14422-0

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aquasis Services, Inc.

File: B-240841.2

Date: June 24, 1991

Jesse W. Rigby, Esq., Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, for the protester.
Theodore M. Bailey, Esq., Bailey & Shaw, P.C., for Golden's Kel Lac Uniforms, an interested party.
Thomas H. Eshman II, Esq., Department of the Air Force, for the agency.
Stephen J. Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly did not include protester's proposed reduced award fee in price evaluation of proposal, where it was clear from the solicitation that offerors were not intended to propose other than the fee stated on the pricing schedule, and that different award fees would not be evaluated.

2. Agency's alleged failure to provide preaward notice of intended awardee under small business set-aside is not basis for overturning award, where agency executed a written urgency determination prior to award and, in any case, protester did not file a timely post-award size protest with the Small Business Administration and was not found to be other than small, and where, in any case, agency executed a written urgency determination prior to award.

DECISION

Aquasis Services, Inc. (ASI) protests the award of a contract to Golden's Kel Lac Uniforms, Inc. under request for proposals (RFP) No. F41636-90-R-0082, issued by the Department of the Air Force as a total small business set-aside for the fitting and alteration of uniforms at Lackland Air Force Base. ASI argues that the Air Force failed to provide the advance notice of the intended awardee that is required for small business set-asides, and that the agency improperly evaluated ASI's cost proposal as other than low.

We deny the protest.

BACKGROUND

The RFP provided for award of a firm, fixed-price contract with the possibility of an award fee. It included a pricing schedule on which offerors were to enter their proposed unit prices on contract line items (CLIN) 0001 through 0016 for the base year, as well as on corresponding CLINs for each of 4 option years. (The pricing schedule for the first option year, for example, included CLINs 1001-1016, and for the second, CLINs 2001-2016.) In addition, the RFP included CLIN 0017[1] (and a corresponding CLIN for each option year), labeled "Award Fee." While the schedule for CLINs 1 through 16 provided blank spaces in which offerors were to enter their prices for various fitting and alteration services, CLIN 17 included preprinted dollar amounts that represented the maximum award fees that could be earned under the contract. Those maximums were specified as $9,000 quarterly and $36,000 annually.

Elsewhere, the solicitation set out detailed "standards of performance [to] be employed . . . in determining whether and to what extent the contractor has earned and shall be entitled to receive any Award Fee," and explained that the actual amount to be paid by the government--ranging from zero up to the maximums specified in the RFP--would depend on the quality of the contractor's performance in each quarterly and annual period. As for the evaluation, the RFP provided that the prices for CLINs 1, 2, 3, 5, 7, 9, 10, and 11 would be evaluated using a formula involving weighted percentages; the prices for CLINs 4, 6, 8, 12, 13, 14, 15, and 16 would be evaluated simply on the basis of the government's best estimated quantities (BEQ), set forth elsewhere in the solicitation. There was no mention of CLIN 17 in the price evaluation scheme.

The proposals submitted by the protester and the awardee differed fundamentally in their treatment of CLIN 17. ASI entered its prices for various kinds of alterations in the blank spaces provided on the pricing schedule for CLINs 1 through 16. For CLIN 17, however, for which no blank spaces were provided, ASI "whited out" the preprinted figures of $9,000 and $36,000 and in their place entered "NO CHARGE" and "0," respectively. Golden's proposal provided prices for CLINs 1 through 16 and simply left intact the preprinted award fee figures for CLIN 17. In evaluating the proposals, the Air Force initially added the maximum award fee amount specified in CLIN 17 to each offeror's evaluated price, including ASI's. The result was a total evaluated price of $1,654,579 for

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1/ In referring to CLINs from this point on, zeroes will be omitted for the sake of brevity.

Golden and $1,671,337 for ASI, and the Air Force awarded the contract to Golden on the basis of its lower proposed price. After ASI protested the award, the Air Force reexamined its price evaluation and determined that it had erroneously included the award fee in the evaluated prices; accordingly, the agency recalculated proposed prices without the award fee. Golden's total price, of course, remained lower than ASI's: $1,516,757, compared to $1,533,514.

IMPROPER PRICE EVALUATION

The protester argues that the agency' evaluation of its and Golden's cost proposals failed to give proper consideration to the award fee under CLIN 17. Specifically, ASI states that, since its proposal clearly indicated a zero or "no charge" amount for the fee, the firm was explicitly relinquishing any additional profit that might accrue from the award fee; consequently, its proposed price should have been evaluated as lower than it would have been with the award fee included. Conversely, the protester argues that, since Golden allowed the preprinted maximum award fee to remain in its pricing schedule, the agency should not subtract that figure from Golden's proposed price; with the $36,000 annual award fee included in Golden's total proposed price, ASI's price would be low. In support of its position, ASI refers to August 1990 clarification letters from the contracting officer to prospective offerors, which stated that "the evaluated price proposal for each contractor will be the addition of all evaluated prices for all contract line items." According to the protester, this language indicated that the price of all CLINs, including CLIN 17, would be added together to obtain the total evaluated prices.

We find that the evaluation was proper. The pricing schedule clearly indicated to offerors that award fee prices different from those already printed on the schedule were not being solicited; the schedule provided spaces for offerors to enter prices for CLINs 1 through 16, but included a preprinted amount for the award fee instead of a space, and nowhere invited offerors to propose a different award fee. Indeed, we think the agency could not have made its intent in this regard much clearer. Certainly, there was no basis for the protester to assume that the agency contemplated offerors whiting out the preprinted amount in order to insert a different fee.

The evaluation provisions similarly were sufficient to indicate that the award decision was not intended to be based on different proposed award fees. In this regard, the price evaluation provisions explicitly set forth an evaluation scheme for each of the CLINs 1 through 16, but made no mention of CLIN 17. This approach presumably was adopted due to the fact that the amount of award fee to be paid under the contract was designed to vary based on the quality of the contractor's performance, so there was no firm basis for comparing proposed award fees during the evaluation. It also is significant that the award fee provision here was designed to obtain high quality performance by providing the contractor with an incentive for such performance; permitting an offeror, on its own initiative, to reduce or eliminate this incentive in hopes of enchancing its chances of receiving the award would defeat the purpose of the provision. If Aquasis desired to reduce its total price, it easily could have done so by reducing its line item prices.

The reference in the agency's clarification letters to adding together "all" of the CLINs to determine the total price meant just that; consistent with the structure of the pricing schedule, the agency would add the preprinted award fee price to the total of the offered CLINs 1 through 16 prices. (The agency ultimately calculated all offerors' evaluated prices without the award fee, resulting in no change in the outcome). The clarification letters in no way reasonably suggested to offerors that changes in the preprinted award fee would be considered.

FAILURE TO PROVIDE PREAWARD NOTICE

ASI also argues that the award to Golden is defective because the agency did not provide the required preaward notice of the intended awardee. The Air Force awarded the contract to Golden on February 8, 1990, and notified ASI of the award on February 11. By failing to notify unsuccessful offerors of the probable awardee prior to contract award, ASI asserts, the Air Force violated Federal Acquisition Regulation (FAR) § 15.1001(b)(2), which generally requires the contracting agency in a small business set-aside to inform each unsuccessful offeror of the name and location of the apparent successful offeror, in writing, prior to award.

The FAR provides an exception to the preaward notice requirement where the agency has executed a written determination that the urgency of the requirement necessitates award without delay. FAR § 15.1001(b)[illegible] Advanced Support Sys. Management, Inc., B-241528; B-2[illegible]2, Feb. 14, 1991, 91-1 CPD ¶ 170. In this case, the A[illegible]ce executed a written determination that urgent and compelling circumstances necessitated that the award be made without delay. In that determination, which was executed on January 25, 1991, the agency found that civilian employees who, prior to award, were performing the alteration tasks encompassed by this contract, held only temporary appointments that were about to expire;2/ that the agency lacked the capability to perform the services in-house if contract performance did not commence on schedule; and that the anticipated influx of reservists called up in connection with Operation Desert Storm made the need for continued alteration services particularly acute.

We will not question the agency's written determination under the circumstances here. In this regard, even where an agency fails to provide the required preaward notice of an award under a small business set-aside, we will not find the award improper where a timely post-award size protest was not filed with the Small Business Administration (SBA) and the awardee was not found to be other than small. See Science Sys. and Applications, Inc., B-236477, Dec. 15, 1989, 89-2 CPD ¶ 558. Neither circumstance is present here; ASI has not filed a size protest with the SBA, and the firm does not allege (and the record does not indicate) that Golden is other than small. Consequently, the lack of preaward notice provides no basis for objecting to the award.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel

2/ The solicitation was issued after the Air Force undertook a study, in accord with Office of Management and Budget Circular A-76, indicating that it could realize substantial cost savings by contracting out services previously performed in-house.