



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Matter of: Tri-State Government Services, Inc.

File: B-277315.2

Date: October 15, 1997

Nicholas A. Della Volpe, Esq., Wagner, Myers & Sanger, for the protester.

Fred T. Hanzelik, Esq., Hanzelik & Associates, for Associated Environmental Services, Inc., an intervenor.

Robin Walters, Esq., Defense Logistics Agency, for the agency.

Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation price schedule required offerors to submit single unit prices for estimated line item quantities, a proposal which split many of the agency's estimated line item quantities and separately priced these quantities in a manner economically advantageous to the offeror was improperly selected for award. Awardee's noncompliant pricing scheme obtains excessive early payments and limits offeror's economic risks in the event the agency does not purchase its full estimated item quantities, thus affording the awardee an unfair pricing advantage over offerors using the required price schedule.

2. Agency improperly conducted discussions with awardee after the submission of best and final offers to allow awardee to explain and provide prices for required quantities beyond the estimated quantities set forth in the solicitation.

DECISION

Tri-State Government Services, Inc. protests the award of a contract to Associated Environmental Services, Inc. under request for proposals (RFP) No. SP4400-96-R-0023, issued by the Defense Reutilization and Marketing Service (DRMS), Defense Logistics Agency (DLA) for the removal, transportation, and disposal of hazardous and nonhazardous waste items located at various DRMS sites. Tri-State argues that the awardee's offer did not comply with the RFP terms for submission of offers and that the agency improperly engaged in discussions with the awardee.

We sustain the protest.

The RFP, issued as a small business set-aside on September 27, 1996, contemplated the award of a firm, fixed-price requirements contract for an 18-month base period with 2 option years. The RFP called for firms to provide hazardous waste management and disposal services for specifically identified generators and various pickup points.

The RFP, which required the submission of separate technical, price, and past performance proposals, cautioned offerors that proposals which did not provide the required information in the prescribed format could be excluded from consideration. The RFP provided that award would be made to the offeror whose proposal, conforming to the solicitation, was determined to be most advantageous to the government and identified, as evaluation factors, price, past performance, socioeconomic plan, and Mentoring Business Agreement participation. Price and past performance were of equal importance and significantly more important than the value of the other two factors combined.

The solicitation price schedule divided the work to be performed into 94 contract line items (CLIN) in each contract period, specifying the agency's estimated quantities for each CLIN. The line items were grouped into "special requirements" and the removal of different waste types, including, for example, "ignitable wastes," "corrosive wastes," "reactive wastes," "toxicity characteristic wastes," and "spent solvent wastes." Offerors were required to insert a single unit price in the space provided for each CLIN, multiply the unit price by the agency's estimated quantity to arrive at an extended price for each CLIN, and then add together the amounts for each CLIN to arrive at a total line item amount. The RFP provided that an offeror's total price for both options would be added to its total price for the basic requirement to calculate the total contract price.

Eleven offerors submitted initial proposals by the October 31, 1996, closing date. The proposals were reviewed by contracting personnel and, based on this review, five proposals, including Tri-State's and Associated's, were included in the competitive range. DLA held discussions with these five offerors and requested best and final offers (BAFOs) by April 7, 1997. DLA requested second BAFOs from the competitive range offerors by May 16. DLA evaluated 4 of the 5 offerors' BAFOs, including Tri-State's and Associated's, as "good" under past performance evaluations and "good" under their best value composite ratings and price essentially became determinative. Associated offered the low price of \$3,296,500; Tri-State's price was second low at \$3,443,189.30.

In its second BAFO, Associated for the first time used a pricing methodology different from that called for by the RFP. Instead of submitting single unit prices for each CLIN as requested by the RFP price schedule, for 18 CLINs in the base period and 14 CLINs in each of the option periods, Associated split the agency's estimated quantities listed on the price schedule and submitted one price for a number that it designated the "first" quantities ordered and a different price for

what it designated the "next" quantities ordered. Associated did this by lining through the estimated quantity figure for the particular CLIN and printing in its own quantities and prices for both the "first" and "next" quantities in lieu of the single existing pricing block for that particular CLIN in the solicitation price schedule form. In effect, Associated created an extra line item for each of the affected CLINs. For example, under CLIN 6613AC, Cleaning/Service Charge for Oil Water Separators, instead of one CLIN price for the estimated quantity of 22, Associated offered a unit price of \$600 for the "first 12" and a unit price of \$50 for the "next 10." Under CLIN 6615BB, Providing Storage Containers, 20 Cubic Yard Rolloff, the awardee offered a unit price of \$800 for the "first 2" and a unit price of \$50 for the "next 4." Under CLIN 6615CC, Provide Storage Containers, 30 Cubic Yard Rolloff, Associated offered a unit price of \$800 for the "first 2" and a unit price of \$30 for the "next 28."¹ DLA treated Associated's pricing strategy as a minor irregularity and awarded the contract to Associated on June 12. This contract contains a "note of understanding" which reads as follows:

Incremental pricing as indicated in the bid schedule, is understood between parties, that in any instance where the quantity exceeds the government estimate, the last price of the incremental priced CLIN in any performance period, will be the price used for the balance of performance.

Tri-State protested the award to our Office on July 7.²

Tri-State contends that the awardee improperly modified the agency's price schedule and that, therefore, its offer should not have been considered for award. Tri-State complains that the awardee used pricing options which were not made available to all offerors on line items representing over two-thirds of the contract waste removal quantities and one-fourth of the special service requirements.³ Tri-State contends that this pricing variation gave Associated an unfair advantage

¹In most instances, the awardee's prices on the split CLINs were higher for "first" quantities and lower for "next" quantities. However, two CLINs under the base period and one CLIN under each option period were priced lower for the "first" quantities and higher for the "next" quantities.

²Tri-State initially protested this procurement on June 23. On June 25, we dismissed that initial protest, B-277315, as legally insufficient because the protester alleged improper agency evaluation based "on information and belief" and did not submit any supporting explanation or documentation.

³The protester calculates that 3,143,900 pounds of the total 4,692,828 pounds of waste the agency estimates will be removed are included in those line items for which Associated offered split prices.

relative to the other offerors and that, if the methodology was acceptable, all offerors should have been given the same opportunity to use incremental pricing in their offers. Tri-State also contends that the agency improperly engaged in discussions with the awardee after the second round of BAFOs. The protester argues that DRMS re-opened discussions with Associated to negotiate prices for any quantities ordered above the estimates given in the solicitation. The protester argues that it was unclear from Associated's offer if the firm had agreed to provide quantities greater than the estimates and, even if Associated had agreed to provide services beyond the estimated service, the offeror's price for these services was not clear from its BAFO.

The agency responds that the awardee submitted pricing for each service required by the RFP and did not deviate from or vary any term or condition contained in the solicitation. The agency contends that nothing in the RFP prohibited the awardee's pricing strategy. Accordingly, the agency views the split pricing methodology as a minor irregularity, consistent with the RFP. The agency argues that the protester was not prejudiced by the awardee's pricing strategy because all proposals were evaluated based on the total estimated quantities of services, and contends that its acceptance of this pricing strategy is consistent with our decisions allowing agencies to accept pricing strategies that vary from the solicitation but offer the lowest cost to the government. See, e.g., Holmes and Narver, Inc., B-196832, Feb. 14, 1980, 80-1 CPD ¶ 134 at 7-9; Keco Indus., Inc., 54 Comp. Gen. 967, 969-70 (1975), 75-1 CPD ¶ 301 at 3-5.

We conclude that the agency improperly accepted the awardee's offer.

A proposal that fails to conform to material terms and conditions of a solicitation should be considered unacceptable and may not form the basis for an award and the fact that the awardee may, after award, agree to be bound to the conditions of the solicitation does not render the proposal acceptable or the award proper. Multi-Spec Prods. Group Corp., B-245156.2, Feb. 11, 1992, 92-1 CPD ¶ 171 at 3-4; Martin Marietta Corp., 69 Comp. Gen. 214, 219 (1990), 90-1 CPD ¶ 132 at 7. Where, as here, an irregularity in an offer results in benefits to an offeror not extended to all offerors by the solicitation, and is prejudicial to other offerors, the offer is unacceptable. See Valix Fed. Partnership I, B-250686, Feb. 1, 1993, 93-1 CPD ¶ 84 at 4.

Although the RFP contained no separate, specific instructions stating that only single unit prices could be submitted for each CLIN, it is clear from the structure of the price schedule which provides a single space for a unit price next to the

estimated quantity, that a single price is called for. This is reinforced by the RFP warning that proposals which do not provide the required information in the prescribed format may be excluded from consideration.⁴

The pricing format substituted by Associated deviated from the RFP price schedule for 46 line items by splitting the estimated line item quantity and pricing the designated smaller quantities separately, effectively converting each affected CLIN into two CLINs. While this type of pricing structure can yield a total offer for evaluation purposes, the substantially higher unit prices for "first" quantities afford Associated the opportunity to realize more revenue and profit at the earlier stages of contract performance. Associated thereby capitalized on the possibility that the agency will need less than the total estimated quantities of services, and front-loaded the payments associated with the "first" orders. Contrary to the agency's contention that Associated's pricing offered the lowest cost to the government, our analysis of Associated's pricing shows that the awardee's pricing is not low in all circumstances. Specifically, if the agency requires only the "first" quantities in Associated's offer, the offer is not low in the base and first option periods and not low overall. Indeed, using only the "first" quantities on the split CLINs, Associated's prices for the base period and option periods are \$1,281,563, \$862,363, and \$822,453, respectively. Tri-State's prices, based only on Associated's "first" quantities, are \$1,192,402, \$815,923, and \$823,153, respectively. Tri-State's total price would thus be only \$2,831,478, while Associated's would be \$2,966,379.

Associated was awarded the contract on the basis of its evaluated low price under a unique and nonconforming price schedule which benefits the offeror and minimizes the risks associated with estimated quantities. In these circumstances, we find without merit the agency's contention that, even if Associated's pricing was improper, Tri-State was not prejudiced.⁵ The agency improperly accepted Associated's nonconforming offer, and this acceptance of Associated's offer was prejudicial to the other offerors.

⁴The protester states that, subsequent to the filing of this protest, DRMS issued amendments to two other solicitations advising offerors that more than one price, a range of prices, or a "split bid" with respect to any contract line item will be considered by the agency as a material deviation from the bid schedule and/or a nonconforming proposal that will be excluded from further consideration.

⁵Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Next, regarding the protester's allegation that the agency improperly conducted discussions with only Associated after receipt of the second BAFOs, the agency responds that the contracting officer believed that it was "reasonably clear" that Associated had offered its "next" pricing for all quantities exceeding the precise number of "first" units specified and that the contracting officer sought clarifications from Associated solely to confirm this reading of the pricing scheme and "avoid any future disputes or claims based on an alleged ambiguity."

Discussions occur when the government communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal or provides the offeror with an opportunity to revise or modify its proposal. Federal Acquisition Regulation (FAR) § 15.601. In contrast, clarifications are merely inquiries for the purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in a proposal and do not give an offeror the opportunity to revise or modify its proposal. *Id.* If a procuring agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range, whereas clarifications may be requested from just one offeror. *Global Assocs. Ltd.*, B-271693, B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100 at 4.

Here, we agree with the protester that the communications of the agency and the awardee as to the prices for services beyond the estimated quantities constituted discussions. Specifically, we do not concur with the agency's assessment that the price for additional services beyond the estimates was "reasonably clear" from Associated's BAFO. Associated's BAFO explicitly states a specific price for a specified number of "first" quantities and a specific price for a specified number of "next" quantities. Associated's offer is silent as to its price for any other quantities, that is, for quantities above the estimated amounts. This may raise a question as to whether Associated was obligated to provide additional quantities above the estimated quantities, as required by the RFP, and raises doubt about the prices for these additional services. Associated's prices on these additional quantities could have been its "first" quantity prices, its "next" quantity prices, or, a third, unknown price.⁶ Under these circumstances, the information sought by the agency, that is, the offeror's agreement to supply additional waste removal services above the estimated quantities at a specified price was essential to determining the acceptability of the proposal. In fact, this information was used to modify the award to Associated in the form of the "note of understanding" discussed above. Because the communications between the agency and Associated involved the exchange of information necessary to determine the acceptability of Associated's

⁶In contrast, a single unit price, as called for by the solicitation, leaves no doubt: all quantities--including requirements greater than the estimates--are offered at the single, stated price.

proposal, those communications constituted discussions . FAR § 15.601, Global Assoc. Ltd., supra.

DLA did not suspend performance of Associated's contract because it found that urgent and compelling circumstances existed which significantly affected the interest of the United States. However, Associated has performed only 4 months of the 18-month base contract. Given this level of performance and the nature of the services to be performed, we recommend that the agency terminate the awardee's contract and award to Tri-State, if otherwise appropriate. Bid Protest Regulations 4 C.F.R. § 21.8(a), (b) (1997). We also recommend that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States