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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Diemaco, Inc.--Reconsideration

File: B-246065.2

Date: June 4, 1992

Richard L. Moorhouse, Esq., Dunnells, Duvall & Porter, for the protester.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest filed after closing date for receipt of proposals that agency should have included current regulatory version of clause in solicitation is untimely. Although Federal Acquisition Regulation § 1.602-1(b) requires contracting officers to adhere to applicable regulations and procedures, that provision does not confer on protesters the right to have General Accounting Office consider an untimely protest of an alleged solicitation defect.

2. Offers must be evaluated in accordance with the terms of the solicitation; there is no "legal entitlement" to have an offer evaluated on the basis of a current regulatory clause that should have been but was not included in the solicitation.

DECISION

Diemaco, Inc. requests reconsideration of our decision Diemaco, Inc., B-246065, Oct. 31, 1991, 91-2 CPD ¶ 414, in which we dismissed its protest against the award of a contract to Nomura Enterprises, Inc. under request for proposals (RFP) No. DAAA09-89-R-1469, issued by the Army for gun barrel assemblies.

We affirm the dismissal.

The RFP included a superseded version of the clause set forth at Department of Defense (DOD) Federal Acquisition Regulation Supplement (DFARS) § 252.219-7007, that required the contracting agency to add a factor of 10 percent to offers from concerns that are not small disadvantaged businesses (SDB). The current version of the clause, which was

effective before the RFP was issued, provides that a contracting agency shall not impose the factor to the price of a non-SDB firm offering the product of a "qualifying country," as defined in the regulations, or if the imposition of the factor would be inconsistent with a memorandum of understanding or other international agreement with a foreign government. DFARS § 252.219-7007(b)(2). The version of the clause included in the solicitation did not include these exceptions to the SDB preference provision.

Consistent with the clause in the solicitation, the contracting agency added a 10-percent evaluation factor to Diemaco's offer, since Nomura is an SDB and Diemaco is not. Thus, although Diemaco's offer as submitted was low, after the evaluation preference was applied, Nomura became the low priced offeror and the Army awarded it the contract.

Diemaco argued that because it is a Canadian company its offer should have been considered a "qualifying country offer" under the current version of the DFARS § 252.219-7007 clause and that, in accordance with that clause, the SDB factor should not have been applied to its offer.

In dismissing the protest, we stated that the agency was required to evaluate offers in accordance with the solicitation's evaluation provisions. Cherokee Elecs. Corp., B-240659, Dec. 10, 1990, 90-2 CPD ¶ 467; Basic Supply Co., Inc., B-239267, June 1, 1990, 90-1 CPD ¶ 522. Since the solicitation included the DFARS clause requiring an evaluation preference for SDBs and did not include exceptions to that preference for qualifying country offers, we stated that the agency properly applied the evaluation preference to the offers of non-SDB firms, including Diemaco, in accordance with the solicitation. Finally, we stated that to the extent Diemaco disagreed with the evaluation scheme in the solicitation--which required application of the evaluation preference to the offers of non-SDBs and included no exception for qualifying countries--it was obligated to protest prior to the time set for receipt of initial proposals.

In its reconsideration request, Diemaco states that our decision may have been premised on the fact that the current clause was promulgated only a short time before the RFP was issued; it argues that what we should have considered is that the procurement extended over two years and that 12 RFP amendments were issued without the agency's ever incorporating the updated version of the clause.

It further argues that under Federal Acquisition Regulation (FAR) § 1.602-1(b), the contracting officer was required to include the current version of the clause in the RFP and that even in the absence of the clause from the solicitation

he had a legal obligation to apply the provisions of the current SDB clause after its effective date because as of that date the protester and other qualified country offerors became the "beneficiaries of a legal entitlement to have their offers considered without application of the preference factor." (Emphasis in original.)

First, our decision was not predicated on when the revised clause was first promulgated. As stated above, it was based simply on what the RFP actually said and on the protester's failure to object to the clause contained in the RFP. To the extent that the agency had multiple opportunities to substitute the new clause for the obsolete one, so did the protester have opportunities to bring the matter to the attention of agency personnel or to our Office. We fail to see how the protester's point provides any basis for modifying our decision.

Second, we find no merit to the assertion that our decision is inconsistent with FAR § 1.602-1(b). That section states:

> "No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met."

While this provision requires contracting officers to adhere to all applicable regulations and "procedures," it is administrative in nature and does not confer upon protesters any greater rights than they otherwise have. For example, we have held that this provision does not give protesters the right to have this Office decide, in a bid protest matter, whether an agency has violated internal policy directives. RMS Indus., B-246082 et al., Jan. 22, 1992, 92-1 CPD ¶ 104. Similarly, even though contracting officials are required to include the current version of clauses in solicitations, Diemaco's right to protest on the basis of a contracting officer's failure to do so is not made any greater by this FAR provision. Again, under our Regulations, if Diemaco objected to the terms of the solicitation, it was required to protest before submitting its proposal. 4 C.F.R. § 21.2(a)(1) (1992). Although Diemaco complains that our decision places an unfair burden on contractors to review solicitations to ensure that current versions of clauses are present, in our view it is not unfair or unreasonable to expect a prospective offeror to determine whether a solicitation includes a clause that is particularly important to it in terms of its own competitive advantage. Certainly, when the protester did not receive the award, it was able to quickly file a protest which clearly articulated its view that the solicitation incorporated the wrong clause. We simply do not understand why it is unreasonable to expect

the protester to have done so, either to the agency or to our Office, before the time that proposals were due.

As for the argument that the contracting officer was required to evaluate proposals on the basis of the clause that was not included in the RFP, we again reiterate the basic rule that offers must be evaluated in accordance with the terms of the solicitation. Diemaco, however, argues for a different rule in this case--it states that solicitation evaluation criteria which are imposed by statute or regulation, such as the SDB evaluation preference clause, should be distinguished from those types of evaluation provisions drafted by agencies for use in individual cases to indicate the basis for proposal evaluation. According to Diemaco, the former type of evaluation provision should be applied by agencies in all prescribed situations, regardless of its absence from the solicitation. We are aware of no such distinction, and Diemaco has cited no authority for it. In fact, our decisions clearly apply the basic rule in cases where an evaluation provision mandated by statute or regulation is omitted from a solicitation. See, e.g., Wackenhut Int'l, Inc., B-241594, Feb. 14, 1991, 91-1 CPD ¶ 172 (failure to apply domestic offeror preference required by statute); Kilgore Corp., B-235813, June 19, 1989, 89-1 CPD ¶ 576, affirmed, 69 Comp. Gen. 59 (1989), 89-2 CPD ¶ 434 (failure to evaluate "quality" as allegedly required by regulation). In short, we know of no "legal entitlement" that an offer be evaluated on a basis contrary to what the solicitation provides.

Finally, Diemaco argues that our decision overlooked a timely basis for protest that it raised in its October 18 response to the Army's request that we dismiss the protest. The Army argued that Diemaco was not an interested party to file a protest, since Diemaco had proposed an unacceptable delivery schedule in its BAFO. In response to the Army's dismissal request, Diemaco argued that if the delivery schedule rendered its proposal unacceptable, the Army should have held discussions with it regarding the deficiency. Diemaco states that the failure to hold discussions was a new basis of protest which we did not address in our decision. Moreover, according to Diemaco, had discussions been conducted with it regarding its proposed delivery schedule, it would have had the opportunity to revise its proposal, including its price.

We disagree. Diemaco's proposal was not rejected because it included an unacceptable delivery schedule. Rather, Diemaco simply failed to receive the award because its evaluated price was higher than Nomura's. Under the circumstances, there was no reason to hold discussions with Diemaco regarding its BAFO since it does not appear that it was considered unacceptable at the time of award.

In any event, even if Diemaco's delivery schedule was considered unacceptable, the agency was not required to reopen discussions to allow Diemaco a further opportunity to revise its proposal since Diemaco first included the "alternate" schedule in its BAFO. JSA Healthcare Corp., B-242313; B-242313.2, Apr. 19, 1991, 91-1 CPD ¶ 388. In this respect, it is inherent in the request for a BAFO that the offeror is responsible for insuring that it submit just such an offer and should not expect any further discussions once it has made a submission. Addsco Indus., Inc., B-233693, Mar. 28, 1989, 89-1 CPD ¶ 317. Under the circumstances, since the agency had no obligation to reopen discussions with Diemaco regarding its delivery schedule, Diemaco was not entitled to another opportunity to revise its proposal, including its price.

The prior decision is affirmed.

Ronald Berger
Associate General Counsel