The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Great Lakes Roofing Co., Inc.

File: B-228484

Date: February 2, 1988

DIGEST

1. Failure by the agency to confirm a request for best and final offers in writing violates the Federal Acquisition Regulation §§ 15.611(a) and 15.611(b)(3) (FAC 84-16). However, this violation does not in itself provide a compelling reason to disturb an award where all offerors in the competitive range are nevertheless afforded an opportunity to compete on a common basis.

2. Protester's allegation that it failed to receive an oral request for a second best and final offer (BAFO) is denied where the preponderance of the evidence in the record indicates that protester was notified of request for BAFO.

DECISION

Great Lakes Roofing Co., Inc. protests award to M&M Services of a firm, fixed-priced requirements contract for interior maintenance of family housing quarters at Fort Riley, Kansas, under request for proposals (RFP) No. DAKF19-87-R-0111, issued by the Army. Great Lakes alleges that procedural irregularities flawed the Army's requests for best and final offers (BAFOs), that M&M was treated more favorably by the Army, resulting in unequal competition, that there was inadequate time to prepare a second BAFO, and that the agency engaged in prohibited auction techniques.

We deny the protest.

On July 31, 1987, the Army issued the solicitation for interior maintenance and repair of housing units at Fort Riley with a September 21 closing date. The RFP provided that the government would award a contract to the responsible offeror whose offer conforming to the solicitation is the most advantageous to the government, cost or price and other factors considered. The RFP contained more than 500 line items. The evaluation criteria were listed as price, performance and qualifications, with price more than twice as important as performance and qualifications which, in turn, were of equal importance.

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Two offers were timely received and deemed technically acceptable (under the technical criteria of performance and qualifications) and were determined to be within the competitive price range as determined by the agency. On September 25, negotiations began with both offerors by telephone. Great Lakes was asked to review its proposal on items that were priced above the government's estimate and on line items that appeared to be extremely low. Later that same day, Great Lakes telephoned the agency to advise that its original prices were correct and no revisions would be made. The agency then advised Great Lakes to confirm this in writing as a best and final offer. Great Lakes' BAFO was received on September 28. On September 25, M&M also was requested to review its line items. M&M telephoned the agency with price changes that same day and the agency then requested M&M to furnish a BAFO. On September 28, the agency again telephoned M&M because a review of M&M's proposal revealed that the prices on doors as proposed included manufactured sealants. The agency's contract specialist pointed out that there was a line item to cover costs to seal doors and perhaps M&M should adjust its proposal accordingly. M&M was also asked to provide a second BAFO reflecting any price changes to reach the agency no later than September 30.

The agency states that Great Lakes was also contacted immediately on September 28 to verify its interpretation for the line items concerning the doors. Upon verification that the doors were priced as unfinished, the agency contends that it specifically informed Great Lakes during that same conversation that any price changes should be submitted as a second BAFO to reach the agency no later than September 30. The BAFOs of M&M and Great Lakes were received on September 30 and award was made to M&M as the offeror with a slightly lower price. This protest followed on October 9.

Great Lakes alleges that the agency failed to follow regulatory procedures in this procurement and, therefore, has compromised the integrity of the procurement process. Specifically, Great Lakes argues that the requests for BAFOs were procedurally deficient because written confirmations were not sent by the agency, established common cutoff dates for receipt of BAFOs were lacking, and insufficient time was allowed to submit a BAFO. Great Lakes also contends that it did not receive a telephone call from the agency on September 28 informing it of the opportunity to submit another BAFO by September 30 if any changes were required, but first heard of this opportunity when it telephoned the

agency on the morning of September 30 to check on the progress of the award decision. This led to what Great Lakes has characterized as favorable treatment for M&M and an auction environment.

The agency concedes that it violated the FAR in not providing written confirmation of the telephone requests for BAFOs which would have confirmed a common cutoff date and time for submission of proposals.

Generally, there is no requirement that negotiations with offerors be in writing. The regulations governing the conduct of negotiations provide that either oral discussions or written communications shall be conducted with offerors to resolve uncertainties. FAR, § 15.610 (FAC 84-16). Further, even where the regulations require a writing, such as requiring written confirmation of an oral request for BAFOs, the lack of written correspondence will not result in the disturbance of the award where all offerors in the competitive range are afforded an opportunity to compete on a common basis. Technical Assistance Group, Inc., B-211117.2, Oct. 24, 1983, 83-2 CPD ¶ 477. Thus, the critical inquiry is not whether discussions and other communications with offerors were in writing, but, rather, whether the competition was conducted on an equal basis.

As evidence of unequal competition, Great Lakes contends that, unlike M&M, it failed to receive the September 28 telephone call from the agency which verified the doors as proposed and requested any changes to be submitted in a second BAFO by September 30. Great Lakes admits that it received a telephone call from the agency and request to submit a BAFO on September 25 after it indicated that no changes were anticipated to its proposal; however, the protester contends that the verification of the doors as proposed occurred then and not on September 28. Great Lakes contends that it first heard of the opportunity to submit a second BAFO on the morning of September 30 when it telephoned the agency regarding the award and was, therefore, prejudiced by the lack of time to properly prepare another BAFO. Great Lakes has submitted affidavits in support of its position.

The agency, on the other hand, flatly states that Great Lakes was told on September 28 to submit a BAFO by September 30. The contract specialist has submitted an affidavit to the effect that she informed Great Lakes on

that date "that a revised [BAFO] would be accepted if it reached this office no later than Wednesday, 30 September." Her position is supported by an agency telephone log, and, less directly, by a telephone memorandum.

The affidavit submitted by the operations manager of Great Lakes states that he has no recollection of a telephone call from the agency on either September 28 or September 29 requesting a second BAFO. The affidavit further states that had a request for second BAFOs been received, an immediate and intensive response to make proposal revisions would have been triggered. Nevertheless, the agency's report indicates that a telephone request for second BAFOs did occur on September 28. This is supported by an affidavit of the contracting officer's representative, agency telephone log, and a telephone memorandum. While the record contains conflicting affidavits from the parties, the record also contains a telephone log prepared in the ordinary course of business at the time the telephone call was made. This business entry identifies the telephone number and location of the protester and indicates that the protester was called on September 28. Therefore, we conclude that the preponderance of the evidence indicates that the telephone request for second BAFOs was made on September 28. See Boniface Tool & Die, Inc., B-226550, July 15, 1987, 87-2 CPD ¶ 47. The evidence, therefore, fails to show that Great Lakes and M&M were treated unequally and denied the same opportunity to submit BAFOs by September 30. Accordingly, we deny this protest ground.

We also find Great Lakes' argument concerning prejudice due to the lack of a common cutoff time and date for receipt of proposals to be without merit. The contracting officer states that BAFOs were required to be received no later than September 30. While there is no documentary evidence in the agency report to establish the exact time that BAFOs were due, both Great Lakes and M&M state that they were told that BAFOs were due by "12 o'clock noon or 1:00 p.m., at the latest," on September 30. The protester is apparently concerned that M&M might have gained a competitive advantage by modifying its proposal after Great Lakes had tendered its offer to the contracting officer. However, this concern is not supported by the record since M&M's proposal was received at 10:49 a.m., September 30, before receipt of Great Lakes' proposal at 11:45 a.m. Since both offerors timely submitted BAFOs, we find that they competed on an equal basis.

With respect to Great Lakes' argument that it was not allowed sufficient time to revise its proposal, this is based on the assumption that Great Lakes first received notice of the final BAFO on September 30, not September 28.

However, we have already found that Great Lakes has failed to show that it did not receive the same notice and the same time to prepare its proposal that M&M received. Consequently, this protest ground must also fail.

Finally, with respect to the protester's allegation of auction techniques, we only note that Great Lakes has failed to substantiate this claim except to imply that a request for a second round of BAFOs is circumstantial evidence of auctioning. We do not agree, as negotiated procurements often have more than one round of BAFOs and the record here indicates that a second round was required to alleviate any misunderstanding about those line items concerning the doors requirement. See Research Analysis and Management Corp., B-218567.2, Nov. 5, 1985, 85-2 CPD ¶ 524.

The protest is denied.

for Seymour Efros
James F. Hinchman
General Counsel