



Comptroller General
of the United States

Washington, D.C. 20548

91-1 QPD 142

Decision

PR

Matter of: Ann Riley & Associates, Ltd.

File: B-241309.2

Date: February 8, 1991

Joseph Gallo, Esq., Hopkins & Sutter, for the protester.
 Ronald K. Henry, Esq., Baker & Botts, and Richard C. Spitzer,
 Esq., for Ace-Federal Reporters, Inc. and Executive Court
 Reporters, Inc., interested parties.
 Denise M. O'Brien, Esq., Federal Energy Regulatory
 Commission, for the agency.
 Catherine M. Evans and John M. Melody, Esq., Office of the
 General Counsel, GAO, participated in the preparation of the
 decision.

DIGEST

Protest challenging contract award for stenographic reporting services as inconsistent with basis for award in request for quotations (RFQ) is sustained where record indicates that agency evaluated awardee's quotation based on its offer of a bonus payment to the government, a factor not stated in RFQ; agency verbally informed awardee that bonus payments would be accepted but did not so inform other quoters; and protester may have offered bonus payment had it known payments would be evaluated.

DECISION

Ann Riley & Associates, Ltd. protests the award of a contract to Executive Court Reporters, Inc. under request for quotations (RFQ) No. DE-RFQ39-91RC-00001, issued by the Federal Energy Regulatory Commission (FERC) for stenographic reporting services. Riley alleges that FERC improperly changed the basis for contract award from that stated in the RFQ without notifying all quoters of the change.

We sustain the protest.

On August 3, 1990, FERC's contracting officer made a determination not to exercise the option to renew its stenographic services contract with Ace-Federal Reporters, Inc., which was to expire on September 30. On August 28, FERC issued an interim solicitation for the 4-month period beginning October 1, with a 1-month option, to cover the time it would take FERC to solicit for and award a new long-term

contract. The RFQ was issued on a small business-small purchase set-aside basis pursuant to Federal Acquisition Regulation (FAR) § 13.105. FERC mailed copies of the RFQ to six small businesses, including Riley and Executive.

FERC historically has received stenographic services at no cost, the contractor instead being reimbursed through charges to the public for copies of transcripts. Consistent with this practice, the RFQ here stated that FERC expected not to be charged, and that quotes would be evaluated based upon the lowest cost for copies of transcripts sold to the public. On September 11, Riley, Executive and a third firm submitted quotes offering to perform the required services at no cost to the government. Riley's evaluated quoted cost to the public was slightly lower than Executive's, but Executive also offered FERC a "bonus bid" of \$0.50 per page; that is, Executive would actually make payments to FERC. The contracting officer determined that award to Executive therefore would be most advantageous to the government.^{1/}

On September 27, Riley learned of the award to Executive, and on October 1 filed this protest in our Office. Performance by Executive had been suspended pursuant to injunctive relief obtained by incumbent Ace in the United States District Court

^{1/} The issue of "bonus bids" first arose in connection with Ace's contract. Unlike the RFQ here, the prior solicitation was an invitation for bids (IFB) which required award to the low responsive, responsible bidder. After Ace submitted an offer of a payment to the government of \$0.05 per page, FERC canceled the IFB and issued a new solicitation which, as amended, prohibited bonus bids. The United States District Court for the District of Columbia found the cancellation of the first IFB improper and ordered FERC to award a contract under the canceled solicitation based on the offer most advantageous to the government, *i.e.*, Ace's bonus bid. Ace-Federal Reporters v. Federal Energy Regulatory Comm'n, No. 90-0287 (D.D.C. Mar. 30, 1990).^X The holding in that case is inapplicable here since it was based on the evaluation criteria under an IFB, where award must be made to the responsive, responsible bidder offering the lowest cost. Here, the RFQ specified that the sole criterion for award would be cost for copies sold to the public. Congress has since enacted legislation requiring FERC to accept bonus bids. However, this provision does not apply to the interim contract as it did not take effect until after the award to Executive.

for the District of Columbia on October 16. Ace-Federal Reporters v. Federal Energy Regulatory Comm'n, No. 90-2396 (D.D.C. Oct. 16, 1990)~~X~~ Ace continues to perform stenographic services for FERC under an extension of its expired contract.^{2/}

Riley argues that FERC improperly failed to adhere to the stated evaluation factor in the RFQ--lowest cost to the public--by awarding the contract to a quoter that did not offer the lowest cost to the public, and that it improperly changed the basis for evaluation by deciding to evaluate bonus bids without notifying all quoters of the change. In this regard, the record shows that Executive had telephoned FERC's contracting office before submitting its quotation to find out whether FERC would accept bonus bids, and was told that it would. Riley asserts that, since it offered the lowest cost to the public, it would have been the successful quoter under the evaluation scheme stated in the RFQ, and maintains that it was prejudiced by FERC's unannounced decision to evaluate bonus bids because it would have submitted a bonus bid had it known such bids would be accepted.

FERC's response is based on the position that small purchase procurements are not subject to the strict requirements that pertain to sealed bidding or negotiated procurements. FERC maintains that it properly considered Executive's bonus bid in the evaluation because FAR §§ 13.105~~X~~ and 13.106~~X~~ require the contracting officer to consider quotations' advantages to the government, including administrative costs. FERC contends it was unreasonable for Riley to believe that cost to the government, i.e., bonus bids, would not be evaluated since the FAR requires contracting officers to consider cost to the government in evaluations. Indeed, FERC argues, Riley was on notice that cost to the government would be considered because the solicitation provided that FERC did not expect to be charged for stenographic services. Alternatively, FERC asserts that contracting officers have broad discretion to apply evaluation factors not stated in the solicitation; to the extent that its oral advice to Executive regarding bonus bids amounted to a change in the evaluation criteria, FERC

^{2/} Ace applied to the District Court for declaratory and injunctive relief after FERC made a determination to award the contract to Executive notwithstanding a protest Ace had filed with our Office. The court granted a temporary restraining order and a preliminary injunction pending our decision on Ace's protest, which primarily alleged that FERC had improperly excluded Ace, a large business, from the competition by setting the procurement aside for small business concerns. We denied the protest. Ace-Federal Reporters, Inc., B-241309, Dec. 14, 1990, ~~X~~ 90-2 CPD ¶ ____.

argues it was not required to amend the RFQ or otherwise notify the other quoters that bonus bids would be considered because the requirement at FAR § 15.410~~X~~ regarding notification to offerors does not apply to small purchases.

The small purchase procedures of the FAR set forth abbreviated competition requirements designed to minimize administrative costs that otherwise might equal or exceed the cost of procuring relatively inexpensive items. While small purchases therefore are not governed by normal competition procedures, all procurements, including small purchases, must be conducted consistent with the concern for a fair and equitable competition that is inherent in any procurement. Armour of Am., B-237690, Mar. 19, 1990~~X~~ 90-1 CPD ¶ 304. In this connection, it is fundamental that an agency may not solicit quotations on one basis and then make award on a materially different basis when other vendors would be prejudiced by such an award. Discount Mach. and Equip., Inc., B-220949, Feb. 25, 1986~~X~~ 86-1 CPD ¶ 193.

The agency clearly did not meet this standard. As indicated, the RFQ stated that the award decision would be based on the cost to the public, that is, on the amount the contractor would charge the public for transcripts. A bonus payment back to the government does not affect the amount the public must pay for a copy of a transcript and a bonus bid therefore clearly is not encompassed by reference to cost to the public.^{3/} While FERC may have had a legal obligation to consider cost to the government and, thus, to evaluate bonus bids, quoters were aware that FERC would consider cost to the government only to the extent indicated in the RFQ--that FERC did not expect to be charged; there was nothing implicit in this provision indicating that bonus payments would be evaluated. As there was nothing explicit in the RFQ providing for the evaluation of bonus payments and the language of the RFQ in no way suggested that the award determination would be based wholly or in part on offered bonus payments, it was improper for the agency to make award based on Executive's bonus bid; quoters, including Riley, were not on notice that bonus bids would be considered.

3/ Moreover, even if we agreed with FERC's broad interpretation, it was not clear from the RFQ how FERC would weigh the public cost and bonus payment factors in determining the overall most favorable quote. The record indicates FERC ultimately considered Executive's bonus bid, not pursuant to a predetermined formula in a source-selection plan, but as more or less of a tiebreaker once the evaluation showed that the two firms' proposed costs to the public were close.

Exacerbating FERC's improper evaluation is the fact that it advised Executive, but not other quoters, that bonus bids could be offered. FERC correctly notes that the FAR § 15.410 requirement that equal information be provided to all offerors does not apply per se to small purchases. However, as discussed above, notwithstanding the inapplicability of particular FAR provisions, FERC was required to conduct the competition in a fair and equitable manner. FERC did not meet this standard; communicating the basis for award to only one quoter precluded other quoters, including Riley, from competing on an equal basis. See Intrrol Corp., 64 Comp. Gen. 672 (1985), 85-2 CPD ¶ 35.

FERC asserts that we previously have held that contracting officers properly may consider evaluation criteria that are not stated in the solicitation. Hoffman Mgmt., Inc., B-238752, July 6, 1990, 69 Comp. Gen. ~~_____~~ (1990), 90-2 CPD ¶ 15; Washington Occupational Health Assocs., Inc., B-222466, June 19, 1986, 86-1 CPD ¶ 567. However, FERC's reliance on these decisions is misplaced. In those cases the agencies allegedly applied unstated subfactors of stated evaluation factors; we held that agencies may apply unstated subfactors that are reasonably related to the stated factors. Here, FERC did not apply a subfactor of a stated evaluation factor, but rather applied an evaluation factor--amount of a bonus bid--that was not related to the sole stated criterion, cost to the public. Thus, FERC clearly had no basis to consider a bonus bid under the terms of the RFQ as issued.

We conclude that the evaluation was based on a factor not specified in the solicitation. Had all quoters, including Riley, been advised, as Executive was, that the award would be based on both cost to the public and bonus bids, which apparently is what the agency intended, the outcome of the competition could have been different. Therefore, the award to Executive under the deficient solicitation was improper, and we sustain the protest on this basis.

Ordinarily, where a competition has been conducted on an improper basis, we will recommend that the deficiencies be corrected and that the competition be reopened. Because the period of performance under this interim contract period is to expire on February 28, and the agency is in the process of soliciting for a new contract for stenographic services, such relief would serve no purpose here. However, by separate letter of today, we are advising the Chairman of FERC of our decision. Further, we find Riley entitled to reimbursement of

its protest costs, including attorneys' fees, and the costs of preparing its quotation. 4 C.F.R. § 21.6(d)(1990). Riley should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e)

The protest is sustained.

Milton J. Jordan

Acting

Comptroller General
of the United States

1. PROCUREMENT

Competitive Negotiation

Offers

Evaluation errors

Allegation ~~substantiation~~

PROCUREMENT

Small Purchase Method

Quotations

Evaluation errors

Non-prejudicial ~~allegation~~