20, 1998, In-Roads filed its protest with the Board. It referred to section 7 of the General Provisions of the RFP and Title 5 DCMR §§ 3700 *et seq*, as the basis of its timely filing with the Board and described the failure of DCPS to respond in any fashion to its concerns about its exclusion from the competitive range.

³ The second BAFO sought information on the contractor's: (1) intake, tracking and monitoring procedures; (2) quality control procedures; (3) capacity for bilingual evaluations; (4) procedures to inform parents/guardians of the assessments; (5) internal training procedures on state and federal standards, and (6) procedures to ensure confidentiality.

Jurisdiction

In accordance with the Procurement Practices Act, Board Rule 302.2 requires that protests other than those concerning improprieties in a solicitation, "shall be filed with the Board not later than ten (10) business days after the basis of the protest is known or should have been known, whichever, is earlier." 45 DCMR § 1415 (March 13, 1998). The District argues that In-Roads' protest was untimely filed with the Board, since it was filed at our offices more than 10 days after the basis of the protest was known. (Motion of the District of Columbia to Dismiss, or in the Alternative Agency Report). The District contends therefore that the Board has no jurisdiction to decide this case

In-Roads filed its protest in accordance with the dispute and protest procedures outlined in the RFP, which accords with the dispute and protest regulations found in the Board of Education Regulations, 5 DCMR §§ 3713 and 3714 (1991). The Board of Education Regulations provide that an aggrieved party shall file its protest in writing with the procurement officer within ten days after the aggrieved party knows or should have known the facts giving rise to the protest. The provisions require the procurement officer to render a written decision within ten days of receipt of the protest stating the reasons for the decision. The dispute and protest regulations afford an aggrieved party an appeal of the procurement officer's decision to the Superintendent, who shall have 20 days from date of receipt of the protest to render a decision. The protester is then afforded 30 days to appeal the Superintendent's decision to this Board. In-Roads followed these procedures. In-Roads filed its protest with the Board 111 days after DCPS first notified it that its proposal was determined to be outside the competitive range, however, it filed its protest with the DCPS' procurement officer in less than 10 days after the procurement officer's March 31 letter

On April 9, 1997, the effective date of the Procurement Reform Amendment Act ("PRAA") all departments, agencies, instrumentalities, boards and commissions of the District of Columbia, including independent agencies, such as DCPS, became subject to the Procurement Practices Act ("PPA") and the Procurement Regulations found in 27 DCMR. (See D C Code § 1-1181.4(a), D C Law 11-259 § 101(b), 44 DCR 1423). The Board of Education's protest and dispute regulations found in Title 5 are no longer applicable to DCPS solicitations. Persons aggrieved by the procurement decisions of DCPS are required to file protests directly with the Board. However, In-Roads' failure to file its protest directly with the Board does not defeat our jurisdiction.

We treat the timely filing of protests with the procurement officer of DCPS as the functional equivalent of filing with the Board. *Fort Myer Construction Corp.*, CAB No. P-452, July 23, 1996, 44 D.C. Reg. 6476. This result is especially compelling here because the protest was misfiled as a result of DCPS's express filing instructions in the RFP, and because the procurement officer failed to forward to the Board the misfiled protest, as we explicitly instructed in *Fort Myer*. The procurement officer and the Superintendent decided instead to ignore the offeror's protests. In-Roads meticulously followed the protest procedures set forth in the RFP

The RFP was issued two months after the effective date of the PRAA, which invalidated the

use of the dispute and protest procedures found in 5 DCMR and required the filing of protests directly with the Board. DCPS had ample time prior to the issuance of the RFP and certainly prior to the submission of proposals to delete the incorrect filing procedures and inform offerors of the correct filing procedures for protests and appeals. We believe it would be inequitable to punish In-Roads for DCPS's error. The District's motion to dismiss is denied. Further, DCPS should immediately amend, if it has not previously done so, the provisions of any solicitations which it issues in order to advise the public of the correct protest and dispute procedures.

Merits

In-Roads initially asserted as grounds of protest its exclusion from the competitive range based on information that it was ranked in second place among a field of thirteen contractors. In-Roads did not know of the irregularities in the initial evaluation in which members of the evaluation team evaluated different proposals, and of DCPS's attempt to correct this error by convening another technical evaluation panel. For the first time, In-Roads learned of possible new grounds of protest in the District's Motion to Dismiss/Agency Report. In-Roads timely filed its Reply to the District's Motion to Dismiss/Agency Report and asserted new grounds of protest. In-Roads contends that DCPS performed a flawed cost evaluation and a flawed technical evaluation.⁴

Cost Evaluation

In-Roads claims that DCPS's evaluation of its cost proposal was flawed in several respects. Preliminarily, the protester points out that the information on the cost evaluation contained in the Agency Report is fragmentary, does not present a clear picture of DCPS's actions in excluding In-Roads from the competitive range, or explain why In-Roads received a score of only 16 out of a possible 30 points for its cost proposal. This in itself is an deficiency in documentation which prevents a clear analysis of how the evaluations were reached. However, we have sufficient information based on our review of the RFP, the records of the evaluations provided, the Agency Report and Protester's Reply, to determine that the second TEP evaluation, which placed In-Roads' outside the competitive range, was unreasonable.

In negotiated procurements, agency selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results in making their determination. *General Servs Engineering, Inc.*, B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44. The record of the agency's action must demonstrate that the agency acted "reasonably and in accord with stated evaluation criteria, and not in violation of procurement laws and regulations."

⁴The District originally notified the Board that it intended to file a response to the Reply of Educational In-Roads to Motion of the District of Columbia to Dismiss Protest or, in the Alternative, Agency Report. However, on the date that the reply was due, the District wrote "that we adequately responded to the protester's concerns in our previous Motion to Dismiss" (Letter dated October 6, 1998, from Warren J. Nash, Assistant Corporation Counsel, to the Board).

Scientech, Inc B-277805.2, Jan. 20 1998, 98-1 CPD ¶ 33. Furthermore, the determination of competitive range is primarily a matter of administrative discretion, which we will not disturb absent a clear showing that the determination is reasonable *Coopers & Lybrand*, 66 Comp. Gen. 216 (1987), 87-1 CPD ¶ 100, *Besserman Corp*, 69 Comp Gen. 252 (1990), 90-1 CPD ¶ 191. However, if there is a close question of acceptability or if the noted deficiency is susceptible to correction through relatively limited discussions, then the inclusion of the proposal in the competitive range is in order. *Besserman Corp*, 69 Comp Gen. 252, *supra*

We find that DCPS's formula for assigning scores to cost proposals was improperly employed and resulted in In-Roads' unfair exclusion from the competitive range. Although the Agency Report does not explain the scoring of cost proposals, the formula in the RFP indicates that points were assigned on the basis of a ratio of the proposed cost to the lowest offered cost. This formula presumes that an offeror would propose a "total price" that could be compared with the total price of other proposals based on the same services. However, offerors were not required to bid on the same items or the same quantity of services. Moreover, there was no uniformity in the definition of services to be provided. It was not until after the competitive range determination had been made that DCPS sought information from offerors about what they had included in their offers based on a common set of definitions and in a consistent format that would permit an accurate evaluation of proposed costs. The initial cost formula appearing in the RFP was improperly employed for these reasons. These factors prevented a true comparison of costs at the time that DCPS made its initial determination of competitive range. The proposed costs for the thirteen contractors were not based on the same assumptions and no meaningful comparison could be made for purposes of determining the ultimate cost to the government.⁵ Rather than clarifying the differences between the proposals, the use of the cost evaluation formula which was not based on a common set of definitions, distorted the differences and obscured the relative merit of the proposals. DCPS' erroneous cost evaluation unfairly disadvantaged In-Roads.

⁵The protester challenged the validity of DCPS's cost evaluation by making a comparison of several components of its proposal to other proposals. For instance, In-Roads' proposal price of \$338 for speech therapy evaluation was within \$13 of awardee Riverside's price of \$325. (Protester's Reply, Exhibit A and Agency Report, Exhibit 13) Riverside and In-Roads were the only contractors who proposed a price for a "full evaluation". In-Roads' proposed price for full evaluation was \$995 while Riverside's price was \$890 for full evaluation. However, Riverside had other costs for travel and materials in the amount of \$21,000 which were included in In-Roads' proposed price, and extra charges of \$65 per hour for parent/teacher and DCPS consultation which In-Roads proposed to provide at no cost. It is also not clear that DCPS confirmed that Riverside's full evaluation included the same components as In-Roads'. The Protester pointed out several other anomalies in a comparison of proposed prices between In-Roads and several successful awardees which DCPS' perfunctory cost comparison methodology produced. Contrary to DCPS' assertion that based on its evaluations the proposals, it received the best value or price, it appears that it may not have received the best value or prices because its cost analysis was flawed.

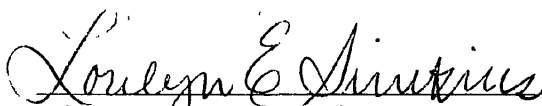
The competitive range consists of all proposals that have a reasonable chance of being selected for award, generally including proposals that are technically acceptable or reasonably susceptible of being made acceptable through discussions. *Kranco, Inc*, B-242579, May 1, 1991, 91-1 CPD ¶ 425. The competitive range is to be "determined on the basis of cost or price and other factors, in accordance with the evaluation criteria that were stated in the solicitation." 27 DCMR 1620.1 Cost or price may emerge, as it did here, as the dominant factor in determining whether proposals fall within the competitive range. A flawed determination of cost, which causes an otherwise acceptable proposal to be prematurely excluded from the competitive range, is unreasonable. The record does not support the agency's conclusion, that at this stage in the procurement, In-Roads did not have a reasonable chance for award.

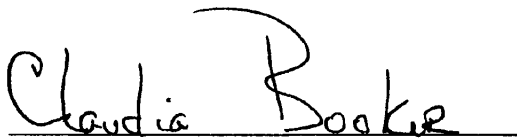
While In-Roads claims that the technical evaluation was also unreasonably performed, we find it unnecessary to review those grounds of protest, since we are satisfied that the protester was prejudiced by the actions of DCPS in the evaluation of In-Roads' cost proposal and in In-Roads' exclusion from the competitive range based on DCPS's evaluation of its costs. Accordingly, we sustain the protest.

The record indicates that contracts were awarded to four companies in May, 1998. We are hesitant to disturb the on-going provision of services to DCPS by terminating those contracts, given the difficulties DCPS has had with special education compliance. Yet, we believe that a remedy can be devised which does not jeopardize DCPS' efforts to timely perform assessments of students, but also accords with notions of fairness for the protester. We, therefore, order that within ten days from the date of this decision that the Office of Corporation Counsel arrange a telephone conference with the Board, In-Roads and program and procurement officials of DCPS, to discuss possible remedies. Further, we order payment of reasonable bid preparation costs. In-Roads shall prepare those costs and present them to DCPS before the date set for the telephone conference.

SO ORDERED.

DATE October 27, 1998


LORILYNE SIMKINS
Chief Administrative Judge


CLAUDIA BOOKER
Administrative Judge