



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Hamilton Enterprises, Inc.
File: B-230736.6
Date: December 20, 1988

DIGEST

1. After conducting two rounds of discussions with offeror, agency properly determined that offeror was no longer in the competitive range since its proposal was found technically unacceptable based on agency's evaluation which was supported by reasonable bases.
2. Protest that solicitation unreasonably required proposals to include a breakdown in man-years for each of the solicitation's 14 areas of required services is untimely, since allegation concerns a solicitation impropriety apparent prior to closing date for receipt of proposals but was not filed before that time.
3. Protest that agency did not comply with regulations concerning preaward notices to unsuccessful offerors is without merit where the protester fails to show that it was prejudiced by the agency's failure to provide the required preaward notices.

DECISION

Hamilton Enterprises, Inc., protests the rejection of its proposal and the award of a contract to H.L.J. Management Group, Inc. (HLJ), under request for proposals (RFP) No. DAAD05-87-R-6116, issued by the Department of the Army for full food and mess attendant services at Aberdeen Proving Ground, Maryland. Hamilton contends that its proposal was improperly evaluated and should have been included in the competitive range and that it was, therefore, improperly deprived of an opportunity to submit a best and final offer. Hamilton also contends that the Army failed to timely notify it of its proposal's rejection and with preaward notification of the apparent successful offeror.

044200/137579

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

The RFP was issued on September 16, 1987, as a total set-aside for small disadvantaged businesses and contemplated award of a firm, fixed-price requirements contract for a base year and 4 option years. Section M.1, "Basis for Award," of the RFP stated that award would be made to the responsible offeror who submits the lowest priced, technically acceptable proposal. Section M.1 also stated that in order to be considered for award, a proposal must receive a rating of acceptable for each of the evaluation factors and subfactors. Section M.3, "Proposal Evaluation Criteria," of the RFP listed as the evaluation factors: (1) management (with five subfactors); (2) technical approach (with five subfactors); and (3) cost realism. A designation of "go" or "no go" for a proposal's management and technical approach, including all subfactors, was to be assigned by the evaluation panel indicating an acceptable or unacceptable rating. In order to be rated "acceptable," therefore, a proposal had to receive a "go" rating on all 10 technical and management evaluation subfactors. Once a proposal's management and technical approach was deemed acceptable, then the proposal's pricing would be evaluated.

On May 4, following an initial technical review by a Proposal Evaluation Board (PEB), none of the 13 proposals received in response to the solicitation were found to be fully acceptable since none of them received "go" ratings for all 10 of the technical and management evaluation subfactors. Three of the proposals were rejected as technically unacceptable and the remaining 10, including Hamilton's and HLJ's, were found to be susceptible of being made acceptable through discussions and were included in the competitive range. Hamilton's initial technical proposal received 6 "no go" ratings out of the 10 technical and management evaluation subfactors. Offerors were advised of the deficiencies and requested to respond.

After reviewing the responses, the Army still did not regard any of the 10 proposals as acceptable. It therefore sent out a second round of letters conveying the PEB's comments and requesting further information from the offerors.

On July 20, following these two rounds of discussions, the competitive range was revised because 5 of the 10 proposals, including HLJ's, were now rated fully acceptable since they had received "go" ratings for each of the evaluation factors and subfactors. Although the other five proposals, including Hamilton's, had also increased their technical ratings, they were considered to be technically unacceptable and no longer in the competitive range since they had all

received at least one "no go" rating for an evaluation factor or subfactor. Hamilton's revised technical proposal received 2 "no go" ratings out of the 10 evaluation subfactors.

On July 29, best and final offers were requested from the 5 fully acceptable firms remaining in the competitive range. On August 5, award was made to HLJ as the lowest priced, technically acceptable offeror. On August 12, Hamilton received notice of the award to HLJ concurrently with notice that its own proposal had been rejected as technically unacceptable because it had received "no go" ratings for: (1) organization structure and proposed overall staffing (an evaluation subfactor under management), and (2) detailed organization structure and staffing plan for the performance work statement (an evaluation subfactor under technical approach). On August 26, Hamilton filed its protest in our Office against the rejection of its proposal and the award to HLJ. Hamilton contends it should receive the award since its proposal should have been found technically acceptable at a price approximately \$130,000 lower than HLJ's price of \$22,175,618 for the base year plus 4 option years.

As a preliminary matter, the Army contends that Hamilton is not an interested party for purposes of filing this protest since Hamilton's proposed low price would have been increased over that of HLJ's had price discussions been held with Hamilton, because Hamilton failed to include a price for the RFP's line items dealing with night feeding. The Army argues that even if Hamilton's protest is sustained and its proposal is determined technically acceptable, Hamilton would have been required to submit a price for those omitted line items. Based upon the amount added to another offeror's proposal which had the same omission, the Army concludes that Hamilton's price would be substantially increased such that it would no longer be low and, thus, not in line for award.

We find, however, the Army's allegations concerning how much, if any, Hamilton's proposed low price would be increased during price discussions to be too speculative to support a determination that Hamilton lacks the requisite direct and substantial economic interest to be an interested party within the meaning of our Bid Protest Regulations, 4 C.F.R. § 21.0 (1988). Hamilton is thus an interested party for the purpose of protesting the rejection of its proposal. See, e.g., Fairfield Machine Co., Inc., B-228015, B-228015.2, Dec. 7, 1987, 87-2 CPD ¶ 562.

A determination that an initial proposal is within the competitive range does not necessarily imply that the proposal would be technically acceptable. It merely denotes that the proposal has a real possibility of being made acceptable and there is a reasonable chance it will be selected for award. See FAR § 15.609(a) (FAC 84-16); Space Communications Co., B-223326.2, B-223326.3, Oct. 2, 1986, 66 Comp. Gen. ___, 86-2 CPD ¶ 377.

Here, based on the results of two rounds of discussions, the Army revised the competitive range to include only those five firms which received "go" ratings for all of the evaluation factors. It is clear from the protest record that Hamilton's proposal was never fully acceptable since its initial proposal received 6 "no go" ratings and its revised proposal, after two rounds of discussions, still received 2 "no go" ratings out of the 10 evaluation factors. In our view, then, the determinative issue for resolution is whether the Army reasonably evaluated Hamilton's revised proposal resulting in two "no go" ratings.

Hamilton contends that the Army's evaluation was unreasonable because it (1) included an evaluation factor not specified in the RFP by downgrading its proposal for failing to include an assistant project manager, and (2) overlooked its proposal's breakdown in man-years of the required services by indicating on the evaluation scoring sheet that Hamilton's proposal failed to provide such a breakdown.

We do not find that the Army utilized an evaluation factor not mentioned in the RFP when it downgraded Hamilton's proposal for failing to include an assistant project manager in its staffing plan. The requirement that the contractor employ an assistant manager was set forth in paragraph C.1.2.1 of the RFP's performance work statement. This provision states that "[t]he contractor shall provide a full-time onsite contract manager and an alternate who shall act with full authority for the contractor" (Emphasis supplied.) This provision adds that the "contract manager" or "alternate" shall be the central point of contact and shall be available "during all dining facility operating hours" which are required to be from 3 a.m. to 8 p.m. weekdays (a 17-hour period) and from 5:30 a.m. to 7:30 p.m. weekends (a 14-hour period). In evaluating Hamilton's proposed overall staffing and detailed proposed staffing for the performance work statement, both listed as evaluation factors in the RFP, the Army, thus, properly downgraded Hamilton's proposal for failing to include an assistant project manager.

Nor do we find that the Army incorrectly determined that Hamilton's proposal failed to include a breakdown in man-years of the services required in the performance work statement. The RFP's performance work statement, as amended, listed 14 separate areas of required services and section M, paragraph (c)(4) of the RFP stated that offerors' staffing plans must separately identify proposed staffing, expressed in productive man-years, for the required services listed in the performance work statement. In its revised proposal, Hamilton did not provide a separate breakdown for each of the 14 areas of required services, despite a specific request to do so during discussions, but instead listed man-years for three categories of laborers, which apparently corresponded to some but not all of the 14 areas of required services. The Army was, therefore, correct in finding Hamilton's proposal deficient for not including the required breakdown in man-years of the required services listed in the RFP.

In the alternative, Hamilton contends that the Army did not need such a detailed breakdown in man-years in order to evaluate proposals and that the requirement in section M of the RFP for such a breakdown was irrational. We find this argument to be untimely since it concerns an alleged solicitation impropriety apparent prior to closing date for receipt of proposals. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), require that protests based upon such alleged improprieties be filed before that time to enable the contracting agency or our Office to decide an issue while it is most practicable to take effective action where the circumstances warrant. See Mycon Construction Co., Inc., B-231544, June 14, 1988, 88-1 CPD ¶ 572. Since Hamilton's protest was filed long after the closing date for receipt of proposals, the issue is untimely.

Hamilton also contends that it was improper for the Army to wait nearly 4 weeks after determining that its offer was technically unacceptable to notify it of that determination. The Federal Acquisition Regulation (FAR) provides, with respect to negotiated procurements, that the contracting officer shall promptly notify each offeror whose proposal is considered to be no longer in the competitive range and to be unacceptable. FAR § 15.609(c) (FAC 84-16). The notice is to state in general terms the basis for the determination and that a revision of the proposal will not be considered. FAR § 15.1001(b)(1) (FAC 84-13). We agree with Hamilton that the Army's action was inconsistent with these FAR provisions. Nevertheless, we have held that an agency's failure to promptly notify a firm that it is no longer in consideration for award is only procedural in nature and does not affect the validity of an otherwise properly

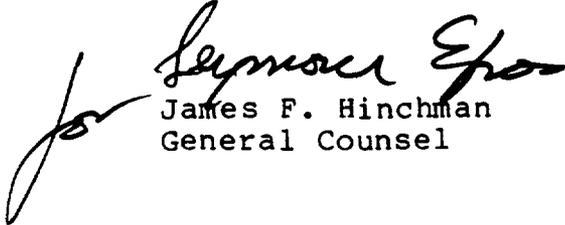
awarded contract. See Space Communications Co., 66 Comp. Gen. at _____, 86-2 CPD ¶ 377 at 5 (6 month delay in providing notice). This allegation, thus, does not provide a basis to overturn the contract award to HLJ.

Hamilton further contends that the Army improperly failed provide it with notice prior to award that the agency intended to contract with HLJ. In a small business set-aside, such as here, the contracting officer is required to inform each unsuccessful offeror in writing, prior to award, of the name and location of the apparent successful offeror. FAR § 15.1001(b)(2) (FAC 84-13). The purpose of this preaward notice is to allow unsuccessful offerors an opportunity to challenge the small business status of the proposed awardee. See Strategica, Inc., B-227921, Oct. 27, 1987, 87-2 CPD ¶ 399. The contracting officer concedes that his failure to provide this preaward notice was inconsistent with these FAR provisions.

Such a failure to provide preaward notice is also only procedural in nature and does not affect the validity of an otherwise properly awarded contract absent prejudice to the protester. See Automation Management Consultants, Inc., B-231540, Aug. 12, 1988, 88-2 CPD ¶ 145. Hamilton contends that it was, in fact, prejudiced by the failure of preaward notice since it was allegedly unable, as a result, to file its protest of the exclusion of its proposal from the competitive range within the required 10 days following contract award in order to trigger the suspension of work provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d) (Supp. IV 1986). We note, however that Hamilton received notice of the rejection of its proposal and of the award to HLJ 7 calendar days after award but did not file its protest with us until 21 calendar days after award. Although in the interim Hamilton did obtain a debriefing, it admits 3 of the 4 initial protest issues were known to it upon receipt of the notice of award. Even though Hamilton would have had to have made a decision to protest over a weekend and to have filed a protest on the next working day following its receipt of the notice of award, had it done so the CICA suspension of work provisions would have applied. In any event, we find no prejudice to Hamilton as a result of this procedural deficiency which could provide a basis to overturn this otherwise valid contract award since the purpose of the preaward notice

requirement is to permit timely size status protests of the apparent successful offeror, and Hamilton has not, at any time, questioned the size status of HLJ.

The protest is denied in part and dismissed in part.

A handwritten signature in cursive script, appearing to read "James F. Hinchman".

James F. Hinchman
General Counsel