



The Comptroller General
of the United States

Washington, D.C. 20548

Kiddee
PL-II

Decision

Matter of: Hall-Kimbrell Environmental Services, Inc.
File: B-224521
Date: February 19, 1987

DIGEST

1. Protest concerning alleged improprieties apparent on the face of a solicitation is untimely when the protest is not filed until after the date set for receipt of initial proposals.
2. The General Accounting Office sustains a protest where the procuring agency awarded a contract on the basis of initial proposals, but there was a reasonable chance that by conducting discussions the agency would find a proposal offering a lower overall cost to the government to be more advantageous under the evaluation factors listed in the solicitation.

DECISION

Hall-Kimbrell Environmental Services, Inc. protests an award of a contract to Environmental Management, Inc. under request for proposals (RFP) No. 589-23-86. The solicitation was for a comprehensive asbestos survey and assessment of the Veterans Administration (VA) Medical Center in Kansas City, Missouri. Hall-Kimbrell contends that award should have been made to the lowest-priced qualified offeror; that consideration for award should have been limited to firms in the Kansas City area; that the award was not consistent with the evaluation criteria in the Commerce Business Daily notice; and that the VA did not evaluate its proposal properly.

We sustain the protest in part and dismiss it in part.

The VA Medical Center issued the RFP on May 15, 1986 seeking a fixed-price contract for the work in question. The solicitation provided that offerors would be ranked on a 100-point scale, and it listed the following evaluation factors and points assigned to each: cost proposal (40 points); asbestos experience and capabilities of the firm and key personnel (25 points); plan for approach to work (15 points); ability and experience working with architects/engineers (10 points); and knowledge and experience working with the VA (10 points).

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The VA received 12 proposals by the July 16 closing date and evaluated them in accord with its detailed scoring plan. Of those, nine were found to be in the competitive range. Hall-Kimbrell received 21 points for its cost proposal, which was third lowest (\$57,952). Environmental Management's cost proposal was fifth lowest (\$68,600), and it received 18 points. Hall-Kimbrell received 34 points for the technical factors, compared to 53 for Environmental Management, resulting in total scores of 55 and 71 respectively.

Environmental Management tied with another offeror in total score. On the basis of initial proposals, without conducting discussions, the VA on August 27 awarded a contract to Environmental Management because the firm had received a higher score for technical factors than the offeror that had received the same total score. The VA notified unsuccessful offerors of the award on September 10. Hall-Kimbrell initially protested to the VA; following denial of its agency-level protest, the firm protested to our Office.

A number of the issues raised by Hall-Kimbrell are untimely. As noted above, the firm argues that geographical location should have been an evaluation factor; that the evaluation factors listed in the solicitation improperly differed from those mentioned in the Commerce Business Daily announcement of the procurement; and that award should be made on the basis of the lowest-priced acceptable offer. These issues were all apparent on the face of the solicitation, and had to be protested by the closing date for receipt of proposals. 4 C.F.R. § 21.2 (a)(1) (1986). Consequently, we dismiss these grounds for the protest.

The Competition in Contracting Act of 1984 (CICA) requires that in negotiated procurements, agencies must conduct discussions with all responsible offerors who submit proposals within the competitive range except "when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the Government." 41 U.S.C. § 253b(d)(1)(B) (Supp. III 1985). Offerors in the competitive range are those whose proposals have a reasonable chance of being selected for award. Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.609 (1986). In our view, this provision of CICA prohibits agencies from accepting an initial proposal that is not the lowest considering only cost and cost-related factors listed in the RFP, where there is a

reasonable chance that by conducting discussions, another proposal would be found more advantageous to the United States under the evaluation factors listed in the solicitation.

The VA failed to comply with the CICA restriction. Four offerors in the competitive range, including the protester, submitted lower-priced proposals than Environmental Management, and the VA has not suggested that these firms did not have a reasonable chance for award. In fact, one lower-priced offeror in the competitive range tied with the awardee in total score. In the case of Hall-Kimbrell, we believe that its technical score could have improved significantly with discussions. For example, the firm's proposed plan for accomplishing the work was amenable to revision. The plan's greatest weakness was that it consisted of a thorough discussion of the numerous steps ordinarily involved in an asbestos assessment and the importance of those steps, without indicating just how, and on what schedule, those steps would be accomplished in this particular case. This could have been remedied following a discussion of the need for greater specificity. Since Hall-Kimbrell received only 5 out of 15 possible points for its plan, discussion of this topic could have significantly improved its technical rating. We believe that Hall-Kimbrell's corporate experience and the qualifications of its personnel could also have been strengthened through discussions. For example, Hall-Kimbrell received only 2 points for its listing of dozens of asbestos assessment projects, even though the VA's scoring plan specified that offerors that had conducted 11 or more such assessments would receive 3 points.

The appropriate remedy where an agency improperly failed to conduct discussions would ordinarily be for the agency to do so and request best and final offers. That remedy is not practical here, since Hall-Kimbrell filed its protest with our Office more than 10 days after contract award, and contract performance was not suspended. See 4 C.F.R. § 21.6(b); E.H. Pechan & Associates, Inc., B-221058, Mar. 20, 1986, 86-1 CPD ¶ 278. Environmental Management has successfully completed all, or essentially all, of the contract work.

As no other corrective action is appropriate, we find that the protester may be allowed the recovery of its proposal preparation costs. See Nicolet Biomedical Instruments, 65 Comp. Gen. 145 (1985), 85-2 CPD ¶ 700. We also find that Hall-Kimbrell should be allowed to recover the costs of filing and pursuing the protest, including any reasonable attorney's fees, since, given the circumstances of this case,

we have not recommended an award to Hall-Kimbrell. 4 C.F.R. § 21.6(e). Accordingly, by separate letter, we are advising the Administrator of Veterans Affairs of our determination. Hall-Kimbrell should submit its claims for such costs directly to the agency. 4 C.F.R. § 21.6(f).

The protest is sustained in part and dismissed in part.

for 
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of the United States