



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: STG, Inc.
File: B-285910
Date: September 20, 2000

Kenneth J. Ingram, Esq., and Michael A. Stover, Esq., Whiteford, Taylor & Preston, for the protester.
Kenneth A. Redden, Esq., U.S. Environmental Protection Agency; and John W. Klein, Esq., and Audrey H. Liebross, Esq., Small Business Administration, for the agencies.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Proposal submitted prior to the issue date of a request for proposals (RFP) is an offer in response to the RFP that the contracting agency must consider where the agency provided the offeror with prior written notice that it would do so.

DECISION

STG, Inc. protests the rejection of its proposal under request for proposals (RFP) No. PR-HQ-00-10150, issued by the Environmental Protection Agency (EPA) for information management services for EPA's libraries, public information centers and records centers.¹

We sustain the protest.

On December 3, 1999, EPA published notice in the Commerce Business Daily (CBD) of the agency's requirement for these services and its intent to issue the RFP in mid-December. Agency Report, Tab 1, CBD Notice. The CBD notice stated that EPA contemplated using the Small Business Administration's (SBA) section 8(a) set-aside program and making two awards, one using the section 8(a) competitive process and the other restricted to Indian Tribal Concerns/Alaskan Native Corporations. Id.

¹ This protest was decided under the express option provisions of our Bid Protest Regulations, 4 C.F.R. § 21.10 (2000).

On or around December 5, EPA posted notice on its Internet site of circumstances that would delay the issuance of the RFP. Contracting Officer's Statement at 1. Shortly thereafter, a prospective offeror requested that EPA release a draft RFP. Id. On December 16, STG sent the contracting officer the following E-mail message:

As a follow-up to our telephone conversation this morning, and at your request, I have provided our question to you below.

Background: STG is an eligible 8(a) for the above referenced opportunity through December 1999. EPA may release a draft RFP in 1999 for the above referenced program.

Question: Should the EPA release a draft RFP in 1999, and should STG have the ability to prepare a compliant response to the RFP in 1999, and should the final RFP not contain any major changes in its content or requirements, if STG elects to submit our proposal based on the requirements of the draft RFP, would EPA evaluate our proposal with the other proposals received in response to the final RFP?

Protest, exh. 1, E-mail Message from STG to EPA. The contracting officer responded to STG on December 20 with the following e-mail message:

In response to your question, I can't see any reason why we wouldn't consider/evaluate your proposal if submitted as you state. Obviously, you would be at your own risk in the event of changes from the draft to the final RFP – and you would have to meet the eligibility requirements of the 8(a) set aside.

Id., E-mail Message from EPA to STG.

On December 22, EPA posted a draft RFP on its Internet site. On December 30, STG submitted a proposal to EPA for consideration under the RFP. Contracting Officer's Statement at 1.

On March 2, 2000, EPA issued the RFP with a closing date for receipt of proposals of April 5. STG made no further submissions in response to the RFP. After receiving proposals, the contracting officer determined that discussions were necessary and began establishing a competitive range. Id. at 2. During the competitive range review process, the contracting officer determined that STG's submission "was not an 'offer' as defined by the Federal Acquisition Regulations (FAR) 2.101." By letter of July 13, EPA notified STG that its submission could not be considered for award. Id.

STG requested and received a debriefing, which was conducted on July 17. This protest followed. EPA has suspended award of a contract pending resolution of this protest. Id.

The essential issue here is whether a proposal submitted prior to the date on which an RFP is issued can be considered an “offer” as defined by the FAR. This is an issue of first impression. The definition at FAR § 2.101 states the following:

“Offer” means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. . . . [R]esponses to requests for proposals (negotiation) are offers called “proposals . . .

The agency alleges that a submission cannot “respond” to an RFP until the RFP is issued; thus it is not an offer, and the FAR precludes consideration of such submissions. Agency Report at 1-2. The protester alleges that its proposal clearly responds to the RFP and should be considered under the terms of that RFP as the agency said it would. Protest at 4-6; Comments at 2-3, 6-7.

Contrary to the agency’s position, the FAR does not, in the definition or elsewhere, preclude consideration of proposals submitted prior to the issue date of an RFP. Here, before submitting its proposal, STG informed EPA of the basis for wanting to submit a proposal prior to issuance of the RFP, and the agency provided written approval for such early submission and stated that it would consider the proposal under the RFP. STG’s proposal was clearly submitted for consideration under the RFP that subsequently was issued; the proposal identified the RFP by number, provided detailed price and technical proposals addressing the requirements and terms to be included in the RFP as stated in the draft RFP, and stated that STG agreed to comply with the final terms of the RFP. Thus, as of the RFP issue date, STG’s proposal was already in EPA’s possession as a response to the RFP.² We consider STG’s proposal to be an offer submitted in response to the RFP.

Since STG reasonably relied on EPA’s written determination that its proposal would be considered by the agency under the RFP, the agency’s actions here of first advising STG that EPA would consider an offer submitted prior to the RFP’s issuance, and then reversing this determination after the closing date for submission of proposals and excluding STG’s offer from the competition was unfair, and arbitrarily and capriciously diminished the field of competitors.³

² Whether the proposal is technically acceptable under the terms of the RFP or should be considered within the competitive range is not at issue here, and the agency has not produced an evaluation record for our review.

³ We would see no basis to object to an agency’s preclusion of the submission of proposals prior to the RFP’s issue date by advising offerors who submitted such proposals that their proposals would not be considered. Such notice must be given
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We recommend that EPA consider STG's proposal to be an offer responding to the RFP and evaluate it consistent with the terms of the RFP and applicable law and regulation.⁴ We also recommend that the agency reimburse the protester its reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should file its claims for costs, detailing the time expended and costs incurred, with the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
Acting General Counsel

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early enough to permit these firms to timely submit new proposals by the closing date if they so choose.

⁴ Set in the background of this protest is the SBA's regulation concerning the determination of the size status of small business concerns, which provides that the SBA will determine the size status of a concern as of the date the concern submits to the procuring agency a written self-certification that it is small as part of its initial offer. See 13 C.F.R. § 121.404 (2000). Prior to this protest, EPA requested a size determination from the SBA for STG under the size status stated in the RFP. STG's self-certification submitted with its offer was dated December 30, 1999, and SBA confirmed that STG was small as of that date. Contracting Officer's Statement at 2. EPA did not notify the SBA that this date was months prior to the issue date of the RFP. At our request, the SBA commented on the protest. Although the SBA confirmed STG's status as small based on the information given to it at that time, it indicates that this determination could change if the issue date of the RFP is considered. The SBA further indicates that it did not contemplate at the time its regulation was drafted that the size status of offerors would be determined on the basis of dates in advance of the issue date of a solicitation, and requests that the decision on this protest preserve the SBA's right to interpret its own regulations based on the present facts. SBA Report at 2-3. The size status of particular firms is for review by the SBA and not by our Office. 15 U.S.C. § 637(b)(6); 4 C.F.R. § 21.5(b). Since the SBA made the previous size determination without knowledge of significant facts, this matter should again be referred to that agency for appropriate resolution.