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DECISION



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

10,959

FILE: B-188770

DATE: August 7, 1979

MATTER OF: Fortec Constructors

DIGEST:

1. Where request for proposals (RFP) informed offerors that alternate features would be considered in proposal evaluation and encouraged proposers to "present creative uses of systems" and "strive for excellence in architectural design" beyond specified minimum quality standards, RFP adequately advised offerors that design initiatives exceeding minimum requirements would be accorded additional evaluation points.
2. Despite protester's lower offered price, GAO finds nothing objectionable in award to offeror who had higher priced proposal where award is based upon lowest cost per technical quality point ratio, offeror's proposal is technically superior and RFP advises offerors of use of cost per quality point ratio.
3. Claim for proposal preparation costs on basis that offeror was induced to submit proposal because agency failed to state procurement involved nonappropriated funds is denied since even if agency was required to or traditionally so informed offerors, failure to do so was at most due to inadvertence or mere negligence. To recover claimant must show that agency solicited proposal in bad faith or considered proposal in arbitrary or capricious manner.

Fortec Constructors (Fortec) protests the award of a contract under request for proposals (RFP) No. DACA21-77-R-0080, issued by the U.S. Army Corps of Engineers (Corps), Savannah District and, in addition, requests proposal preparation costs. The RFP solicited proposals

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[Protest Against Bid Rejection]

for the design and construction of a commissary at Fort Stewart, Georgia. Basically, Fortec questions the award of a contract to a higher priced offeror in light of what Fortec believes was the limited design freedom accorded offerors by the RFP. For the following reasons we are denying the protest as well as the claim for proposal preparation costs.

We initially dismissed this protest upon receipt of advice from the Corps that nonappropriated funds were involved in this procurement, because this Office does not settle nonappropriated fund accounts. Fortec Constructors, B-188770, April 14, 1977, 77-1 CPD 260. However, upon reconsideration, we held that the commissary surcharge funds used were appropriated and subject to our settlement authority. Fortec Constructors--Reconsideration, 57 Comp. Gen. 311 (1978), 78-1 CPD 153. This decision deals with the merits of Fortec's protest.

In its initial report on the merits, the Corps contended among other things that Fortec's protest was untimely. However, the Corps ignored this issue when Fortec first submitted its protest in April 1977 and instead chose to rely on the jurisdictional argument that nonappropriated funds were involved. At this point, in view of the protracted history of this case and because the record has been fully developed, we believe it would be appropriate to proceed without questioning the timeliness of Fortec's protest.

The RFP solicited proposals through a design and cost competition on a firm-fixed price "turnkey" basis. Offerors were specifically advised that the Army reserved the right to make an award of a contract to other than the proposer submitting the lowest priced offer.

The RFP also advised offerors that \$5,559,372 was the total amount available for commitment to the contract, that other desirable features exceeding RFP requirements could be submitted "as long as award can be made within established contract funds," and that alternate features would be considered in proposal evaluation.

The RFP instructions provided that:

"Proposal evaluation criteria. Proposal evaluation will consider both technical quality and cost. The major technical evaluation areas, in order of decreasing importance are as follows:

ARCHITECTURAL
INTERIOR DESIGN
LANDSCAPE DESIGN
GRAPHIC DESIGN
CONSTRUCTION TIME

"Proposals will be reviewed to determine compliance with minimum requirements of the RFP and numerical quality ratings will be assigned for each design factor. Quality ratings may be assigned for any separately priced desirable features which exceed the requirements of the RFP. After the quality ratings of proposals have been determined, their relative value in terms of proposed price will be established by means of a price/quality ratio:

$$\frac{\$ \text{ Price}}{\text{Quality Rating}} = \$ \text{Per Quality Point}$$

"The price/quality ratio will be considered only as a statistical indicator in comparing technical quality with proposal prices. Contract award will be made on the basis of price per quality point and other technical salient factors in the proposal, considered in the Government's best interest."

In addition, the RFP listed and explained the subcriteria included under each of the major criteria, and indicated which of the subcriteria would receive the greatest evaluation emphasis. However, the precise numerical point breakdown was not disclosed.

The Corps, in evaluating proposals, assigned a minimum of 6,000 quality points to a proposal which

met the minimum requirements of the RFP. An additional total of 2,000 points was available for a creative design or other desirable features offered which exceeded the minimum RFP requirements. Award was made to the offeror receiving the lowest dollar per quality point (\$/q.p.) ratio, obtained by dividing the total number of technical quality points into the offeror's proposed fixed price.

Fifteen proposals were received in response to the RFP, with the following pertinent results:

| <u>Offeror</u> | <u>Price</u> | <u>Quality Points</u> | <u>Ratio</u> |
|------------------|--------------|-----------------------|--------------|
| Ira H. Hardin | \$4,584,436 | 7,353 | 623.48 |
| X (lowest price) | 4,176,900 | 6,193 | 674.46 |
| Fortec | 4,468,000 | 6,310 | 708.08 |

Award was made to Hardin.

Fortec contends that the RFP did not allow for major design innovations and did not place offerors on notice that a substantial portion of the total available technical points would be assigned for design features exceeding the minimum requirements of the RFP. In Fortec's view, the plans and specifications of the RFP are so detailed that "they leave only minutia for 'design' by each bidder." Thus, Fortec believes the Army could consider technical design innovation only to a limited extent and that award should have been based primarily on price.

The record does not support Fortec's position. We believe that several questions and answers during a pre-proposal conference (which Fortec attended), in conjunction with the language of the RFP indicate that offerors had a wider latitude in preparing their technical proposals than Fortec indicates. For example, questions relating to design and construction were raised and answered as follows:

- Q. "Should we match exterior materials on the Post Exchange and how much variation is desired in exterior design?"

- A. "[Brick type is specified] to match the brick used on the adjacent PX building. Page 3-1 * ** requires the exterior design and selection of materials to be compatible with the adjacent PX building * * * but not match. Superiority of exterior design will be one of the bases for evaluation."
- Q. "Is reinforced concrete, load bearing, tilt wall exterior wall construction acceptable?"
- A. "Wall construction is only limited by the RFP performance criteria and the requirement that they be faced with brick."
- Q. "Are any specific energy conservation guidelines to be followed?"
- A. "No."
- Q. "Is there a preference for a specific decor theme at interior elevations?"
- A. "No. This is a design opportunity."
- Q. "What kinds of ceiling systems are required?"
- A. "The minimum is stated [in the RFP]. Other systems or configurations would be evaluated as part of interior design."

These answers suggest to us that offerors were clearly informed that within the requirements of the specifications, they had broad latitude in the design and construction of the facility. Moreover, the RFP stated that:

* * * From an Architectural and Landscape Design standpoint, the RFP describes the functional scope and minimum quality standards of the Commissary Facility. However, in his submittal, the Proposer is encouraged

to present creative uses of systems and materials within the scope and standards required by the RFP. The Proposer is also encouraged to strive for excellence in architectural design. This requires a commitment by Proposers as well as the Government to architectural quality, which includes the physical linkage of architecture to the surrounding community, and the details of design that affect the building's users. Special emphasis should be placed on the quality of the architectural design * * *." (Emphasis added.)

We find that this RFP, which fully advised offerors that the RFP describes a "minimum quality standard," that quality ratings may be assigned for desirable features which exceed the requirements of the RFP, and that offerors are "encouraged to present creative uses of systems" and "to strive for excellence in architectural design," placed prospective offerors on notice that design initiatives beyond the minimum requirements of the RFP would be accorded additional points. See Automated Systems Corporation, B-184835, February 23, 1976, 76-1 CPD 124. We believe it would have been unreasonable for offerors to assume, in light of the RFP statement and evaluation criteria, that one proposal offering significant design features beyond that of another proposal would not receive a higher rating. See Digital Equipment Corporation, B-183614, January 14, 1976, 76-1 CPD 21.

Fortec also questions how any proposal in this area could be so much better than another thereby warranting the additional expenditure associated with Hardin's proposal. In this regard, the record shows that the evaluators found substantial variations in the proposals submitted with respect to exterior design treatment (the RFP only required the new building be "compatible" with existing structures), internal lighting, air conditioning, heating and refrigeration systems, energy conservation concepts, structural systems, landscape design, etc. Hardin was clearly viewed as superior overall as 5 of the 6 evaluators scored Hardin's technical proposal higher than any other proposal.

In light of that technical superiority, and the use of the price/quality ratio formula, the validity of which we have recognized, see, e.g., TGI Construction Corporation, et al., 54 Comp. Gen. 775 (1975), 75-1 CPD 167; NHA Housing, Inc., B-179196, April 24, 1974, 74-1 CPD 211, we perceive nothing objectionable in an award to an offeror proposing to give the Government the most for its money. The propriety of making an award on the basis of other than low price in this type of negotiated procurement is, of course, well established. See Shapell Government Housing, Inc. and Goldrich and Kest, Inc., 55 Comp. Gen. 839 (1976), 76-1 CPD 161; Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168.

PROPOSAL PREPARATION COSTS

An offeror's entitlement to the costs of preparing its offer arises from the Government's responsibility in considering proposals submitted in response to a solicitation. Scot, Incorporated, B-189345, August 1, 1978, 78-2 CPD 82. The standard is whether the Government's conduct was arbitrary and capricious towards the bidder/offeror. Keco Industries, Inc., 492 F. 2d 1200 (Ct. Cl. 1974). Here the claimant seeks to characterize the Government's action as arbitrary and capricious because the RFP did not identify the source of the project funding as being a nonappropriated fund procurement.

Specifically, Fortec alleges that if it had been apprised that the solicitation involved nonappropriated funds, it would not have submitted a proposal. Fortec maintains it would not have submitted a bid for a nonappropriated fund procurement since this type of procurement is "not subject to standard procedures, including review by [the General Accounting] Office." Additionally, Fortec alleges that the procuring agency customarily identifies in its solicitation whether nonappropriated funds are involved and the failure to do so was such "that the agency in misrepresenting the solicitation was responsible for such arbitrary and capricious action with respect to a basic right of Fortec as will support reimbursement of Fortec's bid preparation costs." Thus Fortec claims that even though this Office ultimately concluded that appropriated funds were involved in the


solicitation, the agency treated the procurement from the outset as a nonappropriated fund procurement, "controverted" GAO's jurisdiction and made immediate award to Hardin, thus depriving Fortec of "its right to a meaningful review no less than if the solicitation had in fact involved appropriated funds."

We are, of course, unaware of the private business judgments which any firm might make with respect to preparing a proposal in an attempt to obtain the award of a Government contract, whether the source of the project funding is appropriated or nonappropriated. The responsibility for these decisions must rest with the offeror, and if in its judgment it does not choose to compete for nonappropriated fund contracts, it could easily determine the source of the funds by requesting such information from the contracting officer. We are aware of no statute or regulation which requires an agency to advise offerors of the precise source of the funds available for obligation. The citation of an appropriation in an RFP or contract is basically for administrative purposes; an erroneous citation confers no rights on a prospective contractor.

Moreover, even if the agency's standard practice was to advise prospective offerors of nonappropriated fund procurements, as alleged, (a matter which the agency disputes), the omission of the reference to nonappropriated funds would appear to be the result of simple negligence, as there is no evidence in the record to suggest that the agency intentionally sought to mislead offerors concerning the source of the funds. Mere negligence or lack of due diligence does not, standing alone, rise to the level of bad faith or arbitrary or capricious action. Airflote, Incorporated, B-179197, November 4, 1974, 74-2 CPD 236; see ABS Duplicators, Inc., Reconsideration (second), B-187604, June 30, 1977, 77-1 CPD 464; Cf. Groton Piping Corporation and Thames Electric Company (joint venture)-Claim for Bid Preparation Costs, B-185766, June 3, 1977, 77-1 CPD 389, where we denied bid preparation costs to a firm which received an invitation for bids which mistakenly contained a small business set-aside restriction. The joint venture, a small business concern, was the second low bidder; the low bidder/awardee, a large

business. There must be a showing of willful action or gross negligence by the Government. Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344. See also Fiber Materials, Inc., 57 Comp. Gen. 527 (1978), 78-1 CPD 422; William D. Freeman, M.D., B-191050, February 10, 1978, 78-1 CPD 120; A.R.F. Products, Inc., 56 Comp. Gen. 201 (1976), 76-2 CPD 541; Ampex Corporation, et al., B-183739, November 14, 1975, 75-2 CPD 304.

The protest and the claim for proposal preparation costs are denied.


Acting Comptroller General
of the United States