G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Sterling Services, Inc.

File: B-291625; B-291626

Date: January 14, 2003

Walter Bull for the protester.
Clarence D. Long, III, Esq., Department of the Air Force, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is not an interested party to maintain protest challenging proposal evaluation where it did not acknowledge material amendment; protester would be ineligible for award even if protest of evaluation were sustained.

2. Protest that awardee's offered fixed price is unreasonably low is denied; purpose of price reasonableness determination in fixed-price context is to ensure that price is not unreasonably high, as opposed to unreasonably low.

DECISION

Sterling Services, Inc. protests the award of contracts under request for proposals (RFP) Nos. F04626-02-R-0114 (RFP 0114) and F04626-02-R-0115 (RFP 0115), issued by the Department of the Air Force to acquire aircraft wash services and transient alert services, respectively, at Travis Air Force Base, California. Sterling maintains that the agency misevaluated proposals under both solicitations.

We dismiss the protest as to RFP 0114 and deny the protest as to RFP 0115.

RFP 0114

The record shows that, after receiving and evaluating proposals but before making award, the agency issued an amendment that changed the period of performance (shortening it by 2 months) and incorporated a revised wage determination from the Department of Labor into the solicitation. The amendment was issued September 24, 2002 and required that proposal revisions be submitted by September 25. Agency Report (AR), exhs. 18, 45. The amendment was transmitted

to Sterling by facsimile and e-mail on September 24. However, Sterling did not acknowledge the amendment or submit a revised proposal in response to the amendment, despite the agency's repeated inquiries at the time. Shortly thereafter, on September 27, the agency sent Sterling a letter advising that its proposal had been eliminated from consideration because of the firm's failure to acknowledge the amendment. AR, exh. 45.

Prior to receiving the agency's September 27 letter (and apparently in response to being advised that award was made to another concern), by letter of October 3 Sterling requested a debriefing. In response, by letter dated October 10, the agency described the evaluation of Sterling's proposal, noted the firm's failure to acknowledge the amendment and provided information on the technical and price ranking of the successful offeror. This letter was received by Sterling on October 21.

On October 30, Sterling filed a protest in our Office alleging that the agency had misevaluated both its and the awardee's proposals. Sterling's initial letter of protest made no mention of the agency's rejection of the proposal for failure to acknowledge the amendment. In its report to our Office, the agency noted this fact and asserted that, since the proposal was properly rejected, Sterling is not an interested party to maintain a protest with respect to any aspect of the evaluation, since the firm would be ineligible for award even if its evaluation challenge were successful. In its comments responding to the agency report, Sterling asserted for the first time that the amendment was not material, and that it therefore was improper for the agency to reject its proposal for failing to acknowledge it.

Under our Bid Protest Regulations, protests such as this must be filed within 10 days after the basis of protest was or should have been known. 4 C.F.R. § 21.2(a)(2) (2002). Sterling was advised twice of the agency's rejection of its proposal for failure to acknowledge the amendment, first, in the agency's letter dated September 27, and again in the agency's debriefing letter of October 10. Consequently, any objection by Sterling to the agency's rejection of its proposal for failure to acknowledge the amendment had to be filed in our Office no later than 10 days after October 21, the date Sterling received its debriefing letter. Sterling's October 30 protest made no mention of the agency's rejection of its proposal on this basis; Sterling did not raise this argument until December 13, in its comments responding to the agency report. Since this was more than 10 days after October 21, it amounts to an untimely challenge to the agency's rejection of the Sterling proposal.

In light of this, Sterling is not an interested party to challenge the agency's evaluation of proposals. In order to maintain a protest in our Office, a firm must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract. 4 C.F.R. § 21.0(a). A firm is not an interested party where it would be ineligible to receive award under the protested solicitation if its protest were sustained. Acquest Dev., LLC, B-287439, June 6, 2001, 2001 CPD ¶ 101 at 6. Since Sterling is foreclosed by our timeliness rules from challenging the rejection of its proposal for failing to

acknowledge the amendment, Sterling is ineligible for award--an agency may not make award to a firm that fails to acknowledge a material amendment. International Filter Mfg. Corp., B-235049, June 21, 1989, 89-1 CPD ¶ 586 at 3. This being the case, Sterling is not interested to challenge the propriety of the agency's evaluation of proposals. We therefore dismiss the protest with respect to RFP 0114.

RFP 0115

The RFP contemplated the award of a fixed-price contract, and provided for evaluation of proposals in two areas, past performance and price. Offerors were instructed to submit past performance and pricing information, but were not otherwise required to submit technical proposals showing proposed staffing or demonstrating the proposed approach. The agency rated Sterling's proposal satisfactory for past performance; the firm's price was eleventh lowest. The agency rated the awardee's proposal exceptional for past performance; its price was the fifth lowest.

Sterling asserts that the awardee's price was unreasonably low, and that the agency improperly failed to evaluate it as such. Sterling, the incumbent contractor, maintains that the awardee's low price is attributable to inadequate staffing for the requirement.[1]

This argument is without merit. The RFP required the submission of only lump-sum monthly prices for performance of the services outlined in the solicitation, and called for the agency to make a determination of price reasonableness. The purpose of a price reasonableness evaluation in a fixed-price contract setting is to determine whether prices are too high, as opposed to too low (the contractor, not the government, bears the risk that a low price will not be adequate to meet the costs of performance). USATREX Int'l, Inc., B-275592, B-275592.2, Mar. 6, 1997, 98-1 CPD ¶ 99 at 7. The record shows that the contracting officer determined that the awardee's price was reasonable--that is, not too high--based on adequate competition, AR, exh. 10, at 2, and Sterling's protest that the awardee's price is too low provides no reason to question this conclusion. As noted, the RFP did not require technical proposals detailing a firm's proposed staffing or approach, and did not provide for an evaluation of proposals on any basis other than past performance and price. It follows that alleged understaffing by the awardee, even if demonstrated

[1] In its initial protest Sterling also maintained that the agency had improperly solicited prices for a base period of 2 months with five 1-year options, but made award for a base period of 1 year with four 1-year options. Sterling makes no mention of this allegation in its comments, despite the fact that the agency report responded to the assertion; we deem this aspect of Sterling's protest abandoned. O. Ames Co., B-283943, Jan. 27, 2000, 2000 CPD ¶ 20 at 7.

to be the case (in fact, we find nothing supporting the allegation), was not a basis for rejecting or downgrading the awardee's proposal.

Sterling also maintains that the agency erred in the evaluation of Sterling's past performance. However, even if Sterling were given the highest possible past performance rating--exceptional--its rating would only be equal to the awardee's. (Sterling does not challenge the evaluation of the awardee's past performance.) Thus, there would be no basis to question the agency's award decision, because the awardee's price was significantly lower than Sterling's.

The protest is dismissed with respect to RFP 0114 and denied with respect to RFP 0115.

Anthony H. Gamboa
General Counsel