



Comptroller General
of the United States

Washington, D.C. 20548

14-5595

Decision

Matter of: Miller Building Corporation

File: B-245488

Date: January 3, 1992

Lonnie B. Williams, Esq., Marshall, Williams & Gorham, for the protester.

Craig R. Schmauder, Esq., Department of the Army, for the agency.

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DIGEST

1. In order to conduct meaningful discussions, agencies must generally point out weaknesses, excesses, or deficiencies in proposals, unless doing so would result either in disclosure of one offeror's technical approach to another or in technical leveling. However, agencies are not obligated to point out inherent weaknesses in a firm's basic technical approach.

2. Where contracting agency determined that second low-priced proposal was technically acceptable and thus had a reasonable chance for award, contracting agency reasonably included the proposal within the competitive range even if the proposal had some deficiencies.

3. Where solicitation provided that the lowest-priced offeror would not necessarily receive award, and that award would be made to the offeror whose proposal was most advantageous to the government considering price and other factors, agency properly awarded to higher-priced offeror since agency reasonably determined that the technical advantage associated with higher-rated proposal warranted the price premium.

DECISION

Miller Building Corporation protests the award of a contract to Harbert International, Inc. under request for proposals (RFP) No. DACA21-91-R-0039, issued by the United States Army Corps of Engineers, Savannah District, for the design and construction of a Special Operations Forces (SOF) Headquarters at Fort Bragg, North Carolina. The protester

principally contends that the agency failed to conduct meaningful discussions, that the firm was improperly included in the competitive range, and that the selection decision was flawed.

We deny the protest.

BACKGROUND

The RFP, issued on April 3, 1990, required offerors to submit technical proposals and prices. The RFP advised offerors that the government would make award to the responsible offeror whose offer, conforming to the solicitation, was determined to be the most advantageous to the government. The RFP listed the following three evaluation factors in descending order of importance: architectural and engineering approach, management, and previous experience. The architectural and engineering approach category was divided into the following five subfactors: architectural design, site development and design, structural design, mechanical systems, and electrical systems. Of the five subfactors, architectural design was designated as the most important subfactor, site development ranked second and the remaining three subfactors were equal in importance. Although the solicitation did not provide for the rating of price, the RFP advised offerors that their prices would be reviewed for completeness, reasonableness and for compatibility with their respective technical proposals.

Five firms submitted proposals by the December 20 closing date. After the initial evaluation, the agency determined that the five offerors, including Miller and Harbert, were within the competitive range. Discussions were held and best and final offers (BAFO) were requested by April 22, 1991. On July 19, Harbert was awarded the contract. Miller's protest to our Office followed.

DISCUSSIONS

Miller contends that while the agency ultimately determined that Miller's proposed architectural design for the SOF Headquarters was incompatible with the design of the rest of the SOF Complex, the agency's January 1 clarification request did not offer any insight to Miller regarding the perceived incompatibility. In this regard, Miller argues that the only design feature addressed in the clarification request concerned the development of exterior elevations, particularly the window treatment.

Contracting officers are required to conduct discussions with all offerors whose proposals are within the competitive range. Federal Acquisition Regulation (FAR) § 15.610(b).

Such discussions must be meaningful, and in order for discussions to be meaningful, agencies generally must point out weaknesses, excesses, or deficiencies in proposals, unless doing so would result either in disclosure of one offeror's technical approach to another or in technical leveling. The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425.

The record shows that the technical evaluation team (TET) generally found that Miller's technical proposal contained a sound basic architectural design. For example, the TET characterized Miller's exterior design as "very pleasing, but [it] has some problems . . . blending [with] the surrounding architecture." The agency states, and the record shows, that the evaluation of the exterior design's compatibility involved a subjective aesthetic assessment of style by the TET and that the exterior design was a substantial portion of Miller's proposal, the revision of which would have required a major alteration of Miller's proposal, including its basic design. Under these circumstances, the perceived incompatibility of Miller's basic proposal represented an inherent weakness which would have required a major revision to resolve. Agencies are not obligated to point out such inherent weaknesses during discussions. Medical Care Dev., Inc.; Birch and Davis Int'l, Inc., B-227848.3; B-227848.4, Oct. 19, 1987, 87-2 CPD ¶ 371; Advanced Technology Sys., B-221068, Mar. 17, 1986, 86-1 CPD ¶ 260.

INCLUSION IN THE COMPETITIVE RANGE

In the alternative, Miller argues that given the perceived incompatibility of its building design with the existing structures at the SOF Headquarters, the agency should not have included Miller in the competitive range. Miller maintains that the agency's failure to exclude the firm from the competitive range caused Miller to unnecessarily expend substantial costs in the preparation of a revised proposal.

The purpose of a competitive range determination in a negotiated procurement is to select those offerors with which the contracting agency will hold written or oral discussions. FAR § 15.609(a); S&O Corp., B-219420, Oct. 28, 1985, 85-2 CPD ¶ 471. The competitive range consists of all proposals that have a reasonable chance of being selected for award, usually those proposals which are technically acceptable as submitted or which are reasonably susceptible of being made acceptable through discussions. Information Sys. & Networks Corp., B-220661, Jan. 13, 1986, 86-1 CPD ¶ 30; Fairchild Weston Sys., Inc., B-218470, July 11, 1985, 85-2 CPD ¶ 39. FAR § 15.609(a) provides that if doubt exists as to whether a proposal is in the competitive range, an agency should endeavor to broaden the competitive range

since this will maximize the competition and provide fairness to the various offerors. See Cotton & Co., B-210849, Oct. 12, 1983, 83-2 CPD ¶ 451.

As noted previously, the solicitation had three primary technical evaluation factors. Miller's initial proposal received an acceptable rating in all three areas. With regard to price--which was not given a relative weight in the solicitation--Miller's proposed initial price was lower than that of the two firms receiving a higher technical rating and was the second lowest price of the five offers received. Given the fact that Miller was determined to be technically acceptable and, in fact, had submitted the second lowest proposed price, we think the contracting officer, in the interest of full and open competition, reasonably included Miller's proposal within the competitive range. See Kaiserslautern Maint. Group, B-240067, Oct. 12, 1990, 90-2 CPD ¶ 288.

TECHNICAL/PRICE TRADEOFF

Miller contends that the award to Harbert was unreasonable because the agency did not give proper consideration to the offerors' prices. Specifically, the protester argues that the award to Harbert was not the most advantageous to the government because the agency awarded the contract at a price approximately \$2 million higher than Miller's proposed price.

In a negotiated procurement, the government is not required to make award to the firm offering the lowest price unless the RFP specifies that price will be the determinative factor. University of Dayton Research Inst., B-227115, Aug. 19, 1987, 87-2 CPD ¶ 178. Since the RFP did not provide for award on the basis of the lowest-priced technically acceptable proposal, but instead stated that the award would be made to the offeror whose offer is most advantageous to the government, considering price and other factors, the contracting officer had the discretion to determine whether the technical advantage associated with Harbert's proposal was worth its higher price. Such technical/price tradeoffs are subject only to the test of rationality and consistency with the established evaluation factors. Frequency Eng'g Laboratories Corp., B-225606, Apr. 9, 1987, 87-1 CPD ¶ 392.

Miller's second-low BAFO was \$16,817,943, compared to Harbert's third-low BAFO of \$18,930,000. While the TET determined that Miller's proposal met the minimum requirements and it received an "acceptable" rating, the TET found drawbacks in Miller's proposal in each technical evaluation area. In the architectural and engineering approach area--the most important technical area--the TET considered some

of the following weaknesses: (1) Miller's proposed architectural design was not compatible with the design of the surrounding complex; (2) Miller's proposed landscaping looked unnatural; and (3) Miller's proposed handling of the storm drainage and erosion at the site was weak. With regard to the management evaluation area, the TET felt that there were potential management problems because Miller decided to use an outside consultant as the Director of Quality Control, whose authority over the contractor's representative was unclear. Finally, the TET found that Miller's previous experience with similar projects was limited. Miller's experience consisted primarily of commercial rather than government construction projects and Miller's experience was with smaller projects than the one involved here.

On the other hand, Harbert's proposal was rated exceptional in each technical evaluation area. This rating was superior to the rating that Miller received in every area. For example, the TET noted that Harbert's architectural proposal presented "an outstanding image for a major command headquarters." Moreover, the TET concluded that Harbert's proposed landscaping and site design enhanced the architecture of the building it proposed and incorporated necessary security features. With regard to Harbert's management approach, the TET found that Harbert's plan clearly identified the project management system Harbert offered to control the design and construction phases of the project. Finally, Harbert's previous experience was extensive and included similar work on large military projects.

In view of the fact that Harbert's proposal was rated substantially higher than Miller's across the board and since Miller has not challenged the evaluation of Harbert's proposal, we find that the agency reasonably determined, consistent with the evaluation criteria, that Harbert's proposal was significantly superior to Miller's and that it was most advantageous to the government.

BIAS IN FAVOR OF THE AWARDEE

Finally, Miller contends that the agency was biased in favor of Harbert and that this bias is reflected in the way the agency handled the evaluation of the proposals and technical/price tradeoff. Specifically, Miller alleges that Harbert's Executive Vice-President is a retired Army Colonel who is very active with the Corps of Engineers. Miller maintains that given that factor present here, Miller and other contractors always will be eliminated in favor of Harbert. There must be very strong proof that an agency has a specific intent to injure a protester before we may find bias. Adrian Supply Co., B-241502 et al., Feb. 7, 1991, 91-1 CPD ¶ 138. Here, the protester has presented no

evidence to substantiate its claim of bias--other than mere speculation. We have examined the record and see no evidence to support Miller's allegation. We therefore find that the agency acted properly in making award to Harbert.

The protest is denied.


for James F. Hinchman
General Counsel