



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Associated Professional Enterprises, Inc.

File: B-231766

Date: October 12, 1988

DIGEST

Protest that an award was made under a request for proposals on the basis of an improper price evaluation is dismissed as academic when the agency determines that the solicitation was defective and takes the appropriate corrective action.

DECISION

Associated Professional Enterprises, Inc., protests the award of a contract to the Carnation Company under request for proposals (RFP) No. DLA137-88-R-3398, issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA), for the requirements of the Naval Air Station in Adak, Alaska, for dairy products over a 6-month period beginning July 1, 1988. The protester alleges that the method of price evaluation was improper.

We dismiss the protest.

The RFP was issued on April 1 with a May 5 closing date for receipt of proposals. Section B of the solicitation contained a listing of 41 line items with an estimated quantity for the 6-month contract period next to each item. In addition to indicating a unit price for each item, offerors were to insert an extended amount for each item and total the extended amounts for an overall price. Space was also provided under each item listing for the insertion of data which indicated the number of containers per case and the weight and size of each case.

Section M of the solicitation, entitled "Evaluation and Award Factors," provided at page 3a that offers based on f.o.b. Adak or f.o.b. Seattle, Washington, would be acceptable. Seattle deliveries would be repacked and airlifted to Adak at government expense. Page 3a provided further as follows:

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"5. THE ESTIMATED WEEKLY DAIRY SHIPMENTS TO ADAK ARE AS FOLLOWS:

COMMISSARY	418 CASES	15,000 POUNDS
TROOP ISSUE	251 CASES	11,000 POUNDS

6. ALL OFFERS, OTHER THAN FOB DESTINATION-ADAK, WILL BE EVALUATED BY ADDING THE FOLLOWING COST FACTORS TO THE AMOUNT OF THE OFFER:

MISSION (AIRLIFT) COST FROM MCCHORD TO ADAK 40.5
CENTS PER POUND

OVERPACKING COSTS, SEATTLE REPACKING FACILITY .018
CENTS PER POUND"

Associated submitted an offer on an f.o.b. Adak basis with an overall price of \$687,081.95. Carnation offered on an f.o.b. Seattle basis with an overall price of \$242,880.50. Pursuant to the terms of the solicitation, the factors based on the rates and weights listed in Section M were added to Carnation's price to obtain an evaluated price of \$528,828.50.^{1/} Accordingly, Carnation was awarded the contract on May 26; Associated was notified on May 27, and filed an agency protest the next day.

Associated's agency protest was based on the disparity between the weight of the estimated contract quantities contained in Section B of the solicitation, which contained a listing of items to be priced, and the estimated weekly dairy shipments contained on page 3a. By using the estimated quantities beside each of the 41 line items in Section B, Associated calculated the total weight of all the items for the contract period to be 1,120,782 pounds--a figure far in excess of the weight derived from the estimated weekly shipment data in Section M, which totaled 676,000 pounds for the contract period and which was used to evaluate the awardee's price. Associated thus concluded that Carnation had received an unfair advantage because its transportation cost to Adak was, in essence, computed on the basis of estimated quantities which were substantially less than the those provided in Section B. The protester states

^{1/} The agency later discovered that the repacking factor had been overstated in Section M. Instead of .018 cents per pound, it should have been .00018 cents per pound. The corrected evaluated price for Carnation thus becomes \$516,782.50. The error does not affect the relative standing of Associated and Carnation.

that, properly evaluated, Carnation's price would exceed Associated's by approximately \$30,000.

On June 10, DLA dismissed Associated's protest as untimely, noting that the firm was aware prior to the solicitation closing date that the weights contained at page 3a in Section M would be used for evaluation purposes. In addition to being aware of the stated terms of Section M, the agency asserted that Associated had received a further explanation of the evaluation process in a telephone conversation with DLA on April 19. The agency's letter of dismissal indicated agreement with Associated to the effect that it would have been the low offeror if the weights in Section B had been appropriate for use in computing the transportation differential, but only by approximately \$6500, not \$30,000 as computed by Associated.

Associated protested to this Office on June 21. Its arguments are essentially the same as those contained in its protest to DLA. In addition, it disputes the agency's assertion that the protester was informed before the closing date that DLA would use the Section M weights in calculating the transportation costs.

In response, DLA continues to argue that Associated's protest is untimely, but concedes that the solicitation was defective. The agency states that it has taken corrective action by canceling the contract as of September 30 and resoliciting for a new 6-month period.

Given the agency's belief that the RFP was defective, which the protester does not contest, the agency's action here--resoliciting using revised and more accurate estimates--is appropriate. See Special Waste, Inc., B-230103, June 2, 1988, 67 Comp. Gen. ____, 88-1 CPD ¶ 520. Since the agency has acted to remedy the deficiency in this procurement, no useful purpose would be served by further consideration of the protest. Aquasis Services, Inc., B-232053, Sept. 22, 1988, 88-2 CPD ¶ _____. We dismiss it as academic.

With respect to Associated's claim for costs, our authority to allow the recovery of such costs is predicated on a determination by our Office that an agency has acted contrary to law or regulation. 31 U.S.C. § 3554(c)(1) (Supp. IV 1986); Technology & Management Services, Inc., B-231025.4, June 1, 1988, 88-1 CPD ¶ 513. A decision on the merits of the protest is an essential condition to a declaration that the protester is entitled to the award of costs. Id. Since we have made no such determination here, we have no basis for awarding costs to Associated.

See Teknion, Inc.--Claim for Protest Costs, B-230171.22, et al., Sept. 6, 1988, 88-2 CPD ¶ ____.

The protest is dismissed and the claim is denied.

Ronald Berger

Ronald Berger
Associate General Counsel