



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

## Decision

**Matter of:** The Law Company

**File:** B-248631

**Date:** September 10, 1992

Darcy V. Hennessy, Esq., Moore, Bucher & Morrison, for the protester.

Lester Edelman, Esq., and Beth Kelly, Esq., Department of the Army, for the agency.

Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest that challenges the propriety of solicitation evaluation provisions which were apparent from the face of the solicitation is untimely where first filed after contract award.

2. Where solicitation provided for award on the basis of technical, management and price factors, protester is not an interested party to challenge the agency's cost-technical tradeoff where there are two other unsuccessful offerors whose proposals offered prices lower than the protester and were higher rated under technical and management factors than the protester's.

### DECISION

The Law Company (TLC) protests the award of a contract by the Department of the Army, Corps of Engineers, to Hunt Building Company (Hunt) under request for proposals (RFP) No. DACA41-91-R-0013, for the design and construction of family housing units at Fort Riley, Kansas. TLC challenges various provisions of the solicitation and asserts that it should have been awarded the contract on the basis of its lower priced, technically acceptable proposal.

We dismiss the protest.

### BACKGROUND

The solicitation was issued on September 25, 1991, as a one-step procurement for the design and construction of 190 family housing units with options for 60 additional units. Section L.16 of the RFP provided that a firm, fixed-price contract would be awarded.

Section M.1 of the RFP listed various technical and management factors and subfactors in descending order of importance, and stated that price was less important than either technical or management factors.<sup>1</sup> Section C of the solicitation contained a detailed description of the government's minimum requirements for the housing units, and designated certain housing features as "preferred." The RFP stated that proposals incorporating "preferred" features would be evaluated more favorably than comparable proposals incorporating acceptable, alternative features.<sup>2</sup> The RFP stated that award would be made on the basis of the proposal offering the best value to the government.

On or before the January 31, 1992 closing date, the agency timely received proposals from seven offerors, including Hunt and TLC. The agency subsequently evaluated the proposals and conducted discussions. At the agency's request, revised proposals were submitted on March 23, and best and final offers (BAFOs) were submitted on April 6.

As evaluated, TLC's technical and management BAFO received a total of 1,394 points--ranking sixth of the seven proposals; Hunt's technical and management BAFO received a total of 1,629 points--ranking first. TLC offered a price of \$16,691,900; Hunt offered a price of \$17,752,803.<sup>3</sup> The agency determined that Hunt's proposal offered the best value to the government and awarded a contract to Hunt on that basis. This protest followed.

#### DISCUSSION

TLC first protests that the solicitation's incorporation of "preferred" features in the technical evaluation scheme was improper. TLC complains that, generally, the "preferred" items were more expensive than alternative items and,

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<sup>1</sup>Specifically, section M.1(f) stated, "[p]rice is least important out of the three proposal areas (total Technical outweighs total Management which outweighs Price)."

<sup>2</sup>By way of example, the solicitation noted that cast iron tubs was a "preferred" item and, therefore, a proposal offering cast iron tubs would be evaluated more favorably than a comparable proposal offering steel tubs.

<sup>3</sup>The technical and management scores of the seven offerors ranged from 1,378 points to 1,629 points; the prices ranged from \$15,419,138 to \$18,895,400.

therefore, the agency's consideration of the "preferred" features should have been done only in the context of evaluating price proposals rather than as part of the technical evaluation.<sup>4</sup>

Our Bid Protest Regulations provide that protests based on alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (1992). Here, it was clear from the face of the solicitation that proposals offering "preferred" features would be evaluated more favorably, within the context of the technical evaluation factors established in section M, than comparable proposals that did not incorporate "preferred" features. Since TLC did not challenge this provision of the solicitation until after a contract had been awarded, its protest is untimely.<sup>5</sup>

TLC next protests the agency's evaluation of any proposal that exceeded the solicitation's stated funding level.<sup>6</sup> Specifically, TLC asserts that, "offers above fund level should not [have been] considered," and argues, "[t]here could have been no reasonable basis for evaluating overall price, when the Government's estimate was undoubtedly well over fund limitation."

Section M.2 of the RFP clearly put offerors on notice regarding the basis for evaluating price proposals, stating:

"The government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the option(s)."

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<sup>4</sup>TLC's argument seems to be based on the erroneous assumption that the government intended to award a cost-type contract. On the contrary, as noted above, section L.16 of the solicitation specifically provided for award of a fixed-price contract.

<sup>5</sup>To the extent TLC's protest could be construed to challenge the agency's evaluation of its proposal with regard to "preferred" features, TLC has not identified, and the record does not show, any area of TLC's proposal where the agency failed to properly credit TLC for offering a "preferred" feature.

<sup>6</sup>Section B of the solicitation stated that funding for the project was \$14,820,000.

Since the solicitation clearly stated that price proposals would be evaluated on the basis of total price, TLC's protest that the agency improperly considered proposals which offered a price in excess of the funding level is also dismissed as untimely.<sup>7</sup>

TLC next protests the "possible error" in the agency's consideration of alternate proposals. TLC asserts that Hunt may have submitted an alternate proposal,<sup>8</sup> states "[i]t is unknown whether the solicitation restricted alternative proposals," and protests that, if Hunt or other offerors were permitted to submit alternate proposals, they were improperly given "two bites at the apple."

Section L.41 of the solicitation expressly permitted submission of alternate proposals, stating "[a]ny alternate proposal(s) shall be separately identified, priced and packaged." Accordingly, TLC's protest in this regard is dismissed as another untimely alleged solicitation impropriety.

Finally, TLC protests that the agency failed to perform a proper cost-technical tradeoff in its selection of Hunt's proposal. TLC maintains that its proposal was "technically comparable" to Hunt's and therefore maintains that the agency should have awarded a contract to TLC on the basis of its lower price.

Under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1992), a protester must be an "interested party" before we will consider its protest. An interested party for purposes of eligibility to protest must be an actual or prospective offeror whose direct economic interest would be affected by the award of the contract or by the failure to award the contract, and a protester is not an interested party to raise a particular issue if it would not be in line for award were that issue to be resolved in its favor. See, e.g., Hydrosience, Inc., B-227989; B-227989.2, Nov. 23, 1987, 87-2 CPD ¶ 501.

As discussed above, TLC's technical and management proposal ranked sixth out of seven proposals; its price proposal was third low. Both of the proposals offering prices lower than TLC's were rated superior to TLC's proposal under technical and management factors. TLC has not raised any challenge to the agency's evaluation of those proposals. Accordingly,

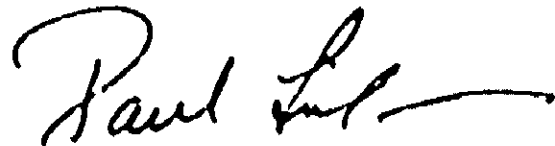
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<sup>7</sup>It also appears that TLC lacks standing to raise this issue since its price proposal exceeded the stated funding level.

<sup>8</sup>The record shows that, in fact, Hunt did not submit an alternate proposal.

even if our Office found unreasonable the agency's determination that Hunt's proposal represented the best value to the government, because there are two intervening offerors, TLC would not be next in line for award of a contract. Under these circumstances, TLC is not an interested party to protest the reasonableness of the agency's cost-technical tradeoff decision. See Systems Dynamics, Inc., B-245666.2, Mar. 11, 1992, 92-1 CPD ¶ 276.

The protest is dismissed.

A handwritten signature in cursive script, appearing to read "Paul I. Lieberman".

Paul I. Lieberman  
Assistant General Counsel