



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dale Stevens Construction

File: B-242234

Date: April 5, 1991

L. Edward Robbins, Esq., for the protester.
Joseph M. Goldstein, Esq., Department of the Air Force, for the agency.
Steven W. DeGeorge, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Award to offeror whose proposal failed to conform to material requirement concerning location for mounting of environmental scrubber system equipment was improper where waiver of requirement resulted in competitive prejudice to protester.

DECISION

Dale Stevens Construction protests the award of a contract to HHI General Contractor under request for proposals (RFP) No. F42650-90-R-0274, issued by the Department of the Air Force, Ogden Air Logistics Center, for the supply and installation of environmental protection scrubber systems for a plating shop located at the Center. Stevens contends that the Air Force improperly waived mandatory requirements of the solicitation in order to accept a nonconforming alternate proposal submitted by the awardee.

We sustain the protest.

The solicitation was issued on July 25, 1990, calling for the supply and installation of environmental scrubber systems to include blowers, mist eliminators and sprinkler systems. The cover page of the RFP provided that the systems were to be designed and installed in accordance with an attached statement of work (SOW). Among the provisions included in the SOW were several pertaining to the particular design requirements of the equipment to be acquired. Other provisions specified the location for installation of the equipment within the plating shop. By an amendment to the RFP, potential offerors were also provided with drawings which depicted the location for installation of the various equipment comprising the scrubber systems. The RFP prohibited the submission of more than one proposal by an offeror.

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Stevens and HHI were the only firms to respond to the solicitation. Both were found to have submitted acceptable offers and, following a brief period of discussions, best and final offers (BAFO) were submitted on September 19. HHI was found to have submitted the low offer at \$3,111,976, compared to the protester's offer of \$3,184,407. Award was made to HHI on September 25.

Following an unsuccessful protest to the agency, Stevens filed the instant protest with our Office. Stevens contends that the award was improper for two reasons: (1) the Air Force improperly waived material requirements of the RFP in order to accept HHI's alternate proposal; and (2) HHI submitted an alternate proposal in violation of the RFP's prohibition against multiple proposals.

As to the protester's first contention, Stevens asserts that the design proposed by HHI, and accepted by the agency, departs from material requirements of the solicitation having to do with the location of the blower component of the scrubber system within the plating shop. According to the protester, while the RFP's SOW mandates that the specified blowers be mounted on the roof of the building, the awardee's successful offer proposed to mount the blowers on one of the building's side walls. The protester relies upon language contained in two paragraphs of the SOW in support of its interpretation:

Paragraph 4.1.3 Blowers and Stacks

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"All fans and motors shall be mounted on existing steel on the roof as shown on drawing 05059006 and the contractor shall provide any needed modification of support steel structure and relocating existing equipment at no additional charge to the government. . . ."

Paragraph 4.1.4 Platform Hoist and Support Structure

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"The monorail east/west shall be extended over the roof on the west side of the building by 6' or more depending on fan size. . . ."

Additionally, the protester points out that Drawing 05059006, referenced in Paragraph 4.1.3 of the SOW, depicts the blowers mounted on the ceiling of the plating shop. Stevens contends

that acceptance of HHI's proposal resulted in a waiver of these requirements.

The Air Force responds by making two arguments. First, it maintains that the protester has misinterpreted the solicitation and that, properly construed, the RFP allows for alternate designs such as that proposed by the awardee. Secondly, the agency argues that in negotiated procurements such as this one, acceptance of alternate designs is inherently allowed. We find that the award was improper for the reasons cited below.

As an initial matter, the Air Force does not dispute that the language relied upon by Stevens calls for the blowers to be mounted on the ceiling of the plating shop. However, the agency argues that alternate designs in this respect were expressly permitted by other language of the RFP's SOW. The agency views the following language in Paragraph 4.1 of the SOW as dispositive:

"Alternate design on mist eliminators may be permitted, if the contractor can show a more effective, economical and proved system is working without any problem in a similar environment and conditions. . . ."

According to the Air Force, this language was prefatory to all of the design requirements set forth thereafter in the SOW, and was intended to encompass all elements of the scrubber systems, including the blowers.

Stevens counters that this language is expressly limited to "mist eliminators," which it maintains are separate and distinct from the blowers. Stevens also argues that a distinction between the two is evidenced by the first page of the SOW which is entitled: "Blowers, Mist Eliminators and Sprinkler System," and by the first sentence of Paragraph 4.1 which references both blower and mist eliminator systems. According to Stevens, the fact that only mist eliminators are thereafter identified in the sentence referenced by the agency, indicates an intent to limit the allowance for alternate designs to only those components. Finally, the protester argues that the Air Force's interpretation ignores Drawing 05059006 which depicts the blowers mounted on the ceiling of the building.

Where, as here, a dispute exists as to the meaning of solicitation requirements, we read the solicitation as a whole and in a reasonable manner that gives effect to all of its

provisions. See National Projects, Inc., 69 Comp. Gen. 229 (1990), 90-1 CPD ¶ 150. Applying this standard, we find the Air Force's interpretation regarding the RFP's requirements, as to the location of blower equipment, to be unreasonable.

In our view, the RFP does in fact distinguish between mist eliminators and blowers as separate components of the required scrubber systems. Thus, even to the extent that Paragraph 4.1 provides for alternate designs in terms of equipment, we believe that is solely limited to mist eliminators and does not apply to the separately described blower system. Furthermore, as stated by the protester, the agency's interpretation fails to give effect to Drawing 05059006 which shows the blowers mounted on the building's ceiling, and was expressly made a part of the solicitation. Accordingly, we fail to find support in the record for the Air Force's interpretation which underlined its acceptance of HHI's alternate design.

In negotiated procurements, any proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. Martin Marietta Corp., 69 Comp. Gen. 214 (1990), 90-1 CPD ¶ 132. It is fundamental that all offerors for government contracts must compete on an equal basis. This requires that agencies revise solicitations and give all offerors an opportunity to submit new or revised proposals if changes occur in requirements or if the proposal considered most advantageous to the government involves a departure from stated requirements. Telenet Communications Corp., B-224561, Feb. 18, 1987, 87-1 CPD ¶ 181. As we have concluded above, the solicitation here required that the blowers be mounted on the ceiling of the plating shop. The agency's waiver of this material requirement in favor of the alternate design proposed by the awardee, without amending the RFP to give the protester the same opportunity, placed it at a competitive disadvantage as our review of the record, including the price proposals, shows that there was indeed a significant price advantage to the alternate location.

We accordingly find the award to HHI to have been improper and sustain the protest on this basis.^{1/}

Stevens requests that we recommend that the Air Force immediately terminate the HHI contract and make award to it, or in the alternative, that we recommend that a reprocurement be conducted under an appropriately amended solicitation. The Air Force reports that the HHI alternate design meets its

^{1/} Since we have concluded that the award to HHI was improper, we need not address Stevens' second protest ground.

needs, and that approximately 40 percent or more of the work under the contract has already been completed. Under these circumstances, we do not believe that termination of the HHI contract at this juncture would be appropriate. However, we do find the protester entitled to its proposal preparation costs and its costs of pursuing this protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1991). The protester should submit its claim for these costs directly to the agency. 4 C.F.R. § 21.6(e).

for Milton J. Fowler
Comptroller General
of the United States