Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Ensign-Bickford Company

File: B-274904.4

Date: February 12, 1997

Paul J. Seidman, Esq., and Robert D. Banfield, Esq., Seidman & Associates, P.C., for the protester.
Steve Bartholomew for Shock Tube Systems, an intervenor.
Craig E. Hodge, Esq., and Denise C. Scott, Esq., Department of the Army, 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

1. Agency reasonably determined that awardee's proposal provided acceptable proof of environmental compliance, although awardee did not submit evidence of required licenses and permits or a waste management plan, where proposal addressed anticipated hazardous wastes and established that waste disposal would be handled by a reputable subcontractor.

2. Where awardee's proposal contained note creating an ambiguity regarding its commitment to the required delivery schedule, which the agency did not notice during evaluation but resolved after award, protest is denied where delivery requirements had not changed, but remained the same as those on which the protester competed, and there is no showing of competitive prejudice from the error.

DECISION

The Ensign-Bickford Company protests the award of a contract to Shock Tube Systems (STS) under request for proposals (RFP) No. DAAE30-96-R-0090, issued by the Department of the Army for M14 blasting caps. Ensign-Bickford asserts that the Army improperly accepted a proposal that did not meet solicitation requirements.

We deny the protest.

On July 19, 1996, the Army issued the solicitation for award of a firm, fixed-price contract for production and delivery of alternative quantities of blasting caps, for time-delayed initiation of fuses used in demolition work, manufactured in accordance with section C of the RFP, the statement of work. The RFP requested

prices for verification testing and first article testing, as well as fiscal year 1996 requirements (quantities of 130,000, 145,000, and 160,000 caps), fiscal year 1996 requirements for inert caps (8,000 and 10,000), and similar option quantities for fiscal years 1997 and 1998. The solicitation provided that the agency would evaluate price by adding all prices for all quantities for the base and option years, in addition to the prices for verification testing and first article testing.

The solicitation provided for award to the low, technically acceptable offeror providing documentation and technical explanation demonstrating compliance with requirements in section L of the RFP, the instructions for preparation of proposals. The RFP required each offeror to demonstrate its acceptability under evaluation factors and subfactors listed at paragraph M.4 of the solicitation, as follows: technical (paragraph L.12 of the RFP), including the six subfactors of requirements, quality assurance, environmental compliance, manufacturing, packaging, and safety; and management (paragraph L.14 of the RFP), including the three subfactors of schedule, facilities/capabilities, and past performance. In pertinent part, under the subfactor of environmental compliance, paragraph L.12 of the RFP required offerors to provide proof of compliance with federal, state, local and Army environmental laws and regulations, as well as a copy of the offeror's waste management procedures. Under the subfactor of schedule, paragraph L.14 of the solicitation required offerors to provide a comprehensive schedule and milestones for technical and management activities, contract deliverables, and government support activities.

The protester and STS submitted proposals on August 19. Evaluators found STS' proposal unacceptable under the subfactor of environmental compliance because STS had provided no proof of compliance with environmental laws and regulations and no copy of its waste management procedures. STS' proposal stated only that its facilities were "operated in strict compliance with all [f]ederal, State, [l]ocal and Army environmental laws and regulations." The agency then initiated discussions with the offerors, identifying the deficiency and affording STS the opportunity to revise its proposal. In response, STS advised the agency that it used a subcontractor to dispose of all explosives and hazardous wastes generated at its current facility and did not have a formal "waste management procedure" document. STS proposed to subcontract waste management under the RFP to Laidlaw Environmental Services and provided data on Laidlaw's capabilities and compliance with environmental regulations. After review of this submission, evaluators determined that STS was acceptable under the environmental compliance subfactor.

STS' evaluated price, approximately $8.25 million, was considerably lower than the protester's evaluated price of nearly $9.5 million. Accordingly, on September 27, the

agency awarded a contract to STS as the low, acceptable offeror. A series of protests by Ensign-Bickford followed.[1]

Ensign-Bickford here contends that the agency should have rejected STS' proposal because STS did not provide proof of environmental compliance, as required by section L of the RFP, and did not offer to meet the required delivery schedule. The protester argues that reliance upon a subcontractor is insufficient to demonstrate such compliance because waste management is a "cradle-to-grave" process, where a generator's responsibility for waste begins at its plant, not after delivery of the waste to a carrier for transport to the disposal facility. Further, the protester asserts, the milestone charts provided with STS' proposal--under the Schedule subfactor of the Management factor--conflict with the RFP's required delivery schedule. The protester argues that STS' proposal failed to comply with either major evaluation factor--under the environmental compliance subfactor of the Technical factor and under the Schedule subfactor of the Management factor. Thus, Ensign-Bickford concludes, the agency should have rejected the awardee's proposal as unacceptable.

The contracting agency is responsible for evaluating the information supplied by an offeror and ascertaining whether it is sufficient to establish the technical acceptability of its offer, since the contracting agency must bear the burden of any difficulties incurred by reason of a defective evaluation. Harris Corp., B-235126, Aug. 8, 1989, 89-2 CPD ¶ 113. When challenging an evaluation, the protester must show that the evaluation was unreasonable or inconsistent with the evaluation scheme; mere disagreement with the agency's evaluation does not meet this burden. Morey Mach., Inc., B-234124, May 10, 1989, 89-1 CPD ¶ 440. The protester here provides no basis for our Office to conclude that the agency unreasonably determined STS' proposal acceptable under the subfactor of environmental compliance.

The agency advises our Office that it does not anticipate that contract performance will involve any explosive or hazardous products in addition to those being produced under the current contracts that the awardee is performing. The Army notes that STS' proposal, including its response to the discussion question, fully and properly identified the type and amount of waste anticipated, as well as a fully competent and licensed subcontractor to handle the disposal off-site. By contrast,

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[1]The instant protest is the fourth and is based on issues discovered during the review of documents provided by the agency in response to the earlier protests. The protester withdrew all issues raised in the first three protests, except for the allegation that the agency improperly relied upon STS' self-certification as a manufacturer under the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1994), dismissed in our decision Ensign-Bickford Co., B-274904, Nov. 15, 1996, 96-2 CPD ¶ 188.

the Army notes, the protester processes hazardous waste at its own facility and needed the necessary permits to demonstrate compliance with environmental laws and regulations. Beyond the unsupported assertion that waste management is a "cradle-to-grave" responsibility, the protester makes no argument that, in subcontracting the waste management tasks to Laidlaw, STS is not meeting the purposes of the contract and the provisions of the statement of work. It is true that, as Ensign-Bickford argues, the Army did not require STS to submit a waste management plan, since Laidlaw was providing the waste management services. However, STS did offer to provide a plan in its response and presumably could have provided an acceptable plan merely by adopting Laidlaw's plans. We fail to see how allowing STS to rely upon Laidlaw, without requiring STS to produce its own plan, was either unreasonable or improperly affected the competition. See Kasco Fuel Maintenance Corp., B-274131, Nov. 22, 1996, 96-2 CPD ¶ 197.

As noted by the protester, there is a note in STS' milestone charts conflicting with the solicitation's required delivery schedule. Paragraph F.5 of the RFP provides for delivery of test hardware components for verification testing 90 days after award, with completion of verification testing within 120 days later. The RFP calls for delivery of first articles 30 days after notification of approved verification testing results and allows 30 days for completion of the first article test report. Thus, Ensign-Bickford argues, approval of the first article could take as long as 9 months after award, leaving only 3 months for delivery of the first year's requirement of 160,000 units. Although STS made a general offer to comply with the indicated delivery schedule, the awardee's milestone chart, which provides for verification testing and first article testing to consume 9 months, contains a note referring to deliveries of "16,000 per month for 10 months." As the protester points out, if STS delivers only 16,000 per month starting with the 10th month, the first year's deliveries will not be complete until 7 months after the required delivery date. Ensign-Bickford argues that the conflict between STS' milestone charts and the solicitation delivery schedule required rejection of the proposal.

Initially, we note that the agency defends the reasonableness of its evaluation. The agency points out that the awardee's proposal contained a specific commitment to meet the solicitation's required schedule and that the evaluators reviewed the milestone chart only to ensure that the awardee had addressed all of the significant events leading to production of the detonator. According to the agency, the evaluators relied upon the awardee's general commitment to meet the schedule, in conjunction with the milestone chart demonstrating its recognition of the requirement for verification testing and first article testing.

The agency contends, further, that even if the note on the milestone chart created an ambiguity about STS' delivery obligation, Ensign-Bickford suffered no competitive prejudice from acceptance of STS' proposal because the Army never intended to agree to a delivery schedule different from that required by the RFP,

and has insisted on that original schedule. In this regard, the award documents explicitly recite the delivery schedule that was in the solicitation, and the awardee has acknowledged the error on its milestone chart and agreed that the delivery schedule in the RFP is controlling.

We agree with the Army that, to the extent it accepted a materially ambiguous proposal, no prejudice accrued to the protester.[2] First, other than asserting that it was prejudiced by the Army's acceptance of STS' proposal, Ensign-Bickford has made no argument explaining how it was prejudiced--for example, that it might have offered a lower price if allowed to propose the longer delivery schedule suggested by the note in STS' milestone charts. Second, the agency's needs have not changed--the delivery requirements remain the same as those on which the protester competed. In this regard, in Norden Sys. Inc., 71 Comp. Gen. 278 (1992), 92-1 CPD ¶ 238, we denied a similar protest where the protester argued that it could have offered a lower price if it could have proposed on the basis of the awardee's changes to the dates for exercise of options. In that case, the agency's requirements had not changed; it had inadvertently accepted a proposal containing a nonconforming schedule and subsequent to award obtained the awardee's agreement to the original option exercise dates. We held that the protester did not suffer any competitive prejudice since it had competed on the basis of the provisions ultimately reflected in the contract. In the absence of any allegation of prejudice from Ensign-Bickford, we reach the same conclusion here.

The protest is denied.

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[2]Competitive prejudice is an essential element of a viable protest. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.