DECISION

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

FILE: B-219735 DATE: September 26, 1985

MATTER OF: Tracor Applied Sciences

DIGEST:

1. Allegation that government indemnification clause should not have been included in the solicitation is untimely and will not be considered where not asserted in a protest filed prior to the closing date for receipt of initial proposals.

2. Award on the basis of initial proposals is permissible where the solicitation advised offerors that award might be made without discussions, and a sufficient number of proposals were received to assure that award would be at a fair and reasonable price.

3. Where contracting agency decides to make award on initial proposal basis, an initial proposal taking exception to a material solicitation requirement is unacceptable and must be rejected.

Tracor Applied Sciences, Inc. (Tracor), protests the rejection of its proposal in response to request for proposals (RFP) No. DTFA-06-85-R-30084, issued by the Federal Aviation Administration (FAA), Department of Transportation. We dismiss the protest in part and deny it in part.

The RFP solicited offers for asbestos monitoring and industrial hygienist services, and included a clause entitled "Save Harmless and Indemnity Agreement." This clause provided that the contractor would indemnify the government against liability for any personal injury or property damage caused in whole or part by the contractor (or subcontractors, employees, etc.) in performing the contract. In June 1985, prior to the June 17 closing date for receipt of initial proposals, Tracor expressed its concern to the contracting officer that the Save Harmless clause would make it difficult for Tracor to obtain insurance. The contracting officer advised Tracor that the clause would remain an RFP requirement.

Tracor and five other offerors submitted proposals by the June 17 deadline. In its proposal, Tracor took "complete exception" to the Save Harmless clause and requested that the clause be deleted. On July 16, having decided to make award based on the initial proposals, without discussions, the FAA advised Tracor by letter that its proposal had been rejected for taking exception to the clause, and that award had been made to McCrone Environmental Services, Inc.

Tracor principally contends that the Save Harmless clause improperly was included in the RFP because it is not a standard clause; it was not authorized for use in accordance with applicable regulations; and it is inconsistent with other standard clauses (e.g., the "Permits and Responsibility" clause) included in the RFP. Tracor maintains that since the clause should not have been included in the RFP, it has no effect, and an offeror's taking exception to its inclusion thus is not a basis for rejecting the proposal.

Tracor's challenge to the inclusion of the Save Harmless clause in the RFP is untimely. Our Bid Protest Regulations, 4 C.F.R. Part 21 (1985), provide that protests based on alleged solicitation deficiencies apparent from the face of the solicitation must be filed prior to the closing date for submission of initial proposals. 4 C.F.R. § 21.2(a)(1). Allegations such as Tracor's, which are based on objectionable solicitation provisions, involve such apparent solicitation deficiencies and thus must be raised before the initial closing date. See Tempest Technologies, Inc., B-213811, Mar. 13, 1984, 84-1 C.P.D. ¶ 302. In this respect, taking exception to a solicitation requirement in a proposal does not satisfy the pre-closing filing rule. Trident Motors Inc., B-213458, Feb. 2, 1984, 84-1 C.P.D. ¶ 142. Consequently, if Tracor believed it was improper--for whatever reason--for the agency to include the Save Harmless clause in the RFP, it was required to develop its arguments and protest on this ground prior to the June 17 closing. Because Tracor failed to do so, its protest on this point is untimely and will not be considered.

Tracor argues that the timeliness of its protest should be measured from the time its proposal was rejected. Our Regulations do provide that certain protests will be considered timely if filed within 10 days after the basis of protest should have been known, 4 C.F.R. § 21.2(a)(2), but

this rule applies only to protest bases concerning other than alleged solicitation defects. A protester cannot wait until after rejection of its proposal to protest an objectionable solicitation requirement. Inclusion of a requirement puts potential offerors on notice that the requirement will be a part of the contract, and any objection to the requirement must be raised prior to the closing date for receipt of proposals so the contracting agency can review the requirement before inviting offers and proceeding with the competition. See Comdisco, Inc.--Reconsideration, B-214409.3, Dec. 3, 1984, 84-2 C.P.D. ¶ 596.

In addition to challenging the propriety of the Save Harmless clause, Tracor contends that it was improper for the FAA to reject its initial proposal without discussions, especially since the RFP did not specifically state that the clause was an essential requirement.

We have held that a contract may be awarded without discussions where there is adequate competition (to ensure that award will be made at a fair and reasonable price), provided that the solicitation notifies offerors that award might be made without discussions. The RFP here incorporated by reference the "Contract Awards" clause, Federal Acquisition Regulation, § 52.215-16 (1984). Section (c) of this provision expressly advised offerors that the government might award a contract "on the basis of initial offers received, without discussions," and that offerors thus should include their best terms in their initial proposals. This constituted adequate notice to offerors that award might be made without discussions. See Tiernay Manufacturing Co., B-209035, Dec. 20, 1982, 82-2 C.P.D. ¶ 552. We consider the five proposals received (other than Tracor's) sufficient competition to assure a fair and reasonable price; Tracor does not assert otherwise. Consequently, it was not improper for the FAA to base award on initial proposals.

As for the rejection of Tracor's initial proposal, we have held that where the contracting agency decides to make award based on initial proposals, it is proper to reject an offeror's initial proposal if it takes exception to a material solicitation requirement. Tiernay Manufacturing Co., B-209035, supra; SAI Comsystems Corp., B-189407, Dec. 19, 1977, 77-2 C.P.D. ¶ 480. The Save Harmless clause was material because it not only would have a direct impact

on offerors' prices due to the need for liability insurance (the record indicates Tracor considered such insurance coverage necessary), but also would result in a significantly different allocation of risk than if the clause were deleted as Tracor requested. The failure of the RFP to state expressly that the clause was an essential requirement did not make the requirement any less material. Tracor's proposal, taking exception to the clause, therefore properly was rejected.

The protest is dismissed in part and denied in part.

for Harry R. Van Cleve
General Counsel