



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: D&K Construction Company, Inc.

File: B-281244.3

Date: October 1, 1999

Bill C. Giallourakis, Esq., for the protester.
Joseph J. Cox, Esq., U.S. Army Corps of Engineers, for the agency.
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DIGEST

Agency reasonably canceled solicitation where the agency had engaged in several rounds of discussions with offerors and the protester's offer remained noncompliant with the solicitation requirements while the only other competitor's revised proposal was submitted late.

DECISION

D&K Construction Company, Inc. protests the cancellation of request for proposals (RFP) No. DACA65-98-R-0010, issued by the U.S. Army Corps of Engineers District, Norfolk, Virginia, for site development, design/construction (build) of 35 family housing units (two accessible to the handicapped), and renovation of a building as a community center at Spicer Village, Picatinny Arsenal, New Jersey. D&K contends that it should have received the award based on its proposal.

We deny the protest.

The RFP was issued on May 11, 1998. Offerors were to submit their proposals in three separate sections: (1) design/technical, (2) offeror performance capability, and (3) pro forma requirements including representations, certifications, subcontracting plan, proposal bonds, Standard Form 1442, and schedule of proposed prices. RFP at 00100-19. The design/technical portion of proposals was to be evaluated on the basis of the following criteria (with the point scores for each criterion): site design (274); site engineering (104); housing unit design (438); housing unit engineering (210); community center design and engineering (50); and offeror past performance

(200). The total possible score was 1,276 points. The factors and subfactors to be considered for each criterion were also listed. Id. at 00100-27 through 00100-37. The RFP stated that an offeror must provide information sufficiently detailed to clearly indicate the materials, equipment, methods, functions, and schedules proposed. Id. at 00100-18. Unsupported promises to comply with RFP requirements would not be sufficient. Significant deficiencies, which caused exceptionally low scores on factors or subfactors could constitute a basis for proposal rejection. Id. at 00100-2. The RFP also stated that a “[f]ailure to submit all the data indicated in this section may be cause for determining a proposal nonresponsive and, therefore, not considered for award.” Id. at 00100-25.

The RFP, while advising that the RFP requirement were minimums, stated that “Innovative, creative, or cost-saving proposals which meet or exceed these requirements are encouraged and will receive quality points. . . . Deviations from any requirements must be clearly noted and justified in the proposal.” Id., Statement of Work (SOW), at 3. The RFP further provided that after the award and notice to proceed, the contractor would have a 135-day design performance period. At the end of 60 days the contractor was to have completed 50 percent of the building design (including design analysis, drawings and specifications) and 100 percent of the utility design. At the end of 100 days the contractor was to have completed 100 percent of the building design including revised design analysis and drawings and specifications, and at the end of the 135-day period the contractor was to have completed all design work. Post-award deviations from the RFP technical requirements would be considered and might be approved by the contracting officer if the changes would result in a significant improvement to the project or exceed the minimum RFP requirements. Id. at 00800-8.

Two offers were received--one from M.A. Angeliades, Inc. and the other from D&K. The technical proposals of each offeror were evaluated with Angeliades’ proposal receiving a score of 529 and D&K’s a score of 456 points. Angeliades submitted a higher price than that offered by D&K. A subsequent request for best and final offers (BAFO) required confirmation that the offeror would comply with certain requirements and permitted the revision of prices. Both offerors provided the requested confirmation; neither changed their initial price. After the proposals had been reviewed, the source selection recommendation board (SSRB), concluded that the higher-priced Angeliades’ proposal offered the “best value” due to the additional quality features proposed and recommended award to Angeliades. On September 29, 1998, award was made, and the notice to proceed on the design phase of the contract was issued. After a debriefing, D&K protested to our Office that the agency’s failure to conduct adequate discussions had been prejudicial to the evaluation of its proposal. In response to the protest, the agency decided to reopen negotiations and suspend performance of Angeliades’ contract. Contracting Officer’s Statement at 7-9. Our Office subsequently dismissed the protest.

By letter of December 17, each offeror was provided with a list of proposal weaknesses/deficiencies. Oral discussions were held with the offerors on January 7 and 8. Id. at 9-10. Subsequent letters identifying weaknesses/deficiencies dated March 9 and April 27 were sent to the offerors. Both the March 9 and April 27 letters reminded the offerors of the specific RFP language that the failure to submit all data could be “cause for determining a proposal nonresponsive and, therefore, not considered for award.” Agency Report, Tabs 62 and 63, Letters from Contracting Officer to D&K and Angeliades, respectively (March 9, 1999) and Tabs 68 and 69, Letters from Contracting Officer to D&K and Angeliades, respectively (April 27, 1999). A final round of oral discussions were conducted with D&K on May 10 and Angeliades on May 12. D&K was advised that the contractor “could not just say he would comply with the solicitation but had to show how. . . . [N]o award could be made with non-compliant items.” Id., Tab 70, Memorandum for File (May 11, 1999). The firms were told to submit their final proposal revisions by noon of May 17. Id., Tab 68 and Tab 69. D&K timely submitted a revised proposal. Angeliades’ response was not evaluated because it was submitted late. The agency evaluated D&K’s proposal and concluded it remained noncompliant in certain areas. By letters of June 2, both offerors were advised that the RFP had been cancelled because no proposal was fully compliant with the solicitation’s mandatory requirements. Id., Tabs 76 and 77, Letters from the Contracting Officer to D&K and Angeliades, respectively. Angeliades was also notified that its contract for the work was terminated for convenience of the government. Id., Tab 78.

D&K’s proposal (which received an evaluation score of 654 points) was rejected because it was noncompliant in the following areas: the offered fuel storage tank was not double walled as required by the RFP SOW; the proposed combined area for exterior bulk storage or for interior bulk storage in the handicapped units did not meet the SOW minimums and the handicapped units contained three bedrooms, not the four required; the kitchen counter tops proposed were made of particleboard, which was not permitted by the RFP; and the proposed air conditioner condensing unit had a 11.5 SEER (Seasonal Energy Efficiency Ratio) rather than the 12 SEER required. Id., Tab 81, D&K June 16, 1999, Debriefing, at 2.

D&K argues that the decision to reject its proposal and cancel the RFP was unreasonable. D&K points out that it received a 654-point evaluation score and that the agency had previously awarded to Angeliades on the basis of a 529-point evaluation score. In this respect, D&K notes that the SSRB apparently found numerous noncompliant matters in Angeliades’ proposal, while recommending award be made to Angeliades. Id., Tab 28, at 2.¹ The protester basically argues it is

¹The short answer to D&K’s allegation that it was treated differently than Angeliades because the agency awarded to Angeliades on the basis of a noncompliant proposal but then rejected D&K’s noncompliant proposal is that the agency, after it recognized its error, took corrective action that led to the termination of the award to Angeliades. In any event, the agency’s erroneous acceptance of a nonconforming

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being held to a higher standard than was the case in the original evaluation and award--an anomaly which resulted from a change in evaluation method after the decision to reopen discussions and which now required offerors, as a prerequisite to obtaining award, to address matters to a degree that was previously left for the design performance period. D&K notes that the agency continually refers to "mandatory" requirements notwithstanding the fact that nowhere in the RFP is the word "mandatory" ever used, nor did the SSRB recognize any "mandatory" requirements. To the contrary, the RFP speaks to minimum requirements and permits exceptions/deviations to these requirements under certain circumstances, and contemplates the submission of final design drawings after award. Protester's Comments at 2-12.

D&K argues that the "noncompliant items" are minor and subject to change during the design performance period. For example, D&K states that the double-walled fuel storage tanks were required because the tanks were to be located outdoors and that it did not propose double walled tanks because it offered tanks that would be installed in the buildings where they would not be subject to the extreme outdoor temperatures, would not endanger children playing outdoors, and would not pose unsightly obstacles. D&K further argues that the particleboard that it intended to use in the countertops, rather than plywood, is the standard product used for installing laminate on countertops because of the inherent problems plywood suffers with warping and delaminating. D&K also asserts that the discrepancies in the area devoted to external and internal bulk storage is minimal and applies to only two of the 35 units being constructed and also can be corrected during the design performance period.

In summary, the protester argues that the requirements it failed to meet in its final proposal were either not mandatory, minor, or easily correctable after award. In our view, the record does not support the protester's position. Here, we think the protester was repeatedly advised during the several rounds of discussions, as well as by the RFP, that these items were considered minimums and material to the agency. The agency, during discussions, referred repeatedly to the solicitation language that failure to submit data could lead to a determination that the offer was noncompliant and would not receive the award. We think D&K reasonably should have been aware of the agency's position and that D&K's failure to address these matters in its final proposal was at its own peril. The record shows, and D&K does not rebut, that it was noncompliant with regard to the bulk storage, countertops and also failed to fully explain its position concerning the double-walled storage tank. The record shows that these matters were the subject of both oral and written discussions, and that the protester's final revised proposal remained noncompliant. In these circumstances where the agency conducted several rounds of oral and written

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offer does not compel the agency to perpetuate the error in its subsequent actions. See Buckeye Pacific Corp., B-212183, Aug. 30, 1983, 83-2 CPD ¶ 282 at 3.

discussions, and the protester's proposal still remained noncompliant with the RFP SOW, we see no basis to object to the contracting officer's decision to cancel. See Concepts Bldg. Sys., Inc., B-281995, May 13, 1999, 99-1 CPD ¶ 95.²

Accordingly, the protest is denied.

Comptroller General
of the United States

²The protester also argues that the agency could have awarded the firm the contract and handled the deviations under post-award procedures that permit deviations from the SOW subject to the contracting officer's approval. In our view, it would have been improper for the agency to award a contract on the basis of a contract competed under a given specification with the intention to change to a different specification during contract performance. See Worldwide Direct Mktg., B-200371, Apr. 2, 1981, 81-1 CPD ¶ 253 at 6.