



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Zell Partners, Ltd.

File: B-248489

Date: August 31, 1992

Marc A. Sorbel, Esq., for the protester,
John L. Boland, Esq., for The Boland Group, an interested party,
Edward J. Weber, Esq., Pension Benefit Guaranty Corporation, for the agency,
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer properly excluded proposal from competitive range on the basis of reasonable determination that the offeror had no reasonable chance of award because of numerous deficiencies in its technical proposal which were not readily susceptible to correction.

DECISION

Zell Partners, Ltd. protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. RFP-91-16, issued by the Pension Benefit Guaranty Corporation (PBGC) for commercial real estate consulting services. Zell asserts that its proposal was improperly evaluated and excluded from the competitive range.

We deny the protest.

The RFP, issued on December 13, 1991, as amended, contemplated the award of a firm, fixed-price contract for the evaluation of PBGC's current office space, the review and analysis of relocation options and the preparation and issuance of a solicitation for the selected options. The RFP provided that technical factors were more important than price. The listed technical factors were each to be evaluated on a 20-point scale and included: (1) experience of key personnel; (2) technical approach to each phase and content; and (3) contractor qualifications. Price was evaluated on the basis of a formula based on a maximum possible total of 40 points.

Thirteen firms submitted proposals by the January 31, 1992, closing date. Offers were evaluated by a three-member technical evaluation panel (TEP). The three members individually scored each offeror's proposal for each technical factor, after which a final consensus score was determined by assigning points corresponding to adjectival descriptions (i.e., low--7 points; medium--14 points; and high--20 points). The consensus score for each evaluation factor was supported by a narrative listing the strengths and weaknesses of each offeror's proposal. The initial consensus scores for technical merit ranged from 26 to 54 out of the possible maximum of 60 points. Zell's technical proposal was ranked seventh, receiving a score of 36 points, and, after factoring in the price evaluation, Zell's proposal was characterized by the TEP as "borderline."

Based on the combined technical and price evaluations, by memo of March 4, the TEP recommended that the competitive range consist of the top three rated proposals which received total scores ranging from 64.6 to 92.2. Thereupon, the contracting officer accepted the TEP's recommendation and excluded Zell's proposal (along with eight other proposals) from the competitive range because he determined that the proposal had no reasonable chance of being selected for award.

On March 16 and 18, discussions were held with the three offerors whose proposals were included in the competitive range; best and final offers (BAFOs) were submitted on March 25, and a second round of BAFOs were submitted on April 15. Based upon the TEP's recommendation, the contracting officer awarded a contract to The Boland Group, whose BAFO received the highest combined point score for the technical and cost factors. By letter dated April 22, Zell was notified of the award to Boland. On April 27, Zell filed this protest challenging the exclusion of its proposal from the competitive range.

Zell argues that its proposal was improperly excluded from the competitive range because the agency miscalculated the proposal. Zell also objects that it "was never invited to participate in the best and final offer process," and argues that if the agency was dissatisfied with its offer, Zell "should have had the opportunity to respond."¹

¹Zell also asserts that it should be provided an opportunity to compete for work encompassed by phase IV, a requirement which was deleted by amendment from the RFP statement of work, which pertains to the evaluation and negotiation of offers received in response to the issued solicitation. Zell apparently believes that the agency may include phase

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Where written or oral discussions are conducted, they must be held with all offerors whose proposals are within the competitive range, which includes all proposals that have a reasonable chance of being selected for award, price and other stated factors having been considered. 41 U.S.C. § 253b(d)(2) (1988); Federal Acquisition Regulation (FAR) § 15.609. In reviewing protests concerning the reasonableness of the evaluation of a technical proposal and the resulting determination of whether an offer is within the competitive range, we do not independently reevaluate the proposal. Rather, our review is limited to determining whether the agency's evaluation was reasonable and otherwise free from violations of procurement laws and regulations, since procuring officials are entitled to a reasonable degree of discretion in evaluating proposals. CKJ Realty/ Bayview Group, B-244492, Oct. 21, 1991, 91-2 CPD ¶ 349; Campbell Eng'g, Inc., B-231126, Aug. 11, 1988, 88-2 CPD ¶ 136.

Zell's technical approach was downgraded because Zell offered to provide various services that were outside of the scope of the statement of work in the RFP. For instance, Zell proposed relocation services, and offered to analyze the response of offerors to the solicitation which was developed and to develop counterproposals. The agency properly viewed these aspects of Zell's proposal as reflecting a lack of understanding of the RFP requirements, and as being nonresponsive to those requirements. The agency also viewed Zell's offer of inappropriate services as raising a significant question as to whether Zell understood the RFP process (which was the crux of the requirement being solicited), or the constraints placed by regulations on the agency's contracting activities. While Zell objects that its proposal was improperly penalized for simply offering to provide extra services, it is clear from the record that the agency properly viewed Zell's offer in this regard as reflecting Zell's lack of understanding of the agency's requirements as outlined in the RFP.

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IV by amendment under the Boland contract, thus depriving Zell of an opportunity to respond to a solicitation for the phase IV work. This basis of protest is premature because the protester merely anticipates action that has not yet taken place. See General Elec. Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512. We also note that there is nothing in the record that suggests that the agency does not intend to compete this requirement, and, on the contrary, the agency has advised that it is preparing to issue a solicitation for same.

Zell's offer was also downgraded with respect to its key personnel because the individuals offered were only committed for between 5 and 30 percent of their time over the 9-week period which the RFP permitted for the performance of the services. While Zell asserts that its proposal showed that it understood the 9-week requirement, we find no basis to object to the agency's concern about whether the offeror could meet the schedule requirement with what the agency reasonably considered to be a relatively minimal commitment of the offeror's key personnel.

Finally, we think the agency reasonably gave a low score to Zell's proposal in the area of contractor qualifications. In response to the RFP requirement that offerors describe similar projects, either in process or completed within the last 3 years, Zell, a 3-1/2 year old company, listed only seven projects, and only two of those were found to be similar in size and scope to the PBGC effort. Other offerors listed more extensive experience. For example, Boland, the awardee, identified ten projects, eight of which were, in fact, similar in size and scope to the PBGC effort.

Accordingly, we find from the record that the agency properly could find the protester's proposal contained serious technical deficiencies that were unlikely to improve through discussions. The record supports the agency's conclusion that the protester's proposal had no reasonable chance of being selected for award, and the agency properly excluded the proposal from the competitive range. Campbell Eng'g, Inc., supra. While Zell objects that it should have been offered an opportunity to correct its deficiencies during discussions, since Zell's proposal was properly eliminated from the competitive range, the agency was not required to conduct discussions with Zell. Drytech, Inc., B-246276.2, Apr. 28, 1992, 92-1 CPD ¶ 398.

Zell also objects that the agency waited until after award to notify it that its proposal had been eliminated from the competitive range. While the record does not indicate why the agency apparently failed to notify Zell at the earliest practicable time, as required by FAR § 15.609(c), a failure to do so where, as here, the contract is properly awarded, i.e., where no prejudice resulted, does not establish a basis to sustain a protest. Id.

The protest is denied.


for James F. Hinchman
General Counsel