COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

40312

B-179089

December 28, 1973

Chemical Technology, Inc.
Suite 217
910 17th Street, N.W.
Washington, D.C. 20006

Attention: Mr. William L. Devries, President

Gentlemen:

Further reference is made to your mailgram dated July 4, 1973, and related correspondence, on behalf of your subsidiary, Checker Service Company ("Checker"), protesting an award to Tidewater Management Services, Inc. ("Tidewater"), under request for proposals No. N00123-73-R-1643, issued on April 13, 1973, by the Naval Regional Procurement Office, Los Angeles, California.

The solicitation, a 100 percent small business set-aside, requested offers for a fixed-price services contract for mess attendant services at Naval Air Station, Miramar, California, for a term of one year with two one-year options.

The RFP required the submission of manning charts and contained the following provisions:

"<u>SECTION D-EVALUATION & AWARD FACTORS</u>

<u>Evaluation of Offeror's Manning Charts and Prices</u>

(a) The manning levels reflected in the offeror's manning charts must be sufficient to perform the required services. For the purpose of evaluating proposals and establishing a competitive range for the conduct of negotiations, the Government estimates that satisfactory performance will require total manning hours (including management/supervision) of approximately 370 on a representative weekday and approximately 200 on a representative weekend day/holiday. Submission of manning charts whose total hours fall more than 5% below these estimates may result in rejection of the offer without further negotiations unless the offeror clearly substantiates the manning difference with specific documentation demonstrating that the offeror can perform the required services satisfactorily with such fewer hours.

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"(b) Further evaluation of the offerors' manning charts will be based on the following criteria:

(1) the manning distribution in space/job categories prior to, during, and after meal hours and at peak periods must represent an effective well planned management approach to the efficient utilization of manpower resources in performing the services required; and

(2) the hours shown in the manning charts must be supported by the price offered when compared as follows. The total hours reflected in the manning charts for the contract period (i.e., based on a contract year containing 252 weekdays and 113 weekend days/holidays) will be divided into the total offered price (less any evaluated prompt payment discount) to assure that this dollar/hour ratio is at least sufficient to cover the following basic labor expenses:

(i) the basic wage rate;

(ii) if applicable, fringe benefits, (health and welfare, vacation, and holidays); and

(iii) other employee-related expenses as follows:

(A) FICA (including Hospital Insurance) at the rate of 5.85%;

(B) Unemployment Insurance at the rate set forth by the offeror in the provision in Section D of this solicitation entitled 'Offeror's Statement as to Unemployment Insurance Rate and Workmen's Compensation Insurance Rate Applicable to His Company'; and

(C) Workmen's Compensation Insurance at the rate set forth by the offeror in the provision referred to in (B) above.

Failure of the price offered to thus support the offeror's manning chart may result in rejection of the proposal without further negotiations.

(c) Award will be made to the responsible offeror whose proposal, meeting the criteria set forth in (a) and (b) above, offers the lowest evaluated total price.

"Note to offeror: The purpose of the above price-to-hours evaluation is to assure:

(i) that manning charts submitted are not unrealistically inflated in hopes of securing a more favorable proposal evaluation; and,

(ii) that award is not made at a price so low in relation to basic payroll and related expenses established by law as to jeopardize satisfactory performance.

Nothing in this Section D shall be construed as limiting the contractor's responsibility for fulfilling all of the requirements set forth in this contract."

The manning hours estimate (paragraph (a) above) was subsequently reduced to 310 for a representative weekday and 180 for a representative weekend day. The minimum hourly wage was determined to be $2.85, consisting of $2.73 basic hourly wage and $0.12 health and welfare benefit. Proposals based on these figures were received from fifteen offerors. Applying the evaluation criteria cited above, the contracting officer determined that both Checker and Tidewater would be included in the competitive range for negotiation procedures.

Negotiations were conducted and best and final offers were requested to arrive not later than June 22, 1973. Analysis of the final offers of Checker and Tidewater is shown below:

	Checker	Tidewater
Total hours	96,882.5	93,550
Total price (net)	$297,586.14	$315,650.16
Average dollar per hour price	3.0716	3.3741
Minimum possible dollar per hour wage cost	3.322	3.348

"Average dollar per hour price" was computed simply by dividing total hours into total net price. "Minimum possible dollar per hour wage cost" was determined by adding to the minimum hourly wage of $2.85 the following: (1) 5.85% FICA; (2) 5% estimate for vacation and holiday pay; and (3) workmen's compensation and unemployment insurance rates as provided by each offeror.

Based on the above table, the contracting officer eliminated Checker, the low offeror, as not conforming with paragraph (b)(2), Section D, of the RFP and, pursuant to paragraph (c) of the above-cited Section D, made the award to Tidewater, the second low offeror. In various correspondence with the contracting agency, you conceded that your reduced your price in your best and final offer to a point where it no longer supported the total manhours offered, but contended that you did this knowingly and that you were prepared to incur a loss if necessary in order to obtain the contract.

The essence of your protest is that, since you were determined to be within the competitive range, and since your best and final offer contained the lowest total net price, you should have received the award unless you were determined to be nonresponsible. The agency contends that application of the evaluation criteria in Section D of the RFP shows that you could not perform without incurring a substantial loss or jeopardizing satisfactory performance, and that your proposal was therefore properly dismissed.

While it is true that the determination to reject Checker's offer was based in fact on considerations usually going to questions of responsibility (51 Comp. Gen. 204; id. 308, (1972)), we do not agree that in this negotiated procurement such rejection was in essence a determination of responsibility. Rather, the failure of Checker's final offer to be considered for negotiation was due to its deficiencies in the area of compliance with the Government's express requirements. Cf. 46 Comp. Gen. 893 (1967).

In 52 Comp. Gen. 198, 208 (1972) our office concurred in an agency's exclusion from the competitive range of an initially acceptable offer, where:

> "after the revised proposals were examined * * * serious misgivings arose concerning * * * [that offeror's] ability to perform the contract successfully."

Under such circumstances we stated:

> "* * * Whether a proposal is initially determined to be within the competitive range or whether the proposal is initially rejected, the contracting agency should not be required to hold discussions with an offeror once it is determined that his proposal is outside the acceptable range. See B-174436, April 19, 1972, and B-173967, February 10, 1972, where we upheld administrative determinations to exclude firms initially determined to be within the competitive range from further award consideration after their revised proposals were found to be technically unacceptable and no longer within the competitive range."

Applying the above principles to your protest, together with the mandate of the evaluation criteria, we think that the mere fact an offeror is initially determined to be in the competitive range for the purpose of further negotiations in no way prevents the contract negotiator from subsequently rejecting an offer which does not finally meet that mandate. Consequently, your reliance on B-170038, March 29, 1971 (50 Comp. Gen. 679) is misplaced. In that case we found that once an offeror had submitted an acceptable manning schedule and was therefore considered to be within the competitive range, award should have been made to that offeror submitting the lowest total price. Here, however, there were evaluation criteria which your firm did not meet.

We therefore agree with the Navy's decision to award a contract to Tidewater. The RFP provided that award would be made to the offeror whose proposal met the two basic evaluation criteria, that is, a proposed manning level within 5 percent of the Government estimate (unless justification was provided for a different level) and a price to support the direct labor costs involved in that manning level. However, the RFP also explained that the purpose of the second criterion was to prevent unrealistically inflated manning charts and an award at a price so low that satisfactory performance would be jeopardized.

Here, there was a substantial difference between Checker's proposed average cost per hour or dollar/hour ratio and the computed basic labor expense. Under these circumstances, the contracting officer acted in accordance with the RFP in rejecting Checker's final offer and accepting Tidewater's.

For the foregoing reasons, your protest is denied.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States