



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

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Decision

Matter of: Georgetown University--Reconsideration
File: B-249365.3
Date: June 7, 1993

Wendy T. Kirby, Esq., Martin Michaelson, Esq., and Daniel C. Sweeney, Esq., Hogan & Hartson, for the protester. Rand L. Allen, Esq., Stanley R. Soya, Esq., and Phillip H. Harrington, Esq., Wiley, Rein & Fielding for the Henry M. Jackson Foundation for the Advancement of Military Medicine, an interested party. James F. Trickett and Mike Colvin, Department of Health and Human Services, for the agency. C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of decision denying protest against acceptability of awardee's proposal is denied where request identifies no errors of law or fact in the previous protest; where protester submitted unacceptable initial proposal and late best and final offer, protester was not an interested party to object to comparative ranking of proposals or failure to conduct meaningful discussions.

DECISION

Georgetown University requests that we reconsider our decision, Georgetown Univ., B-249365.2, Jan. 11, 1993, 93-1 CPD ¶ 87, denying its protest against the award of a contract to the Henry M. Jackson Foundation for the Advancement of Military Medicine (HMJF) under request for proposals (RFP) No. 263-92-P(AN)-0204, issued by the National Institutes of Health (NIH) for professional radiology services and other services. The protester contended that the agency failed to hold meaningful discussions with Georgetown and that the evaluation and award decision were neither reasonable nor consistent with the factors set forth in the solicitation.

We deny the request for reconsideration.

On April 2, 1992, the agency issued the solicitation for a firm, fixed-price labor hour contract to provide radiology services at the NIH Clinical Center for a base year and four 1-year option periods. The solicitation provided for a

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price/technical tradeoff, with emphasis on technical quality and point values as follows: objective (understanding the objective of the project), 40 points; experience, 40 points with 25 points for personnel experience and 15 points for corporate experience; and price, 20 points.

As a guide for offerors in estimating the type and number of staff required to perform the radiology services, Article L.4 of the solicitation listed staffing levels and 16 labor categories from a recent sample period. These estimated staffing levels were also used for purposes of evaluating price. The price schedule listed the 16 labor categories with estimated full-time hours for each, which, when multiplied by the offeror's burdened hourly rate, produced a "not-to-exceed" total price for each category. For example, for the 16 labor categories under line item Nos. 1 through 5, an offeror was to provide prices for 22.9 staff members working an estimated 47,632 hours. Line item No. 8, for positron emission tomography imaging, radio-chemistry, and cyclotron support, required an additional 6 labor categories, with 11 staff members, working an estimated 22,880 hours a year. The solicitation contained a price schedule for a total of 33.9 staff members working an estimated 70,512 hours.

Article L.6 of the solicitation instructed offerors to complete the price schedule included in the solicitation, but encouraged them to submit alternative schedules with different proposed staffing or mixtures of labor categories. The invitation was intended to obtain proposals that might present a more economical means of satisfying the required radiology services. Offerors were also advised that in the course of performance, they might be required to acquire materials, equipment or services for which the agency would compensate them at cost plus a service fee. Article L.7 also allowed offerors to submit alternate proposals deviating from the requirement, provided that the proposal did not compromise overall performance.

On May 4, 1992, the protester submitted a proposal for the services. In its proposal, the protester advised the agency of its method for estimating salary escalation during the contract period and cautioned that:

"[A]ny modifications to this rate resulting from action of the Board of Directors, including comparability adjustments for specific position classifications, will be implemented as of the

effective date of the change with annual adjustments to the contract accordingly. This may require amended funding during the life of the contract."

The protester thus did not, in its initial proposal, offer a firm, fixed labor hour rate but included a contingency for increases to be determined by its Board of Directors.

The protester also advised the agency that "the fringe benefits rate [would] vary during the life of the contracts, and the burdened hourly rate adjusted accordingly in any annual renegotiations." Further, the protester noted that it would "require reimbursement for the full cost of adequate malpractice insurance coverage, whatever this cost may be, during the life of any contract awarded" with adjustments in the burdened hourly rate "processed as an annual adjustment." The protester's proposal also provided for 12 months notice of termination for certain staff, with a minimum termination cost equivalent to 6 months of the contractual effort.

With its basic proposal, HMJF submitted an alternative price schedule, which differed from the RFP price schedule by proposing, instead of the 2,080 hours in the basic schedule, a total of 1,840 hours for a full-time equivalent (FTE), in view of solicitation instructions to exclude nonproductive (vacation, holiday, and sick leave) hours from direct labor hours. (Nonproductive hours were instead included in the burden rate applied to direct labor.) The price for this alternative schedule, including the options for extended and additional hours, totaled \$42,418,702 for the 5-year contract period. The schedule included purchase of additional equipment, in accordance with Article L.6 of the RFP, to increase efficiency, at a price of \$61,237, including service fee.

The agency found the protester's and HMJF's proposals to be within the competitive range, with the two HMJF proposals receiving a slightly higher technical score. On June 8, the agency provided the protester with a written list of questions for discussion. Responding to the various conditions and contingencies in the protester's proposal, the agency advised the protester that the solicitation was for a fixed-price contract and that salaries, fringe benefits, and rates for malpractice insurance would not be subject to adjustment. In addition, the agency insisted that in accordance with the solicitation provisions for termination for convenience, any termination costs must be limited to a contractor's reasonable costs as determined by a settlement agreement. In a telephone conversation on that date, the

agency directed the protester's attention to these concerns and the fixed-price nature of the solicitation; the protester advised the agency that if NIH insisted on a fixed-price format, its BAFO price would probably be higher.

On June 10, the agency advised the protester that it would have until 3 p.m. on June 12 to respond to the agency's concerns and questions and that Georgetown's BAFO would be due at that time; the agency also advised the protester of its willingness to consider alternate proposals to provide the same work at a lower price. On June 12, the protester attempted to submit a portion of its BAFO by facsimile, but failed to deliver a copy of the BAFO by the time set for receipt. The agency notified the protester by letter of June 15 that its BAFO was late and would not be considered; however, the agency agreed with the protester to consider the initial proposal. On June 30 the agency awarded a contract to HMJF on the basis of its lower priced alternative.

Georgetown filed a protest, contending that the agency failed to conduct meaningful discussions with the protester and that the evaluation of its proposal and the selection decision were unreasonable and inconsistent with the factors listed in the solicitation. Upon receiving the agency response, the protester filed a supplemental protest arguing that the HMJF proposal did not conform to solicitation requirements and that, in any event, the evaluation of the awardee's proposal was unreasonable.

In response to the second protest, the agency raised the issue of whether Georgetown was an interested party to protest the evaluation, the adequacy of discussions, and the price/technical tradeoff; the agency pointed out that neither the initial proposal, which took exception to material terms of the solicitation, nor the BAFO, which was late, could be considered for award.

Our Regulations define an interested party entitled to pursue a protest as an "offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 4 C.F.R. § 21.0(a) (1993). Determining whether a party is sufficiently interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Jack Young Assocs. Inc., B-243633, June 20, 1991, 91-1 CPD ¶ 585. A party is not interested to maintain a protest if it would not be eligible for award if the protest were sustained. Moltech Corp.--Recon., B-236490.2, Dec. 6, 1989, 89-2 CPD ¶ 519.

We found that the record before our Office clearly demonstrated that the protester's initial proposal contained price contingencies that deviated from the solicitation and rendered that proposal ineligible for award. Where an RFP requires fixed prices, and a proposal does not offer fixed prices, the proposal as submitted cannot be considered for award. See Sonshine Enters., B-246268, Feb. 26, 1992, 92-1 CPD ¶ 232. We agreed with the agency that the protester submitted an unacceptable initial price proposal. Accordingly, regardless of the merit of its contentions concerning the technical evaluation and adequacy of discussions, the protester was not eligible for award because it had submitted an unacceptable initial offer and had not submitted a timely BAFO.

Our Regulations provide that at any time when the basis for dismissal of a protest becomes clear, our Office may dismiss a protest if we find it to be untimely or otherwise not for consideration by our Office. 4 C.F.R. § 21.3(m)(3). The fact that the agency erroneously included the protester's proposal among those considered in its selection decision does not alter the fact that the proposal clearly deviated from material solicitation requirements in a way that rendered it unacceptable for award. See W.H. Smith Hardware Co., B-218975, Aug. 23, 1985, 85-2 CPD ¶ 220. In Sonshine Enters., supra, the agency selected for award a proposal that contained the same exceptions to solicitation provisions which Georgetown took--price contingencies conflicting with the firm, fixed-price mandated by the solicitation and a termination clause conflicting with the termination for convenience provisions of the solicitation. Although Sonshine limited its protest to the reasonableness of the evaluation, our Office could not ignore the agency's failure to evaluate proposals on a common basis. We reached the same result here.

The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551, 3553(a) (1988), specifically requires that a protester be an "interested party" before we will consider its protest. Issues related to the standing of parties to protest may be raised at any time consistent with the expeditious resolution of protests, and the merits of the agency's arguments were plain on the face of the record. The protester's arguments that this will allow agencies to make such allegations routinely are of no consequence; such issues are indeed frequently raised in the course of protests, and, as in this case, we give protesters the opportunity to respond to them.

The protester argues that we failed to distinguish our decision in Eagle Tech., Inc., B-236255, Nov. 16, 1989, 89-2 CPD ¶ 468. That case is inapposite here. In Eagle, we held that the protester had standing to object to the adequacy of discussions, although it was not directly in line for award, since the appropriate remedy if the protest were sustained would be reopening negotiations and reevaluating proposals, including the protester's; the possibility thus existed that the protester would be in line for award. Here, in contrast, there was no offer from Georgetown that the agency could accept, since Georgetown submitted its BAFO late and its initial proposal was ineligible for award. See CCL, Inc., B-251527.2, May 3, 1993, 93-1 CPD ¶ _____. Consequently, even if we sustained the protest and recommended that negotiations be reopened, Georgetown would be ineligible to participate further in the procurement.

Although Georgetown was not an interested party to challenge the technical evaluation of its proposal, the adequacy of discussions, or the price/technical tradeoff, we concluded that the protester was eligible to protest the acceptability of the awardee's offer. Since there were no other eligible offerors, if the awardee's proposal were unacceptable, it would be necessary for the agency to hold a further round of discussions to cure the deficiencies in the awardee's proposal. Georgetown's proposal was within the competitive range, so the agency would have had to include Georgetown in the discussions and the protester would have had the opportunity to correct the deficiencies in its proposal. See Techniarts, B-189246, Aug. 31, 1977, 77-2 CPD ¶ 167.

The protester contended that the agency had made award to HMJF on the basis of an unacceptable alternate proposal. The protester asserted that the "alternate" proposal was no more than a price reduction obtained simply by "slashing" the number of estimated hours in the basic price schedule, containing no assurance that services could be provided in less time than the agency estimates contained in the solicitation. The protester argued that the risk of an erroneous labor hour estimate by the awardee rested squarely upon the government, which, the protester maintained, would have no choice but to purchase additional hours from HMJF or another source at additional cost, or to leave its requirements unfulfilled, if the awardee could not provide the required services within the reduced number of hours contained in its alternate proposal.

The RFP had specifically invited offerors to submit reduced-hour proposals. Prior to the receipt of initial proposals, HMJF had asked whether "estimated labor hours [can] be reduced to what the contractor considers to be a FTE Man

Year." This question was provided to all offerors with amendment No. 2 to the RFP, along with the agency's response, which directed offerors to address the 2,080 hours identified in the solicitation but invited them to submit an alternative proposal with reduced hours if the offeror believed the work could be performed with fewer hours.

HMJF's alternate price proposal was based upon the awardee's "review of the historic level of performance as presented in Article L.4 and . . . assessment of the staffing required." It was also based on the proposed purchase, in accordance with Article L.6, of a voice recognition system, an image transmission system, and other equipment to reduce the need for staff to be physically present at the facility for consultation; on a computerized communication system; and, in part, on staggered staffing. HMJF also proposed alternate pay classifications in three categories, which it believed would result in lower personnel costs than anticipated by the RFP. The agency found this approach to be reasonable, and noted that HMJF's technical proposal allowed cross-utilization of personnel to meet requirements and concentration of staff during patient care hours, which would reduce the number of hours needed to meet the requirements.

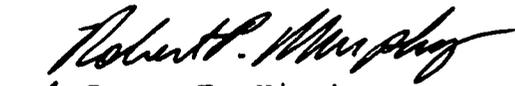
We saw nothing unreasonable with the agency's conclusion that HMJF could perform with fewer total hours. Despite the protester's complaints about the risk on the agency if HMJF were unable to do so, it did not point with specificity to any deficiency in the evaluation of HMJF's proposal, which was provided to counsel for Georgetown pursuant to a protective order. We therefore found no basis for objecting to the award and denied the protest.

The protester contends that we failed to acknowledge its arguments concerning certain alleged irregularities in the agency's evaluation of the HMJF proposal. As stated above, however, Georgetown is an interested party solely for the limited purpose of challenging the acceptability of the successful proposal, not its comparative ranking. While our review of the record did reveal concerns about whether the evaluation was reasonable and consistent with the factors listed in the solicitation, Georgetown has not identified any portion of the statement of work that would not be met by the awardee's proposal and no part of that proposal which took exception to material terms of the solicitation. It is true that the protester argued that acceptance of the awardee's proposal to purchase additional equipment to enhance the efficiency of performance constituted a new requirement, of which the agency should have apprised all offerors, and that we did not directly address this issue

in our decision. We did, however, direct the protester's attention to Article L.6 of the RFP, which authorized the purchase of additional equipment on behalf of the agency, and noted that such a purchase was therefore within the scope of the RFP. The items to be discussed during negotiations are the weaknesses in the offeror's own proposal relative to solicitation requirements, not the merits of a competitor's offer or how to help the offeror bring its proposal up to the level of other proposals. Maytag Aircraft Corp., B-237068.3, Apr. 26, 1990, 90-1 CPD ¶ 430. It would have been improper to disclose to a competitor HMJF's innovative approach or solutions to problems. Aydin Vector Div., B-243430, July 22, 1991, 91-2 CPD ¶ 79. The agency's failure to suggest that Georgetown copy HMJF's approach of purchasing equipment under Article L.6 to increase the efficiency of operations therefore was reasonable.

To obtain reversal or modification of a decision, the requesting party must convincingly show that our prior decision contains either error of fact or law or information not previously considered that warrants its reversal or modification. 4 C.F.R. § 21.12(a); Gracon Corp.--Recon., B-236603.2, May 24, 1990, 90-1 CPD ¶ 496. The protester provides no basis for granting its request for reconsideration.

The request for reconsideration is denied.


for James F. Hinchman
General Counsel