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Curcio



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fritz Companies, Inc.
File: B-246736; B-246736.2; B-246736.3
Date: May 13, 1992

J. Michael Farrell, Esq., and James H. Roberts III, Esq., Manatt, Phelps, Phillips & Kantor, for the protester, Elias Rosenzweig, Esq., and Francis P. Manfredi, Esq., Brauner, Baron, Rosenzweig & Klein, for Daniel F. Young, Inc., an interested party. Jonathan Silverstone, Esq., Agency for International Development, for the agency. Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee is not complying with solicitation provision, which prohibits the awardee and any subcontractor of the awardee from representing any foreign government during the period of performance, involves a matter of contract administration for consideration by the procuring agency, not the General Accounting Office.
2. Protest that agency improperly awarded contract on the basis of initial proposals, without establishing a competitive range and holding discussions, is sustained where agency could not reasonably conclude that the awardee's initial proposal was superior to the other acceptable proposals received.
3. By allowing one offeror to revise a provision of its subcontracting plan that was material to its status as the successful offeror, the contracting agency engaged in discussions with the offeror and therefore was required to give a similar opportunity to revise their proposals to the other offerors in the competitive range.

DECISION

Fritz Companies, Inc. protests the award of a contract to Daniel F. Young, Inc., under request for proposals (RFP) No. W-FA-91-011, issued by the Agency for International Development (AID) for the acquisition of freight forwarding services.

We dismiss the protests in part and sustain them in part.

BACKGROUND

The RFP was issued on July 16, 1991, for a contractor to provide freight forwarding and booking services related to food-aid cargoes for which AID is responsible. The RFP contemplated the award of a requirements contract on a no-cost basis to the government.¹ The RFP required the submission of a technical proposal and listed four evaluation factors against which the technical proposal would be evaluated. The RFP also required the submission of a business management proposal which would be evaluated to determine the responsibility and eligibility of the offeror and which was to include a small business and small disadvantaged business (SDB) subcontracting plan, if the offeror itself was not a small business or SDB. The RFP provided that if offers were found to be equal, the participation of disadvantaged enterprises² and small business concerns could become the determining factor in the award decision. Finally, the RFP provided that any contractor or subcontractor associated with the procurement was prohibited from representing any foreign government during the period of the contract. The RFP stated that the contract would be awarded to the responsible and eligible offeror whose proposal, conforming to the solicitation, was most advantageous to the government, technical and business management factors considered.

Eight offerors responded to the solicitation by the August 30 closing date. After the proposals were evaluated independently by each member of a three-member technical evaluation team, the evaluation team met and reached a consensus evaluation for each offeror. Based on the consensus scores, Young was ranked first and Fritz was ranked third. Following the evaluation, the team recommended to the negotiator (the contracting officer's

¹The contractor is compensated through commissions paid by the steamship companies on which the cargoes are booked or chartered.

²As described by AID in the cover letter to the RFP, disadvantaged enterprises are United States business concerns owned and controlled by socially and economically disadvantaged individuals; institutions designated by the Secretary of Education as historically black colleges and universities; colleges or universities having a student body in which more than 40 percent of the students are Hispanic-American; and private voluntary organizations which are controlled by individuals who are socially and economically disadvantaged.

representative) that award be made to Young on the basis of initial proposals because the Young proposal was superior technically and none of the other proposals could become competitive with Young without substantial revisions.

The negotiator reviewed the file and disagreed with the technical evaluation team. Specifically, he found that the proposals of Fritz and the second ranked offeror could be improved through discussions. He concluded, however, that at best the proposals could become technically equal to the proposal of Young, which received a near perfect score. He also found that Young submitted a small business and SDB subcontracting plan that was superior to those submitted by Fritz and the second ranked offeror. Accordingly, he recommended that the contracting officer award the contract to Young on the basis of initial proposals because at best the proposals could be ranked technically equal if discussions were held, and in such circumstances the solicitation directed award to the offeror with the best plan for participation by disadvantaged enterprises and small businesses, in this case Young.³ The contracting officer concurred and, on December 20, awarded the contract to Young on the basis of initial proposals.

DISCUSSION

On January 6, 1992, Fritz submitted its protest to our Office. Fritz raised eight issues.⁴ On January 16, Fritz amended its protest to add an additional protest ground which Fritz asserted it learned on January 10. Fritz

³We are not revealing the exact percentages of commissions to be earned by the subcontractors proposed by each offeror since this information was submitted pursuant to a protective order and is considered proprietary.

⁴Those issues are: (1) its acceptable proposal was improperly excluded from the competitive range; (2) AID failed to notify Fritz that it was excluded from the competitive range until after the negotiations had been completed with Young; (3) AID improperly limited the competitive range to one firm; (4) AID did not consider cost; (5) AID did not conduct discussions; (6) AID compared proposals against each other instead of against the evaluation criteria; (7) AID either downgraded Fritz or increased the score of Young based on unannounced criteria; and (8) AID improperly ranked Young's proposal higher based on Young's status as incumbent. AID has persuasively responded to each of these issues. However, in view of our finding that AID improperly made award on the basis of initial proposals, discussed further below, it is unnecessary for us to address the merits of these issues.

complained that Young was ineligible for award because an affiliate of a subcontractor of Young is currently representing foreign governments in violation of paragraph H.2 of the solicitation.

On February 14, AID submitted its report on the protest. On March 3, Fritz submitted its comments on the report. In those comments, Fritz raised two new protest issues: (1) AID improperly awarded the contract to Young on the basis of initial proposals because there were deficiencies in the proposal that had to be corrected through discussions before Young could receive a contract award; and (2) there was a violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (Supp. I 1989). Fritz also specifically addressed AID's reply concerning whether Young was precluded from receiving a contract award because an affiliate of Young's subcontractor represents foreign governments.

We find that the contracting officer could not reasonably conclude that Young's initial proposal was superior to the other acceptable proposals received, and that AID could not properly base the award decision on a revision to Young's subcontracting plan, discussed further below, without giving the other offerors an opportunity to revise their proposals.

Fritz asserts that Young submitted an unacceptable small business and SDB contracting plan. In this regard, Fritz notes that a November 6, 1991, memorandum prepared by the director of AID's Office of Small and Disadvantaged Business Utilization declared the Young subcontracting plan unacceptable. Fritz argues that the agency could not make an award to Young without holding discussions and permitting Young to correct these deficiencies. Fritz further complains that AID did in fact hold discussions with Young on the subcontracting issue and permitted Young to revise its plan. Fritz argues that once the agency did so it was required to establish a competitive range and hold discussions with all offerors in the competitive range. Specifically, Fritz asserts that in the subcontracting plan submitted with its initial proposal, Young stated the percentage of commissions to be earned by a small business or SDB as a range. After discussions were held, however, Young's proposal was changed to indicate that the highest percentage of the commissions stated in the range would be earned by an SDB.

In response, AID asserts that in the contracting officer's view Young submitted a superior subcontracting plan because the top end of the range of commissions that Young proposed would be earned by a small business or SDB was greater than the percentage proposed by the second ranked offeror or Fritz. AID therefore argues that it properly awarded the

contract to Young based on initial proposals because if discussions were held, at best, Fritz and the second ranked offeror would have become equal to Young technically and the tie breaker provision would have dictated award to Young, who proposed the greatest participation by a small business or disadvantaged enterprise.

AID also explains that after the contracting officer determined that Young was the apparent successful offeror, he forwarded Young's subcontracting plan to the director of AID's Office of Small and Disadvantaged Business Utilization for review. The director found that Young's subcontracting plan was unacceptable because it did not include separate percentage goals for using small business and SDB concerns as subcontractors; the address and telephone number of the administrator of the subcontracting plan was not included; and there was no specific citation to Federal Acquisition Regulation (FAR) § 52.219-8 as the clause to be used in all subcontracts that offer subcontracting opportunities. Young was then given the opportunity to revise its subcontracting plan in accordance with these deficiencies. AID argues that when Young's subcontracting plan was found unacceptable by the director, he was using the standards prescribed in the Small Business Act, 15 U.S.C. § 637(d)(6), and in FAR § 19.704 for final plans required after an apparent successful offeror has been designated. AID argues that the apparently successful offeror may negotiate these details with the contracting officer and in such cases the agency does not violate the prohibition against holding discussions with only one offeror. AID asserts that Young's subcontracting plan was otherwise fully responsive to the solicitation.

We find that AID's decision to award the contract to Young on the basis of initial proposals was improper. After the initial proposals were evaluated, Young's technical proposal was scored higher than the proposals of the second ranked offeror and Fritz. As a result, the technical evaluation team recommended award to Young on the basis of initial proposals because, according to the evaluation team, Young's proposal was substantially superior to the other proposals, which could not be improved without major revisions. In reaching his award decision, the contracting officer disagreed with this conclusion. Instead, he found that the proposals submitted by the second ranked offeror and Fritz could become competitive with Young's technical proposal if discussions were held. He nevertheless awarded the contract to Young on the basis of initial proposals based on his conclusion that Young's subcontracting plan was superior to those submitted by the second ranked offeror and Fritz. The fact is, however, that as initially submitted, Young's subcontracting plan offered only a range of participation by a small business or SDB. The contracting officer could not

reasonably conclude that the possibility that Young's subcontractor might earn a percentage of the commissions equal to the top of the range made its proposal superior to the other two proposals since Young in fact committed only to the low end of the range; this low figure was less than the percentage proposed by the second ranked offeror and equal to the percentage proposed by Fritz. Accordingly, AID could not properly make award to Young on the basis of initial proposals on the ground that, even if the top three offers were otherwise equal, Young would be in line for award based on the superiority of its proposed subcontracting plan.

As noted above, the awardee eventually revised its proposed subcontracting plan to provide for a fixed percentage of participation by its proposed SDB subcontractor. While this revision made Young's proposal superior to that of Fritz and the second ranked offeror under the terms of the tie breaker provision in the RFP, AID could not properly base the award decision on Young's revised proposal without giving the other offerors a similar opportunity to revise their proposals.

By allowing Young to make a material revision in its initial proposal, AID engaged in discussions with the firm. See FCC.O&M, Inc., B-238610.2, July 20, 1990, 90-1 CPD ¶ 26.⁵ Once an agency holds discussions with one offeror, it must do so with all offerors. Information Ventures, Inc., B-245128, Dec. 18, 1991, 91-2 CPD ¶ 558. It is clear that AID's decision not to establish a competitive range was based on its decision that award would go to Young under the tie breaker provision; if it had established a competitive range, it is equally clear that both Fritz and the second ranked competitor would have been included in it. Accordingly, AID could not make award to Young on the basis of its revised proposal without holding discussions with

⁵The agency argues that the change in Young's subcontracting plan was not the result of discussions, but instead was the negotiation of an acceptable subcontracting plan with the apparently successful offeror, as permitted under the applicable regulations. Under FAR § 19.702(a), an otherwise successful offeror is to negotiate the terms of its subcontracting plan with the agency; these negotiations clearly do not rise to the level of discussions. See Ask Mr. Foster Travel Div., B-238305, May 9, 1990, 90-1 CPD ¶ 460. It is not reasonable to interpret this provision to apply where, as here, the offeror's status as successful offeror is the result of the revisions to its subcontracting plan.

Fritz and the second ranked offeror and giving them an opportunity to submit revised proposals.⁶

We will not consider Fritz's contention that award could not properly be made to Young because an affiliate of Young's subcontractor is currently representing foreign governments in violation of section H.2 of the solicitation. Fritz's argument is based on information that the affiliate was representing foreign governments on January 10, 1992, 22 days after the contract was awarded. Fritz argues that the provision in issue concerns Young's eligibility for award or definitive responsibility criteria. In response, AID argues that in Young's proposal, Young and its subcontractor specifically agreed to abide by the restriction. AID therefore argues that the issue involves contract administration and is for consideration by AID, rather than by our Office. AID notes that it is currently investigating the issue.

The provision in issue reads in pertinent part as follows: "the Contractor, or any subcontractor associated with this procurement . . . are prohibited from representing any foreign government during the period of this contract." Thus, the provision did not prohibit offerors or their subcontractors from representing foreign governments before the contract was awarded, but only during contract performance. As such it establishes a performance requirement rather than an eligibility criterion or definitive responsibility criterion. See Southern Nevada Comms., B-241534, Feb. 11, 1991, 91-1 CPD ¶ 146. Whether Young and its subcontractor actually comply with this performance requirement is a matter of contract administration for consideration by the procuring agency, not by our Office. See Central Air Serv., Inc., B-242283.4, June 26, 1991, 91-2 CPD ¶ 8.

⁶Fritz also contends that the agency could not make award to Young on the basis of initial proposals because Young did not designate a key person for quality assurance. Our review shows that the solicitation did not require offerors to designate key personnel for quality assurance; rather, whether such personnel were listed could be considered in the evaluation. The record shows that Young's failure to designate a specific individual in fact was recognized and considered by the evaluators.

⁷In the comments it submitted on the agency protest report, Fritz also alleged that there was a violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423, because one of the offerors under the procurement became aware that the evaluations were completed and that one offeror was judged

RECOMMENDATION

Based on our conclusion that award on the basis of initial proposals was improper, we recommend that AID reopen the procurement, establish a competitive range, and hold discussions with those offerors in the competitive range. If, as the result of these discussions, an offeror other than Young is in line for award, AID should terminate Young's contract and award the contract to the successful offeror. We also find that Fritz is entitled to recover its protest costs.

The protests are dismissed in part and sustained in part.

for Milton J. Fowler
Comptroller General
of the United States

superior before this information was released. Fritz apparently believes that one of the technical evaluation committee members disclosed this information to the offeror. AID responded that while it was aware of this problem, the head of the contracting agency determined pursuant to FAR § 3.104-11 to proceed with the procurement because, since the award was being made on the basis of initial proposals, no offeror could benefit from any information that was disclosed. While there is no evidence in the record to show that information prejudicial to the competition was disclosed, we are recommending to the agency that it fully investigate this matter at the same time it proceeds with our recommendation for this decision.