

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-185840

DATE: July 14, 1976

97928

MATTER OF: United States Tower Services

DIGEST:

1. Where protest against failure to provide amendments clarifying statement of work requirements was implicitly rejected by procurement activity by proceeding to scheduled closing time for receipt of proposals without issuing amendments and where protest against failure to include evaluation criteria in solicitation must be filed prior to date set for receipt of proposals, matters not protested to GAO until 2 months after closing date are untimely and not for consideration.
2. Where offerors were informed that award on initial proposals might be made, where no negotiations were conducted, where adequate competition existed, and where award price was reasonable, award on initial proposals without negotiations is justified.
3. Although contracting activity letter to unsuccessful offeror advising of award to successful offeror did not advise offeror of general reasons for not accepting offer as required by ASPR, and promptness of letter may be questionable, deficiencies are merely procedural and do not constitute sufficient grounds for setting aside award.
4. Although successful offeror may have had advantage in submitting proposal on dismantling and reassembling same tower, that cannot be deemed privileged information regarding procurement offered by contracting activity to offeror and to no one else.

Request for proposals No. N00140-76-R-6270 was issued as a total small business set-aside for the procurement of services and materials necessary to dismantle, transport and reassemble at another location a tower (with antennas and other hardware). The following offers were received by the Naval Regional Procurement Office, Newport Division, the procurement activity:

United States Tower Services (U.S. Tower)	\$12,480
Francisco Tower, Inc. (Francisco)	13,900
Micro-T, Inc.	20,800

Because the U.S. Tower offer was accompanied by a letter which qualified what it offered vis-a-vis the statement of work requirements, because the second low offeror took no exception to any of the terms and conditions of the solicitation (it had also originally installed the tower), and because of the alleged urgent need for the services, award was made to Francisco without conducting negotiations. The contract had been completed by the time of our receipt of the Department of the Navy report.

U.S. Tower protests the award without negotiations to anyone other than itself, the manner in which it was notified of the award, and the reasons causing it not to receive the award. It is the position of U.S. Tower that the statement of work was vague and imprecise with the result that an offer might not consider some aspects of the work required. U.S. Tower allegedly asked activity personnel to clarify certain areas in the statement of work so that it might better ascertain what the work would entail. No amendments were issued. It is further believed that the solicitation, due to the vagueness of the statement of work, should have contained the evaluation criteria (52 Comp. Gen. 161 (1972)) in paragraph 3-501Sec.D of the Armed Services Procurement Regulation (ASPR) (1975 ed.). It is stated that without the evaluation criteria the offer of U.S. Tower could not have been eliminated from the competitive range without first conducting negotiations as required by ASPR § 3-805.2 (1975 ed.).

Also, U.S. Tower believes that the manner in which it was notified, and the substance of the notification, that it would not receive award was contrary to the provisions in paragraphs 3-508.2(a) and 3-508.3(a)(v) of ASPR (1975 ed.). By letter of January 7, 1976, the procurement activity advised U.S. Tower that no negotiations would be conducted and that Francisco had been selected as the successful offeror. The letter also stated the procedure for challenging the small business status of the successful offeror if there are grounds for challenge. By letter of January 29, received February 2, U.S. Tower was advised of the award price. Neither letter advised why the U.S. Tower offer had not been found acceptable for award. Finally, U.S. Tower believes the successful offeror, by accepting the work unqualifiedly, either had privileged information or a right to negotiate later for expensive modifications to the contract, and it disputes the fact that any urgency existed which permitted award prior to the resolution of its protest in view of the

almost 1-month period that was allowed to elapse between the time it was decided to make award to Francisco and the actual award.

The procurement activity points out that paragraph 10, "AWARD OF CONTRACT," of the "SOLICITATION INSTRUCTIONS AND CONDITIONS" provides:

"(a) The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered.

* * * * *

"(f) The right is reserved to accept other than the lowest offer and to reject any or all offers.

"(g) The Government may award a contract, based on initial offers received, without discussion of such offers. * * *"

The procurement activity also notes that various deficiencies were found in the U.S. Tower proposal, deficiencies for which U.S. Tower also offers various explanations. The statement of work called for the supplying of "one stub anchor consisting of 28 ft. of 6 inch extra strong pipe." U.S. Tower noted in its proposal that it could not provide this length without welding two pieces of pipe together and, therefore, offered to use an "I" beam, which would have to be primed, painted, or galvanized. The cost of the latter preparation was not included in the offer price and was to be negotiated. U.S. Tower states that activity personnel said use of an "I" beam would be acceptable and that the cost range would be \$20 for painting to \$240 for galvanizing. The activity had estimated preparation costs to run as high as \$200.

U.S. Tower also based its proposal on the assumption that the soil conditions "* * *" are average with soil bearing capacities of 4000PSF with no dewatering or blasting required, and digable by backhoe." Upon evaluation of the proposal, the activity concluded that it would be "extremely difficult to utilize backhoe" because the work is to be accomplished on a steep bank, and that while it might be possible with some degree of stabilization of the unit, this would result in a sizeable additional cost. It was estimated that to use hand labor for

the excavation would increase the cost to U.S. Tower by an estimated \$500 to \$1,000. U.S. Tower states that the mention of backhoe was not made with regard to site accessibility (which allegedly had been discussed previously with activity personnel), but rather to the soil conditions upon which its proposal was based since the solicitation contained neither information regarding soil tests or borings nor a differing site conditions clause.

U.S. Tower assumed in its proposal that there were no lighting or electrical hookups on the tower other than transmission lines. The activity states that this assumption is incorrect as there were antennas, lighting, a rotor, and a beacon on the tower, the removal and reinstallation of which would entail an additional cost. In turn, U.S. Tower contends that it knew of the beacon (lighting of the tower is required by law) and of antennas (it was allegedly advised to assume two existed instead of the four which actually existed) and that its offer included the cost of moving the lighting system with the tower, "* * * but since the actual source of power for the lights was not known by the RFP technical people we included no expense for this service in our offer." Any costs inconsistent with these assumptions were left for later negotiation.

U.S. Tower interpreted the statement of work to require the furnishing of two turnbuckles. The activity found the assumption to be incorrect and stated that while turnbuckles are not that expensive, additional labor costs for installation of the cable would be incurred. U.S. Tower assumed that all concrete anchors would be of Rohn design No. 8C, an assumption the activity found to be contrary to the tower manufacturer's recommended installation. This incorrect assumption meant an underestimation of the concrete that would be needed and, therefore, an underestimation of cost. Finally, in the proposal U.S. Tower assumed "no responsibility for design or engineering of this tower or its parts." The activity evaluation personnel believed this to be an attempt to relieve the offeror from liability for any damage it might cause to the tower.

As regards the protest by U.S. Tower against the vagueness of the statement of work and the failure of the activity to issue clarifying amendments, while the offeror did allegedly protest the failure to issue such amendments to the procurement activity, that protest was implicitly denied when the activity failed to issue amendments and proceeded with the scheduled closing time for receipt of proposals. This occurred in December 1975. The U.S. Tower protest on this matter was not filed with our Office until February 1976, clearly beyond the time for filing provided in our

Bid Protest Procedures, 4 C.F.R. part 20 (1976). Moreover, a protest against the failure to include the evaluation criteria in ASPR § 3-501Sec.D in the solicitation must be filed prior to the time set for receipt of proposals. 4 C.F.R. § 20.2(b)(1). Accordingly, the protest on these issues is untimely and not for consideration on the merits.

ASPR § 3-805.1(a), in part, provides:

"(a) Written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, except that this requirement need not be applied to procurements:

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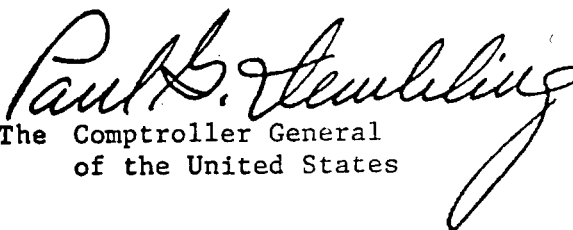
"(v) in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price, provided however that the solicitation notified all offerors of the possibility that award might be made without discussion, and provided that such award is in fact made without any written or oral discussion with any offeror."

Offerors were advised in the solicitation that award might be made without negotiations, and none were conducted. Also, since competition was obtained on the procurement and since the close proximity in price of the two low offers and the aforescussed assumptions made by U.S. Tower in its proposal--in most cases, but not all, indicating additional costs to be negotiated--logically led to the conclusion that the Francisco price was reasonable, we are unable to find as unjustified the contracting activity's decision to make award on the initial proposals without negotiations. See 52 Comp. Gen. 346, 350 (1972); Shapell Government Housing, Inc., et al., 55 Comp. Gen. 839 (1976), 76-1 CPD 161.

With respect to whether U.S. Tower was properly notified of the award to Francisco, we note that ASPR § 3-508.2(b) requires that after a successful offeror has been selected each unsuccessful offeror shall be advised of that offeror's name and location, that further negotiations shall not be conducted, and that the small business status of that offeror may be challenged if grounds therefor exist. The activity's January 7 letter to U.S. Tower complied with the requirements of ASPR § 3-508.2(b). As regards the provisions of ASPR § 3-805.3, the activity agrees that its January 29 letter to U.S. Tower did not advise the offeror of the general reasons for not accepting its offer for award. The activity advises that future corrective action will be taken. We question also, in view of the intended award date of January 14--we were not furnished the actual award date, if later--the promptness of the notice given to U.S. Tower. However, these deficiencies are merely procedural and do not constitute sufficient grounds for setting aside the award.

As for the contention that Francisco had privileged information or the right to later negotiate price modifications, there is no evidence to substantiate such allegations. The fact that Francisco originally installed the tower may have given it an advantage in submitting a proposal, but that cannot be deemed privileged information offered by the activity to Francisco and to no one else. Further, the contract was completed at the quoted price.

Accordingly, the protest is denied.


For The Comptroller General
of the United States