



The Comptroller General
of the United States

Washington, D.C. 20548

89-1 CPD 381

Decision

PR

Matter of: Cenci Powder Products, Inc. ✓

File: B-234030

Date: April 17, 1989

DIGEST

Solicitation is defective where it lists eight evaluation factors, including price, in descending order of importance when in fact non-price factors were intended to be used only to determine whether the offerors were technically acceptable, not as the basis for a relative evaluation of the offerors' technical merit, and contracting agency in fact intended to award to the lowest priced technically acceptable offeror. Nevertheless, agency properly may make award under the defective solicitation since there is no indication that any offeror was prejudiced by the defect and the awardee's product meets the agency's needs.

DECISION

Cenci Powder Products, Inc., protests the decision of the Department of Veterans Affairs (VA) to reopen negotiations after having awarded Cenci a contract under request for proposals (RFP) No. M5-Q324-88, issued as a total small business set-aside to supply bulk laxatives to three VA locations on a requirements basis. We sustain the protest.

The RFP provided that proposals would be evaluated against eight criteria, listed in descending order of importance as follows:

- "1. Manufacturing facility is in compliance with Food and Drug Administration GCMP regulations.
- 2. Food and Drug Administration has issued an approval NDA/ANDA for the product.
- 3. Price.
- 4. Visual inspection of product (if required).
- 5. Shelf life.

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6. Past performance.
7. Delivery schedule.
8. Full product line can be supplied."

VA received six offers with both Cenci and Lafayette Pharmacal, Inc., submitting the lowest unit price of \$1.39. The contracting officer reviewed the offers and in an effort to resolve the price tie requested that Lafayette and Cenci submit best and final offers. When both firms responded without changing their offers the contracting officer awarded the contract to Cenci on August 9, 1988, because Cenci, unlike Lafayette, would perform in a labor surplus area. See Federal Acquisition Regulation § 14.407-6(a)(1)✓ (tie bids are to be broken by awarding to bidder which is also a labor surplus area concern).

On August 10, Lafayette protested to the contracting officer that the award to Cenci was improper. The contracting officer denied the protest by letter dated October 13. On October 20, Lafayette appealed the decision of the contracting officer to the director of VA's Office of Acquisition and Materiel Management. In reviewing the protest, the director concluded that the award to Cenci was improper because in making the award decision the contracting officer ignored all the evaluation criteria set out in the RFP except price. The director instructed the contracting officer to reopen the procurement, evaluate the proposals in accordance with the stated criteria, hold discussions and award to the highest rated offeror. On December 14, the contracting officer issued Amendment 1 to implement the director's instruction. The amendment revised the RFP to include only four of the eight original evaluation criteria (price, visual inspection of the product, shelf life and delivery schedule); required submission of bid samples; and called for revised offers by December 30.

Subsequently, Cenci protested to our Office that because prices have been exposed, VA's decision to reopen discussions will result in an auction and thus is improper. Cenci also disputes VA's contention that the contracting officer failed to consider all of the evaluation factors stated in the RFP in connection with the initial decision to award to Cenci.

While procuring agencies have broad discretion in determining the evaluation plan they will use, they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation. Once offerors are informed of the criteria against

which their proposals will be evaluated, the agency must adhere to those criteria or inform all offerors of any significant changes made in the evaluation scheme. Greenebaum and Rose Assocs., B-227807, Aug. 31, 1987, 87-2 CPD ¶ 212. Here, while we agree that the record does not demonstrate that the seven evaluation factors, other than price, set out in the RFP were evaluated, we do not find that issue dispositive of the protest. Rather, as discussed below, the solicitation itself was defective.

As the VA states, it issued the solicitation with evaluation criteria that were either unnecessary or irrelevant and accordingly later deleted four of the eight original criteria when it issued Amendment 1. More important, while the RFP purported to list them in descending order of importance, the evaluation factors, with the exception of past performance, are objective factors which an offeror either does or does not meet. They do not lend themselves to use in an evaluation of offerors' relative merit, and there is no indication as to how VA intended to apply the factors on a comparative basis to determine the technically superior offeror.

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Concerning past performance, this is a traditional responsibility factor which may be used as a technical evaluation factor where the agency's needs warrant a comparative evaluation of the offerors' past performance. See Sanford and Sons Co., B-231607, Sept. 20, 1988, 88-2 CPD ¶ 266. Here, however, since VA ultimately deleted past performance from the evaluation scheme in the solicitation, it is clear that VA did not intend to use it in a comparative evaluation of the offers it received. As a result, past performance was improperly listed as a technical evaluation factor.

Finally, the fact that Amendment 1 to the RFP deleted any reference to the relative weights of the evaluation factors confirms our view that VA intended that award be made on the basis of price among those offerors found acceptable under the three technical factors (delivery schedule, shelf life and visual inspection) retained in the amended RFP. Thus, to the extent that the RFP stated that award would be based on evaluation of the relative merits of the offerors, rather than on the lowest priced technically acceptable offer, the RFP was defective.

While we agree that the RFP was defective, the defect is not one which warrants terminating the award to Cenci and reopening the competition after prices have been exposed, given that there is no indication that Lafayette was prejudiced by the defective solicitation. See AT&T Communications, 65 Comp. Gen. 412 (1986), 65-1 CPD ¶ 247.

In this regard, Lafayette's proposal was evaluated on the same basis as Cenci's proposal and the contracting officer found both proposals equal in all respects. Further, we have no reason to believe that Lafayette would have changed its offer, with regard to either price or the product offered, if it had been clear that award would be made to the lowest-priced technically acceptable offeror. Finally, the record shows that Cenci met the required delivery schedule and its product had the required shelf life, and thus, award to Cenci will meet VA's needs.

Given that the only reason offered by VA for terminating Cenci's contract and reopening the competition was its failure to follow the original evaluation scheme, which we have found defective; there is no indication that any offeror was prejudiced by the initial evaluation; award under the original RFP will meet VA's needs; and reopening the competition would simply promote an auction among the offerors without any corresponding benefit to the procurement system, we find that terminating the award and reopening the competition was not justified. Accordingly, if after VA performs the visual inspection on the product offered by Cenci, the product proves acceptable, VA should reinstate the award to Cenci. We also find that Cenci is entitled to recover the costs it incurred in filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1)(1988).

The protest is sustained.

Milton J. Fowler
for
Comptroller General
of the United States

PROCUREMENT

Sealed Bidding
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Propriety
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Defects