



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Penn, Ferrara, Adler & Eichel

File: B-224224

Date: February 9, 1987

DIGEST

1. A solicitation for an indefinite quantity of legal services that does not contain estimates for any of the specific services to be performed is defective since without estimates, the agency cannot compare proposals on an equal basis or ascertain which offeror submitted the lowest overall cost. Thus, the agency cannot determine which offer was most advantageous to the government when considering technical and cost factors, as required by the solicitation.

2. When solicitation deficiencies prevented offers from being evaluated on an equal basis, but termination and resolicitation of the basic contract is not possible, the procuring activity should not exercise options, but resolicit using a revised solicitation. However, since the protester participated in the competition and did not complain of an allegedly deficient evaluation until after award, it is not entitled to recover either proposal preparation costs or the costs of filing and pursuing the protest.

DECISION

Penn, Ferrara, Adler & Eichel protests the award of a contract for legal services to Gutman & Mintz, P.C., under request for proposals (RFP) No. 028H-86-012, issued by the New York Regional Office of the Department of Housing and Urban Development (HUD). The protester raises numerous questions regarding the propriety of the evaluation and award, contending primarily that it was given misleading and prejudicial advice regarding revision of its cost proposal.

We sustain the protest because we find that solicitation deficiencies prevented offerors from competing and the agency from evaluating proposals on an equal basis.

BACKGROUND

The solicitation, issued on January 13, 1986, contemplated an indefinite quantity contract having a base period of 1

year plus two additional 1-year option periods. The legal services to be performed relate to the eviction of illegal occupants from HUD-owned single and multi-family buildings in New York City. The contractor is to provide all qualified personnel, facilities, materials, and supplies necessary to perform all eviction proceedings, including court appearances and document preparation, promptly upon receipt of orders from HUD. Payment is to be on the basis of invoices submitted upon completion of each eviction.

The solicitation set forth six technical evaluation factors: success in prior similar litigation; academic and professional background of legal staff; size of staff (both legal and nonlegal); success in non-routine eviction cases; type and quantity of specialized office equipment; and proximity of office to courthouses. These were worth a total of 33 points. The RFP further provided that award would be based upon technical rating and reasonableness of cost, with price, although secondary, to be considered in determining which proposal was most advantageous to the government.

Nine offerors submitted proposals by the February 26 due date. The technical evaluation panel initially found four of these, including the one submitted by the protester, to be acceptable. The contracting officer, however, subsequently determined that he could not readily compare the cost proposals of these four offerors because they had been prepared using divergent approaches. For example, offerors broke down the services to be performed differently, and some proposed hourly rates and others fixed prices for particular services. To rectify this problem, the contracting officer provided each offeror with copies of the other proposals (with prices omitted) and asked each to submit a revised proposal using common terminology and including a breakdown of fees for identical services. He also informed offerors that HUD preferred fixed prices for each service and requested that they convert hourly rates, where proposed, to fixed prices. Separate items such as postage and copying were to be included in these fixed prices. These requests were not formalized in a written solicitation amendment.

Upon receipt of the revised cost proposals, the contracting officer states that he was still unable to compare or equate prices. Along with the evaluation panel, he therefore conducted oral discussions with the four offerors. The panel revised its ratings as a result of these discussions and determined that only three firms, including the protester, were still in the competitive range. Of those at issue here,

the awardee's proposal received the highest average technical score, 31.33 points, while the protester, the second-highest rated offeror, received 28.6.

HUD then requested best and final offers and determined that Gutman & Mintz's was most advantageous to the government. This was primarily because the contracting officer believed that this firm would require less assistance from HUD staff than the protester in connection with "holdovers," which are evictions for reasons other than non-payment of rent. Concluding that this offset the cost advantages of the protester's proposal, HUD entered into final negotiations with Gutman & Mintz that resulted in the award of the contract on July 21.

Penn Ferrara initially protested the award to the contracting officer, alleging primarily that it had been given misleading instructions regarding revision of its cost proposal and arguing that HUD had improperly accepted the awardee's proposal which, contrary to instructions, still included an hourly fee schedule. The firm concluded that its own proposal was most advantageous to the government. The contracting officer denied this protest on August 25. While conceding that he had specifically requested all offerors to include fixed prices in their revised proposals, he maintained that he had never advised offerors that hourly rates were unacceptable, but merely that they were undesirable. Since the awardee (and one other offeror) "remained adamant that certain services would only be performed on an hourly basis," and since such pricing was not actually prohibited, the contracting officer states, there was no basis to disqualify the awardee. Penn Ferrara's protest to our Office is on essentially the same grounds as its protest to HUD.^{1/}

DISCUSSION

Our review of the record supports the agency's determination that an equal comparison of the cost proposals as initially

^{1/} Penn Ferrara initially appealed the contracting officer's decision to the HUD Board of Contract Appeals, which formerly decided protests such as this one concerning procurements conducted under authority of the National Housing Act, 42 U.S.C. § 1701 et seq. (1982). The Board forwarded the protest to our Office in accord with recent decisions in which our Office assumed jurisdiction over National Housing Act procurements. See, e.g., CoMont, Inc., 65 Comp. Gen. 67 (1985), 85-2 CPD ¶ 555.

submitted was impossible. For the following reasons, we do not believe that the contracting officer could properly evaluate revised cost proposals or best and final offers either. Thus, he could not determine which was most advantageous to the government.

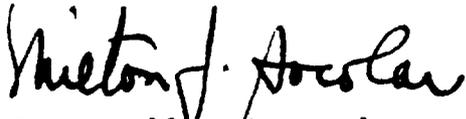
The solicitation in question required offerors to submit fixed unit prices for each specific legal service to be performed. However, it did not provide estimated quantities for any of these specific services, so that the unit prices could not be extended or a determination made as to the lowest overall cost. As a result, the agency could not properly evaluate or compare cost proposals. For example, one offeror might have submitted the lowest price for one task, such as filing a motion, but a higher price for a court appearance. Since these tasks would not necessarily be performed with the same frequency or require the same amount of professional or support time, the agency, without these estimates, could not ascertain which offer was most advantageous to the government. Certainly there was no reasonable basis for the contracting officer's determination that the awardee's higher price would be offset by the use of HUD staff time in processing holdovers.

Thus, regardless of the weight that cost was given in the evaluation scheme, HUD could not properly have considered this factor. Fabrics Plus, Inc., B-218546, July 12, 1985, 85-2 CPD ¶ 46; see Associated Healthcare Systems, Inc., B-222532, Sept. 2, 1986, 65 Comp. Gen. ____, 86-2 CPD ¶ 246.

We sustain the protest. We recommend that HUD issue a revised solicitation that includes an accurate estimate of the agency's needs for each of the legal services to be performed and that also contains specific instructions regarding the preparation of cost proposals on a fixed price or hourly fee basis. Performance has continued on the present contract, which expires June 30, 1987. Since it appears unlikely that HUD can revise its solicitation, conduct a new negotiated procurement, and select an awardee before this date, we do not recommend termination of the contract. Rather, we are recommending that HUD not exercise the option for extended performance.

Both the lack of estimates and the agency's failure to issue a written amendment stating a common basis for preparation of cost proposals should have been apparent to the protester before the due date for best and final offers, and should

have been protested by that time. 4 C.F.R. § 21.2(a)(1) (1986). Penn Ferrara instead participated in the competition without knowing how its offer would be evaluated, and only protested the allegedly deficient evaluation after award. Under these circumstances, we find that the firm is not entitled to recover either its proposal preparation costs or the costs of filing and pursuing the protest. General Engineering and Machine Works, B-223929, Oct. 27, 1986, 86-2 CPD ¶ 477.

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