



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Evergreen Landscaping, Inc.

File: B-239241

Date: July 16, 1990

Richard H. Foley, Jr., Esq., Foley & Foley, for the protester.

E.L. Harper, Associate Deputy Assistant Secretary for Acquisitions, Department of Veterans Affairs, for the agency.

James Vickers, Esq., Robert Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency allowed unreasonably short time period for response to request for best and final offers is denied where agency allowed 6 days between mailing of request and due date for response, was not arbitrary in its treatment of offerors, and offeror in same city as protester responded the day before the due date.

2. Contracting agency is only obligated to notify unsuccessful firms of the agency's award decision after the award is made.

DECISION

Evergreen Landscaping, Inc. protests the award of a contract to Associated Professional Enterprises, Inc., by the Department of Veterans Affairs (VA) under request for proposals No. 663-21-90 for the care and maintenance of the Fort Richardson National Cemetery, Fort Richardson, Alaska.

Evergreen contends that the solicitation failed to advise it of the possibility that the agency would request best and final offers (BAFOs), and that failure, combined with the unreasonably short time permitted by the agency's request for BAFOs, prevented the protester from responding to the request. The protester also complains that the agency

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improperly failed to issue a notice of intent to award before awarding the contract to Associated.

We deny the protest.

The RFP was issued on February 1, 1990, with a proposal due date of March 1. The proposals of Evergreen at \$548,422 and Associated at \$500,718 were the only two received. Both proposals were included in the competitive range. By letter dated March 22, sent by Airborne Express, the contracting officer requested both offerors to submit their BAFOs by 10 a.m., March 29.

The letter was delivered to Evergreen's post office box at 11:07 a.m., on March 26, but was not picked up until March 28. According to the protester, the letter was not opened until March 30 when Evergreen's president returned from out of state. Associated also received the request for BAFOs on March 26 and responded by letter dated March 27, which the contracting officer received on March 28. Award was made to Associated at a price of \$500,718 on March 30.

First, Evergreen argues that it was unaware of the possibility that BAFOs would be requested because the solicitation contained a clause which advised offerors to submit their proposals on the most favorable terms as the agency reserved the right to make award based on initial offers.

The solicitation indicated that the procurement would be conducted by negotiation rather than sealed bidding. Generally, in negotiated procurements, agencies must conduct written or oral discussions with all responsible offerors within the competitive range before awarding a contract. Those offerors must be given an opportunity to revise their proposals and submit BAFOs by a common cutoff date. Federal Acquisition Regulation (FAR) §§ 15.609 and 15.611; Medical Research Laboratories, Inc., B-235243, July 17, 1989, 89-2 CPD ¶ 54.

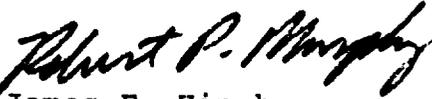
In limited circumstances, award may be made on the basis of initial proposals, without discussions and BAFOs. FAR § 15.610. One of those circumstances arises when the solicitation contains the warning cited by the protester that the agency reserves the right to make award based on initial proposals "without holding any further discussions." Thus, this warning in the RFP was not at all inconsistent with the agency's right spelled out in the regulations to hold discussions and request BAFOs; it simply placed offerors on notice that the VA could make award without discussions. Thus, it should not have misled the protester into believing that award would necessarily be made on the

basis of initial proposals. Moreover, contrary to the protester's argument, there is no requirement that the solicitation itself include all of the rules governing procurement by negotiation. Those rules are set forth in FAR Part 15, and since these regulations are published in the Federal Register, Evergreen is deemed to have constructive notice of their contents. Delta Sys., Inc.--Recon., B-232235.2, Sept. 23, 1988, 88-2 CPD ¶ 282.

Next, regarding the amount of time allowed for the submission of BAFOs, there is no hard and fast rule governing the amount of time to be provided for responses to BAFO requests; however, agencies should allow a "reasonable time" under the circumstances for a response to be prepared. See Morris Guralnick Assocs., Inc., B-218353, July 15, 1985, 85-2 CPD ¶ 50 (1-day response time held reasonable). Here, the record discloses that both offerors received the same amount of time to respond from Anchorage, and that the reason the protester did not respond within that time period was its own delay in picking up and opening its mail. Under these circumstances, there is no basis to conclude that the agency acted arbitrarily or unreasonably in establishing the time frame it did. Id.

Finally, Evergreen contends that it should have received a notice of intent to award the contract 10 days prior to the award date to allow time to file a protest. While FAR § 15.1001(b)(2) requires a preaward notice be given to offerors in a small business set-aside negotiated procurement so that a small business size challenge can be made, the instant procurement was unrestricted. FAR § 15.1001(c) only imposes an obligation upon contracting agencies to notify unsuccessful firms of the agency's award decision once the award has been made. We are aware of no legal authority under the circumstances present in this case which imposes a duty upon the contracting officials to notify offerors prior to making an award. Kunkel-Wiese, Inc., B-233133, Jan. 31, 1989, 89-1 CPD ¶ 98.

The protest is denied.



for James F. Hinchman
General Counsel