Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Working Alternatives, Inc.

File: B-276911

Date: July 2, 1997

Barry Rubin and Donald W. Gormly, Jr., Esq., for the protester.
Joseph Summerill, Esq., Department of Justice, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency properly concluded that protester's proposal was technically unacceptable where the documentation submitted to comply with a mandatory requirement to show the firm's right to use the facility it proposed is insufficient on its face in that it sets out terms dictated by the prospective lessor with no indication that the protester/prospective lessee has agreed to the terms and fails to specify a definite duration of the lease.

2. There is no basis to object to agency decision not to communicate with offeror regarding deficiencies in its documentation submitted to show compliance with a mandatory right to use requirement regarding proposed facility, since any such communication would have constituted discussions, not clarifications, and the solicitation clearly notified offerors of the agency's intention to make award without discussions.

DECISION

Working Alternatives, Inc. (WAI) protests as improper the rejection of its proposal under request for proposals (RFP) No. 200-374-W, issued by the Department of Justice, Federal Bureau of Prisons, to obtain residential community corrections center services in the Los Angeles, California area.

We deny the protest.

The solicitation advised that award would be made to the offeror whose offer, conforming to the solicitation, was most advantageous to the government, considering price and various technical factors not at issue here. In addition, proposals would be evaluated to determine whether the offeror complied with several mandatory technical requirements. One of these mandatory requirements concerned the offeror's right to use its proposed facility:

L.7 (a) . . .

ALL TECHNICAL PROPOSALS MUST CONTAIN DOCUMENTATION REGARDING RIGHT TO USE, ...

(g) All proposals must provide evidence supporting the offeror's right to use the proposed facility. Acceptable evidence of right to use is limited to deeds, leases, bills of sale, options to lease, options to buy, contingency leases or contingency deeds. Please note that the Bureau of Prisons may award a contract based on the initial submittal of offers, therefore, offerors must consider each proposal as a best and final offer unless otherwise instructed by the Contracting Officer.

Confirming the instruction contained in this final sentence, the solicitation included Federal Acquisition Regulation (FAR) § 52.215-16, Alternate II, which advised offerors of the agency's intent to award the contract on the basis of initial proposals without conducting discussions, save for communications conducted for the purpose of minor clarification.

Proposals were submitted on April 1, 1997. The contracting officer reviewed WAI's proposal and determined that the document submitted in connection with the right to use requirement--an agreement to lease--was insufficient to show that the firm complied with this mandatory requirement. As a result, the contracting officer determined that WAI's proposal was technically unacceptable. In its protest, WAI argues that its agreement to lease was sufficient to meet the mandatory right to use requirement or, alternatively, that the agency should have communicated with the firm to clarify the matter.

The evaluation of proposals and the resulting determination of whether a proposal is within the competitive range is a matter within the discretion of the contracting agency, since the agency is responsible for defining its needs and the best method of accommodating them. Bannum, Inc., B-271075 et al., May 22, 1996, 96-1 CPD ¶ 248 at 3. Our Office will only question the agency's evaluation where it lacks a reasonable basis or conflicts with the stated evaluation criteria for award. Id.

The document in question is a letter to WAI's president from the prospective lessor entitled, "Agreement to Lease 101 W. 89th St., Los Angeles, CA." The letter states:

> "This letter shall serve as a record of my agreement to enter into a lease for the above-mentioned property to Working Alternatives, Inc. for the purpose of operating federal corrections programs. The terms of the lease will be as follows:

1. The lease term shall be for five years, with an option to extend the lease for an additional five years.

2. The rental amount shall be based on the contracts that are serviced in the facility, with a rental of $18,000 per month per 50 bed contract.

3. The rent shall increase by 5% per year at the beginning of each contract year.

4. Tenant (Working Alternatives, Inc.) shall be responsible for all taxes, insurance, repairs and maintenance for the property.

5. All operations must be in compliance with the Conditional Use Permit.

6. All other terms of the lease shall be commercially reasonable and acceptable to both parties.

"Additionally, I have asked my attorneys to draft a lease formalizing these terms. The draft should be prepared within 30 days. A copy will be forwarded to you as soon as possible. . . ."

The agency contends that this letter does not conform with the strict terms of evidence required by section L.7(g) because it leaves several terms to be agreed upon when the lease is drafted. We agree.

To create a valid lease in California, certain points of mutual agreement are necessary. There must be a definite agreement as to the extent and boundary of the property to be leased, a definite and agreed term, a definite and agreed price of rental, and the time and manner of payment. Levin v. Saroff, 201 P. 961, 963 (Cal. 1921). The letter submitted by WAI is by its terms an agreement by the prospective lessor to enter into a lease in the future. It consists of the terms dictated by the prospective lessor, but gives no indication that WAI, the prospective lessee, agreed to these terms. In addition, while the letter includes a 5-year term, the absence of anything more definite, such as a commencement date or reference to a contract award date, leaves open the question whether the facility will be available when required under this contract. Id.; see also Bannum, Inc., B-248169.2, Sept. 29, 1992, 92-2 CPD ¶ 216 at 5 (offerors did not satisfy strict terms of the evidence requirement under an identical provision where, among other things, neither offeror's letter of intent to lease included material terms and conditions for a lease pertinent to the contract period). WAI's argument that this letter represents a contingency lease--with the contingency being award of the contract--does not in any way address the material failings of the document, and further overlooks the fact that the letter makes no reference at all to this solicitation or the anticipated contract. Further, the letter does not purport to be nor can it be construed as a deed, bill of sale or option to lease or buy. Accordingly, we conclude that the

agency properly determined that the firm's proposal failed to show that it complied with the mandatory right to use requirement.

An offeror must affirmatively demonstrate by the terms of its proposal that its offered product or services meets all of a solicitation's material requirements. Gordon R.A. Fishman, B-257634.3, Nov. 9, 1995, 95-2 CPD ¶ 217 at 2. An agency may not properly accept for award a proposal that fails to meet one or more material solicitation requirements. Id. Since the agency properly determined that WAI's proposal did not meet a material solicitation requirement, its actions here were unobjectionable.

WAI alternatively argues that the agency should have requested clarification from the firm regarding its right to use the proposed facility. The protester points out that FAR § 52.215-16, Alternate II, allows for the possibility of communications conducted for the purpose of minor clarification in a procurement where the government intends to award a contract without discussions.

Clarifications are communications with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. FAR § 15.601 (FAC 90-45). The evidentiary inadequacies of WAI's agreement to lease cannot be construed as any of these. Instead, the record shows that the document was insufficient on its face and rendered the proposal technically unacceptable for failure to meet the mandatory right to use requirement. As a result, any communications between the agency and WAI to supplement the document would have constituted discussions--communications that involve information essential for determining a proposal's acceptability or that provide an offeror the opportunity to revise or modify its proposal. Id. Since the solicitation clearly notified offerors of both the agency's intention to award a contract without discussions and the mandatory nature of the right to use requirement, the agency was under no obligation to hold discussions with WAI. See Gulf Copper Ship Repair, Inc., B-272830, Sept. 25, 1996, 96-2 CPD ¶ 124 at 3.

The protest is denied.

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