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Decision

Matter of: Farmland National Beef

File: B-286607; B-286607.2

Date: January 24, 2001

James H. Roberts, III, Esq., Manatt Phelps & Phillips, for the protester.
Eliot J. Clark, Jr., Esq., Defense Commissary Agency, for the agency.
Harvey G. Sherzer, Esq., Scott Arnold, Esq., and Mitchel Neurock, Esq., Howrey, Simon, Arnold & White, for Excel Corporation, an intervenor
Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where awardee's proposal to provide beef products to Department of Defense commissaries stated that the awardee was taking "exception" to the solicitation's mandatory delivery schedule, and the awardee's subsequent submissions further explained that it was proposing a "flexible" schedule under which the awardee would determine on a week-by-week basis when deliveries would be made to the various commissaries, award was improper in that the awardee's proposal failed to conform to a material solicitation requirement.

DECISION

Farmland National Beef (FNB) protests the Defense Commissary Agency's (DeCA) award of a contract to Excel Corporation under request for proposals (RFP) No. DECA02-00-R-0007 for the sale and delivery of beef to commissaries in the northern area of DeCA's Eastern Region. FNB protests the award on the basis that the agency improperly evaluated FNB's and Excel's proposals with regard to past performance, and that Excel's proposal took exception to the solicitation's delivery schedule requirements.¹

We sustain the protest.

¹ FNB's initial protest challenged the past performance evaluations. Upon reviewing the agency report, FNB protested Excel's exception to the delivery requirements.

BACKGROUND

The solicitation at issue was published on July 6, 2000, and sought proposals to provide all fresh beef products necessary to support specified commissaries within DeCA's Eastern Region.² The solicitation contemplated the award of a contract (or contracts) covering each of the four commissary groups for a 1-year base period with two 1-year option periods. The estimated value of the total procurement was slightly over \$230 million.

Section B of the solicitation lists the various types and estimated quantities of beef products for which offerors were required to propose fixed prices by commissary group and contract period. The solicitation contemplates weekly deliveries to the commissaries and contains a detailed delivery schedule which lists each commissary and identifies the days of the week, along with specific times of day, when deliveries are required.³ RFP at 95-115. The solicitation expressly provides that “[p]roducts shall be delivered in accordance with the Delivery Schedule.” RFP at 63.

Offerors were advised that proposals would be evaluated on the basis of technical capability,⁴ past performance,⁵ and price, that technical capability and past performance were equally important, and that price was significantly more important than technical capability and past performance combined. RFP at 93-94. As amended, the solicitation required that proposals be submitted by August 4.

² The commissaries were divided into four geographical groups. Group 1 consisted of specified commissaries in Pennsylvania, Kentucky, Missouri, Illinois, Indiana, Michigan and Ohio. Group 2 consisted of specified commissaries in Virginia and Keflavik, Iceland (with deliveries to be made to a point in Norfolk, Virginia). Group 3 consisted of specified commissaries in Maryland and Northern Virginia. Group 4 consisted of specified commissaries in Maine, New York, New Jersey, Maine, Pennsylvania, Connecticut and Rhode Island.

³ For example, the solicitation's delivery schedule requires that deliveries to Fort Myer, Virginia must occur on Mondays between 7:00 a.m. and 11:00 a.m., that deliveries to Rock Island, Illinois occur on Wednesdays between 9:30 a.m. and 11:30 a.m., and that deliveries to Fort Monroe, Virginia occur on Thursdays between 7:00 a.m. and 2:00 p.m. RFP at 95, 101, 106.

⁴ Under the technical capability factor, the solicitation identified the following subfactors: experience, quality control, distribution plan and additional support. RFP at 94.

⁵ Under the past performance factor, the solicitation identified the following subfactors: timeliness of deliveries, conformance with specifications and contract terms, and customer satisfaction. RFP at 94.

Four offerors, including FNB and Excel, submitted proposals by the specified closing date. Excel's proposal included a letter with the following statement:

Ladies and Gentlemen:

In regards to solicitation DECA02-00-R-0007 the following exceptions to your request are brought to your attention. [Emphasis added.]

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6. In order to maximize freight rates and coordinate deliveries we would like to adjust the delivery schedules as needed to make routing of orders more orderly and economically. We will try to accommodate the original delivery dates and times whenever possible. By doing this we will avoid excess cost for delivery and pass this savings on to DECA. We realize this may take a short time period of adjustment by the commissaries but we feel the savings will off set the changes.

Agency Report, Tab 8, Letter from Excel to DeCA (Aug. 3, 2000).

Initial proposals were evaluated by a technical review board with the following results:

	Max. Score	Excel	FNB
Technical Capabilites			
Experience	[deleted]	[deleted]	[deleted]
Quality Control	[deleted]	[deleted]	[deleted]
Distribution Plan	[deleted]	[deleted]	[deleted]
Additional Support	[deleted]	[deleted]	[deleted]
Past Performance			
Timeliness of Deliveries	[deleted]	[deleted]	[deleted]
Conformance with Specs	[deleted]	[deleted]	[deleted]
Customer Satisfaction	[deleted]	[deleted]	[deleted]
Total Score	[deleted]	[deleted]	[deleted]

Agency Report, Tab 10, Summary Rating Sheets.

FNB's initial proposal offered a total evaluated price of [deleted]; Excel's initial proposal offered a total evaluated price of [deleted].

Upon reviewing the proposals, the agency concluded that those submitted by Excel, FNB, and a third offeror were the most highly rated, established a competitive range consisting of those three proposals, and prepared written discussion questions for

each competitive range offeror. In a letter telecopied to Excel on August 14, the agency stated:

This letter opens discussions regarding your proposal. During review of your offer [deleted] deficiencies and [deleted] clarifications were noted and require resolution.

Please clarify the following: [identification of [deleted] items for which clarification was sought].

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Please resolve the following deficiencies. . . . In the letter accompanying your offer ([paragraph] #6), you mention “adjust the delivery schedules as needed to make routing of orders more orderly and economical.” “We will try to accommodate the original delivery dates and time whenever possible.” A clearer explanation is necessary. Are you accepting the delivery schedule as stated?

Agency Report, Tab 8, Letter from DeCA to Excel (Aug. 14, 2000).

Excel telecopied its response to DeCA that same day, stating:

Following are clarifications to solicitation DeCA02-00-R-0007 that you faxed to me. I will try to make all of the clarifications and attempt to take appropriate action on the deficiencies.

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9. The comment on the delivery schedule is an attempt to keep costs as low as possible for DECA. Whenever possible we propose to [deleted]. Our proposal is to simply adjust delivery date and time to make it more efficient for all parties. Every effort will be made to accommodate the original delivery schedule first. We can notify the commissaries as the orders are put together when to expect delivery. This would be done normally on the Thurs. afternoon or Friday morning prior to delivery. [Emphasis added.]

Agency Report, Tab 8, Letter From Excel to DeCA (Aug. 14, 2000)

After reviewing Excel’s response, the contracting officer, contract specialist, and technical review board members engaged in internal discussions regarding Excel’s proposal to “adjust” the solicitation’s delivery schedule. The contract specialist documented these conversations in a memorandum to the file, stating in part: “Today, I gave a copy of [Excel’s August 14 response] to all three Technical Review Board Members to review [T]hey had a big problem with altering of the delivery

schedule.” Agency Report, Tab 8, Contract Specialist’s Memorandum to the File (August 15, 2000). One of the technical review board members described his concerns in an e-mail message to the contract specialist and the other review board members, stating: “[T]hey [Excel] continue to talk around pre-determined delivery schedules. I would have expected them to say we will comply with all delivery schedules.” Agency Report, Tab 8, E-mail from Technical Review Board Member to Contract Specialist (Aug. 15, 2000). At the hearing conducted by GAO in connection with this protest,⁶ the contracting officer recalled discussing her concerns with the contract specialist and advising him as follows: “The delivery schedule represents when the commissaries need the product. That is of paramount importance operationally.” Video Transcript (VT) at 9:20. The contracting officer further explained that an example of her concerns was that Excel would “decide[] to deliver on a Tuesday when the commissary needs the delivery on a Monday.” Agency Report, Tab 8, Contract Specialist’s Memorandum to the File (Aug. 15, 2000); VT at 9:20-21.

By letter to Excel dated August 22, DeCA again raised the issue of Excel’s proposed delivery schedule, requesting that Excel identify the specific adjustments sought and asking “please provide an alternate delivery schedule, showing commissaries, days and times of delivery.” Agency Report, Tab 8, Letter from DeCA to Excel (Aug. 22, 2000). Excel never provided the type of information the agency had requested. Testimony of Contracting Officer, VT at 9:44. Rather, by letter dated August 22, Excel confirmed that, rather than binding itself to any pre-determined schedule, Excel was proposing a “flexible” delivery schedule, under which Excel would, on a week-by-week basis, make the final determination as to the day and time that delivery to each commissary would occur, and that, following Excel’s weekly determination, the commissaries would be notified. Specifically, in that letter Excel stated:

⁶ In resolving this protest, GAO conducted a hearing, recorded by videotape, at which testimony was obtained from the contracting officer and the technical review board chair.

In my letter attached to our final revision, paragraph 9, I mentioned alternative delivery schedules. As a point of clarification, what I was proposing was a flexible delivery schedule.

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It is EXCEL's intent to deliver orders for the military as close to the original deliver[y] time as possible. There will be times when that will not be possible and delivery times and possibly dates will need to be flexible. By dates, I refer that the shipment may deliver Tues. instead of Mon. We do this in an effort to give all of our customers the best service available while keeping the costs as low as possible. When your orders are routed we will contact the commissaries to confirm the delivery day and approximate time.⁷ [Emphasis added.]

Agency Report, Tab 8, Letter from Excel to DeCA (Aug. 22, 2000).

Finally, Excel elaborated that if its proposal were to include a commitment to comply with the solicitation's delivery requirements, Excel would have to alter the manner in which it had proposed to perform the contract and increase its price. Specifically, Excel stated:

We can guarantee deliver[y] by your schedule but that will add 2 factors that we are not including in our proposal. One, it would mean [deleted]. . . . Two, it would add cost to the bases [deleted]. [Emphasis added.]

Id.

During the morning of August 29, the contracting officer, contract specialist, and technical review board chair placed a telephone call to the Excel representative responsible for Excel's proposal, during which the agency personnel, yet again, questioned Excel's proposed delivery schedule. The Excel representative again discussed its proposal in terms of a "flexible" schedule. The contract specialist documented that conversation with another memorandum to the file, stating:

⁷ This response essentially echoed Excel's August 14 submission, quoted above, wherein it advised the agency as follows: "We can notify the commissaries as the orders are put together when to expect delivery. This would be done normally on the Thurs[day] afternoon or Friday morning prior to delivery." Agency Report, Tab 8, Letter from Excel to DeCA (Aug. 14, 2000).

In regards to the delivery schedule, [Excel] said that they would notify stores of late deliveries. [Excel's representative] also stated that they would try to adhere to the delivery schedule as best as they possibly can. He also added that we might have to be flexible on delivery times.

Agency Report, Tab 8, Memorandum for the Record (Aug. 29, 2000).

At the GAO hearing, the contracting officer stated that, following the telephone call to Excel in the morning of August 29, she initiated a second call to Excel that afternoon in which the other DeCA personnel did not participate. VT at 9:58. According to the contracting officer, during her afternoon call, the Excel representative unconditionally agreed to comply with the solicitation's delivery schedule. VT at 9:59-10:00. Excel did not submit any written confirmation of this change to its proposal, nor did the contracting officer prepare any contemporaneous documentation of the call. The record is clear that Excel's letter dated August 22 was its final written submission discussing the delivery schedule requirements.

On the basis of the contracting officer's description of her afternoon telephone conversation with the Excel representative, the agency concluded that Excel's proposal was now acceptable.⁸ Additionally, based on the contracting officer's description of this telephone call, the technical review board chair increased Excel's technical score under the evaluation subfactor "distribution plan" from [deleted] points to [deleted] points. Following the agency's adjustment to Excel's technical rating, Excel's total score for non-price factors was [deleted] and FNB's total score for non-price factors was [deleted]. The final evaluated prices proposed by FNB and Excel for each of the four groups were as follows:

	Excel	FNB
Group 1	[deleted]	[deleted]
Group 2	[deleted]	[deleted]
Group 3	[deleted]	[deleted]
Group 4	[deleted]	[deleted]

Agency Report, Tab 12, Source Selection Decision Summary, at 11-12.

⁸ At the GAO hearing, the contracting officer testified that, following Excel's August 22 submission, she viewed Excel's proposal as taking exception to the solicitation's delivery schedule requirements. VT at 10:15.

The agency performed a best value analysis for each of the four groups. With regard to groups 3 and 4, the contracting officer determined that Excel's proposal offered a better value than FNB's because [deleted]. With regard to groups 1 and 2, [deleted], the contracting officer determined that [deleted], but noted that, [deleted]. Agency Report, Tab11, Source Selection Memorandum, at 1-2. The contracting officer concluded: "[deleted], therefore, Excel was determined to offer the best value for Groups 1 and 2 also." Agency Report, Tab 12, Source Selection Decision, at 15.

On October 11, the agency awarded a contract to Excel for all four groups. This protest followed.

DISCUSSION

FNB protests that award to Excel was improper because Excel took specific exception to the solicitation's stated delivery schedule requirements. We agree.⁹

It is well settled that, in a negotiated procurement, a proposal that fails to conform to one or more of the solicitation's material requirements is technically unacceptable and cannot form the basis for an award. Marine Pollution Control Corp., B-270172, Feb. 13, 1996, 96-1 CPD ¶ 73 at 2-3.

Here, the solicitation specifically provided that "[p]roducts shall be delivered in accordance with the Delivery Schedule," RFP at 63, and there is no dispute that the delivery schedule provision constituted a material solicitation requirement. VT at 9:57-58. As discussed above, Excel's initial proposal stated that it was taking "exception" to the solicitation's pre-determined delivery schedule, offering instead to perform under a "flexible" schedule.¹⁰

⁹ FNB also protests the agency's evaluation with regard to the past performance of FNB and Excel. In short, FNB complains that FNB's score of [deleted] under the past performance subfactor "timeliness of deliveries" (which fell within the range of scores the agency's evaluation scheme describes adjectivally as "[deleted]") should have been higher, and that Excel's score of [deleted] under that subfactor (which fell within the range of scores the evaluation scheme identifies as "[deleted]") should have been lower. We have reviewed the significant amount of past performance data which the agency considered in its evaluation and find no merit in this portion of FNB's protest.

¹⁰ In its initial proposal, Excel expressly recognized that it was proposing to alter the solicitation requirements, stating: "[T]his may take a short time period of adjustment by the commissaries[,] but we feel the savings will off set the changes." Letter from Excel to DeCA (Aug. 3, 2000).

Excel's subsequent submissions made clear that it was proposing delivery terms under which Excel would "adjust" the solicitation's delivery schedule on an "as needed" basis in order to make the routing of orders more efficient and economical for Excel, and then, on a weekly basis, would notify the commissaries as to the day and time that deliveries would occur. In evaluating Excel's initial proposal, the agency recognized the alternative delivery schedule as one of [deleted] "deficiencies" in the proposal. Letter from DeCA to Excel (Aug. 14, 2000).

Further, if there could have been any reasonable doubt about whether, in fact, Excel's proposal offered to comply with the solicitation's pre-determined delivery schedule, such doubt was expressly removed by Excel in its submission of August 22, wherein it stated that Excel could perform as required by the solicitation, but "that will add 2 factors that we are not including in our proposal." (Emphasis added.) Letter from Excel to DeCA (Aug. 22, 2000). Excel went on to identify the two aspects of its proposal that it would have to alter in order to accommodate a commitment to comply with the solicitation's delivery schedule, stating: "One, it would mean [deleted]. . . . Two, it would add cost [deleted]." Id.

Excel and the agency have argued that Excel's exceptions to the solicitation's delivery schedule requirements could reasonably have been interpreted as relating only to "unforeseen events," that is, "weather [or] mechanical failure." Supplemental Contracting Officer's Statement at 3; VT at 9:29-36. This assertion is without merit. As discussed above, Excel's proposed "flexible" delivery schedule specifically contemplated Excel's weekly determination regarding which delivery dates and times would be most efficient, and Excel planned to, following that weekly determination, notify the commissaries "on Thurs[day] afternoon or Friday morning" as to when the following week's deliveries would occur. Letter from Excel to DeCA (Aug. 14, 2000). Clearly, Excel's proposed "flexible" schedule was not based on "unforeseen events" such as weather or mechanical failures. To the contrary, Excel stated that its "flexible" schedule was based on its proposed alternative method of contract performance.

In its post-hearing comments, counsel for Excel also asserts that "Excel resolved any exception to the delivery schedule by orally modifying its proposal to the Contracting Officer on the afternoon of August 29, 2000." Excel Post-Hearing Comments at 5. We disagree. Excel could not effectively "orally modify" the specific, detailed provisions of its written proposal without timely submitting such modifications to the agency in writing. See, e.g., Mil-Spec Contractors, Inc. v. U.S., 835 F.2d 865, 869 (Fed. Cir. 1987); SCM Corp. v. U.S., 595 F.2d 595, 597 (Ct. Cl. 1979).

In summary, it is clear that Excel did not offer to comply with a material term of the solicitation and, thus, award on the basis of that nonconforming proposal was improper. Further, in our view, FNB was prejudiced by the award to Excel. As Excel specifically stated, if it were to agree to meet the solicitation's stated delivery schedule requirements, it would have to increase its price and [deleted]. Conversely, if FNB had been aware that it could propose a "flexible" delivery schedule, it is reasonable to assume that it could have lowered its proposed price. On this record, it is clear that, but for the agency's improper award on the basis of Excel's non-conforming proposal, FNB would have had a substantial chance of receiving an award. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Finally, the agency and Excel assert that, in any event, FNB expressed a similar exception to the solicitation requirements. We disagree. The agency's and Excel's assertions in this regard are based entirely on an exchange of letters between the agency and FNB concerning FNB's past performance. Specifically, by letter dated September 14, 2000, the agency advised FNB that "we have received adverse past performance information regarding timeliness of deliveries," and stated, "[t]his provides you an opportunity to respond to this past performance information." Agency Report, Tab 5, Letter from DeCA to FNB (Sept. 14, 2000). By letter dated September 18, FNB responded, stating:

I would like to address the past performance items mentioned in your [Sept. 14] letter.

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DECA's method of direct purchase from the packers has provided the [commissaries] with fresh product of excellent quality at very competitive prices. The system, however, requires [less than load] deliveries of minimum quantities from 2000 miles away. Unlike a local distributor, no packer can guarantee that they will have no late deliveries or occasional shortages. DECA is a highly preferred customer and [FNB] puts strong emphasis on delivering all orders on time and with no shortages. Our record during the current Northeast contract and over the last 25 years will bear this out.

Agency Report, Tab 5, Letter from FNB to DeCA (Sept. 18, 2000).

Clearly, FNB's explanation responding to critical past performance information does not constitute a qualification of its commitment to be prospectively bound to the solicitation's stated delivery schedule

requirements. The record reflects that the agency believed FNB's proposal committed to meet the RFP's delivery schedule. Indeed, in explaining the agency's rationale for discussing the delivery issue with Excel some four separate times, but never raising this matter with the other competitive range offerors, the contracting officer states that "there was no reason to ask the same question of [FNB and the third competitive range offeror]. They both apparently accepted the delivery schedule without reservation or comment." Supplemental Contracting Officer's Statement at 3. Unlike Excel's unambiguous statements that it was proposing to alter the solicitation's stated requirements, FNB's explanation in response to questions concerning past performance did not qualify its proposal.

The protest is sustained.

RECOMMENDATION

Based on the record, it appears the solicitation's pre-determined delivery schedule may not reflect the agency's actual requirements. Accordingly, we recommend that the agency review its needs and determine if the solicitation's stated delivery requirements reflect its actual needs. In the event they do not, the agency should amend the solicitation to reflect its actual requirements, reopen negotiations with all competitive range offerors, and award a contract or contracts on the basis of the final revised proposal or proposals offering the best value to the government, consistent with the amended solicitation. If an offeror other than Excel is selected for award of one or more of the commissary groups, the agency should terminate Excel's contract in whole or in part.

In the event the agency concludes that the solicitation's stated delivery requirements do reflect its actual needs, we see no basis for seeking revisions to the final proposals submitted by the two remaining competitive range offerors. Accordingly, the agency should select the proposal that represents the best value to the government for each of the four commissary groups from the two proposals remaining in the competitive range and award a contract or contracts consistent with those determinations.¹¹ We also recommend that the agency reimburse the protester for its costs of filing and pursuing the protest regarding Excel's compliance with the delivery schedule

¹¹ DeCA has expressed concern that our Office's sustaining the protest could effectively leave the agency without any supplier of beef products for its commissaries for a period of time. Either of our alternative recommendations should be understood to permit the agency to take whatever steps are reasonable and necessary to provide for an uninterrupted supply of beef for its commissaries while expeditiously implementing the recommendations.

requirements, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2000). In accordance with section 21.8 of our Regulations, FNB's certified claims for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

Anthony H. Gamboa
Acting General Counsel