



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SWD Associates
File: B-226956.2
Date: September 16, 1987

DIGEST

Post-best and final offer (BAFO) communications with the low offeror for leased office space to remove exceptions taken in its BAFO to the solicitation requirements covering the minimum termination notice and occupancy date constitute discussions requiring discussions with the protester who was also in the competitive range. The award to the low offeror without reopening discussions violated Federal Acquisition Regulation § 15.611(c), since the protester was not offered an opportunity to submit a new BAFO.

DECISION

SWD Associates (SWD) protests the decision of the General Services Administration (GSA) to award a contract under solicitation for offers (SFO) No. GS-05B-14403 to Bankers Building for 200,000 square feet of leased office space in Chicago, Illinois, to house the regional headquarters of the Department of Health and Human Services.

SWD argues that GSA improperly conducted discussions with Bankers after the receipt of Bankers' best and final offer but not with SWD.^{1/} We sustain the protest.

The SFO requested prices and other information pertaining to the proposed building and provided that the "term of the lease would be for ten years" and offers were to be submitted in each of two ways: (1) 10 years without any cancellation rights by either party and (2) 10 years with the right by GSA to cancel at any time after 5 years upon written notice of 120 days. The SFO contained GSA Form No. 1364, paragraph 17 of which requested offerors to specify the "number of days notice required to terminate lease."

^{1/} SWD earlier protested that it had been misled in discussions. We denied that protest in SWD Associates, B-226956, July 17, 1987, 87-2 C.P.D. ¶ ____.

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The SFO contained the terms and conditions of the 10-year lease, including a requirement that occupancy of the building would commence within 120 days after delivery by the government of the layout plans for interior rooms in the building.

After the evaluation of initial offers and discussions with the offerors, including Bankers and SWD, the contracting officer requested all offerors to submit best and final offers (BAFO) by October 3, 1986. Bankers' BAFO price of approximately \$35 million was evaluated at nearly \$10 million less than SWD's price for the 10-year lease term.

However, Bankers' BAFO also contained several statements that are the subject of this protest. In response to GSA's paragraph 17, which requested the "number of days notice required to terminate the lease," Bankers placed the notation "365 days*." A note just below paragraph 17, to which the asterisk referred, stated in pertinent part "tenant shall only be given option to terminate within the 365 days after 5 years" Moreover, both SWD's and Bankers' BAFOs provided that occupancy of the building would occur 180 days after delivery of the layout plans.

GSA says that Bankers' offer "met all the RFP requirements at a significantly lower price than the other offer" to the extent that "contractor selection was not in doubt at that point." Nevertheless, GSA felt that it needed to obtain, prior to award, certain "clarifications" from Bankers. The first issue was whether, by its "365 days" notations, Bankers intended to modify the notice provision or the period within which GSA could terminate the lease. In other words, was Bankers stating that GSA only could terminate the lease (a) upon giving notice at any time within 365 days after 5 years, or (b) at any point after 5 years by giving 365 days' notice? The second issue (also applicable to SWD's offer) was that Bankers provided for occupancy 180 days after delivery of the layout plans, not 120 as required by the SFO.

In response to GSA's requests, Bankers stated on October 27, 1986, that GSA would have the "option after the sixtieth full month of the lease to terminate the lease with 120 days prior written notice." Bankers also provided for occupancy within 120 days after delivery of the layout plans.

GSA argues that Bankers' October 27 letter was only a "clarification" of its BAFO and GSA's consideration of these revisions did not prejudice other offerors since the revisions did not change GSA's price evaluation. GSA states that Bankers' price was so favorable that it would have

awarded to that firm even if it had not revised the 365-day notations and that none of the statements in question contained in Bankers' BAFO were "critical to minimum acceptability."

Whether Bankers' BAFO could be interpreted as extending the notice provision or defining the period within which termination action could be taken, it represented a significant limitation of the government's rights. In either event, its BAFO took material exception to the terms of the solicitation. In addition, although SWD took the same exception as Bankers to the SFO provision regarding the commencement of building occupancy (180 days vis a vis 120 days after receipt of the layout plans), this too contravened a material SFO requirement. Consequently, we find the communications with Bankers to remove these exceptions constituted discussions. See Federal Acquisition Regulations (FAR), § 48 C.F.R. § 15.611(c) (1987); Environmental Tectonics Corp., B-225474, Feb. 17, 1987, 87-1 C.P.D. ¶ 175, aff'd B-225474.2 et al., Apr. 9, 1987, 87-1 C.P.D. ¶ 391.

Where, as here, discussions are conducted with an offeror in the competitive range, they must be conducted with all offerors in the competitive range. 10 U.S.C. § 2305(b)(4)(B) (Supp. III 1985); Motorola, Inc., B-225822, June 17, 1987, 87-1 C.P.D. ¶ 604. In this case, the record indicates Bankers took material exceptions to the SFO requirements in its BAFO and that SWD was still in the competitive range, despite its higher price. In this regard, SWD states that its proposed price could have been lowered significantly had it been allowed the opportunity to participate in further discussions.

We have considered GSA's argument that Bankers' more advantageous price outweighed any deviations from the solicitation requirements which its BAFO may have contained. We note, however, that GSA did not waive these deviations but at the time felt itself obligated to remedy the situation. It is not reasonable to argue that a provision which may be interpreted to limit to the sixth year of the lease GSA's right to terminate is not a matter critical to the acceptability of that offer.

We recognize that Bankers' price was substantially lower than the protester's price.^{2/} Nevertheless, the record does not show that GSA excluded SWD from the competitive range

^{2/} In this connection, we are not persuaded by SWD's suggestion that the price difference between the two offerors is solely attributable to the 365-day provision contained in Bankers' BAFO proposal.

because of its higher price, but rather the agency concluded that a reopening of discussions was not required, a conclusion with which we disagree. Since GSA provided Bankers the opportunity to remove the 365-day provision from its offer, we think that GSA also should have provided the protester the opportunity to submit a more competitive price. Therefore, the award to Bankers after the improper post-BAFO discussions was therefore in violation of FAR, 48 C.F.R. § 15.611(c), which prohibits post-BAFO discussions unless all offerors in the competitive range are given an opportunity to submit new BAFO's.

The protest is sustained.

We do not recommend that the award be disturbed in this case, since the award was made on March 31, 1987, and as indicated above, there is no right of termination within the initial 5-year phase of the lease. However, since GSA unreasonably excluded SWD from the procurement, we grant SWD the cost of preparing its proposal and filing and pursuing the protest, including attorneys fees. 4 C.F.R. § 21.6(d) (1987).

for *Harry R. San Cleve*
Comptroller General
of the United States