



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: B-222622; B-222622.2
File: VA Venture; St. Anthony Medical Center, Inc.
Date: September 12, 1986

DIGEST

1. Question of availability of public utilities to a construction site pertains to responsibility and may be fulfilled after submission of an offer; agency's affirmative determination of offeror's responsibility will not be reviewed by GAO absent factors not present in this case.
2. While offer which provides for net usable square footage approximately 2 percent less than low end of range required under solicitation deviates from technical requirements, offer need not be rejected where it meets the agency's actual requirements, there is no material change in the awardee's price advantage as a result of the lower square footage offered, and protester was not prejudiced under the solicitation's method of award.
3. Allegation that Davis-Bacon Act is applicable to procurement is untimely when filed after receipt of initial proposals, where the solicitation indicates that the act was not applicable.

DECISION

VA Venture and St. Anthony Medical Center, Inc. (St. Anthony's), protest the award of a contract to Hamstra Builders Inc. (Hamstra) by the Veterans Administration (VA) for the construction and lease of a facility for a VA outpatient clinic in Crown Point, Indiana, under solicitation for offers (SFO) No. 08K-02-85. Both protesters assert that Hamstra's offer is nonresponsive to the solicitation specifications and should have been found ineligible for award. In addition, VA Venture asserts that St. Anthony's offer is similarly deficient. We deny both protests in part and dismiss them in part.

The SFO, issued on November 4, 1985, requested offers for space for an outpatient clinic in a facility providing a minimum of 38,016 and a maximum of 40,000 net usable square feet (nusf). The SFO provided a detailed description of the space to be utilized and the type of rooms which would be

required. Offers were to be for a 15-year lease term with a 5-year renewal option. In addition, the successful offeror would be required to provide certain equipment and space alteration work as specified in the SFO schedule "B." The SFO also listed conditions to be met by the offerors, including a requirement that "all public utilities must be available to the site."

The SFO provided for award to the offeror with the lowest evaluated price per nusf, which met the technical requirements of the SFO. To calculate the nusf, the solicitation provided the following formula:

"Net usable space is a term measuring the area for which VA will pay a square foot rate. It is determined by . . . the following:

"Compute the inside gross area by measuring between the inside finish of the permanent exterior building walls or from the face of the convectors (pipes or other wall-hung fixtures) if the convector occupies at least 50 percent of the length of exterior walls. Make no deductions for columns and projections enclosing the structural elements of the building.

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"Deduct the following from the gross area including their enclosing walls for both single and multiple tenancy floors:

- Toilets and lounges,
- Stairwells,
- Elevators and escalator shafts,
- Building equipment and service areas,
- Entrance and elevator lobbies,
- Stacks and shafts, and
- Corridors in place or required by local codes and ordinances; (use 5.5% of above gross area),

"Unless otherwise noted, all references in this Solicitation to square feet shall mean net usable square feet."

To arrive at the evaluated price, the SFO provided a formula which reduces all of the costs, including a lump-sum payment, to an amount per nusf, intended to provide a normalized present value cost calculation. The SFO provision providing for these calculations is:

"Evaluation of offers will be on the basis of the annual price per square foot. To determine the lowest offer, the square foot price for the initial and renewal term will be evaluated. Excluded from the total square footage, but not from the price, will be parking and wareyard areas. To this square footage rate will be added:

"(1) The estimated cost per square foot of escalated Government provided services.

"(2) The annualized per square foot cost of any other items specified in this Solicitation which are not included in the rental.

"The Government will make a present value price evaluation by reducing the initial term and renewal option(s) to a composite annual square foot rate, as follows:

"(1) Parking and wareyard areas will be excluded from the total square footage, but not from the price.

"(2) Annual adjustments in operating expenses will not be made. The gross annual per square foot price of the initial term and renewal options will be discounted annually at 11.25 percent to yield a gross present value life cycle cost (PVLCC) per square foot.

"(3) To the gross PVLCC will be added:

"(a) The cost of Government provided services not included in the rental escalated at 3 percent compounded annually and discounted annually at 11.25 percent.

"(b) The annualized per square foot cost of any items specified in this Solicitation which are not included in the rental (lump sum payments made at the beginning of the lease will be annualized but not discounted.)

"The sum of the above will be the per square foot present value of the offer for price evaluation purposes."

The sum arrived at under this formula is expressed as a number which reflects the cost per one nuf. Therefore, award is based on a unit price number, without extension by the total number of nuf actually offered.

The VA received six offers and, after negotiations, all six offerors submitted best and final offers on February 14, 1986. After receipt of best and final offers, the VA determined that all offers were technically acceptable. Cost evaluations resulted in Hamstra's offer being evaluated at \$6.62 per nuf, St. Anthony's at \$6.66 per nuf, and VA Venture at \$6.84 per nuf. Award was made on May 22 to Hamstra, and these protests followed. The VA made a determination to permit the contract performance to commence and continue notwithstanding the protest, on the basis that continued performance was in the best interest of the government.

Both protesters assert that Hamstra did not meet the solicitation requirement that utilities be available to the site, at the time that it made its offer, and more particularly that Hamstra did not have a firm commitment for public water and sewer facilities at that time. VA Venture also makes the same allegation with respect to St. Anthony. The VA contends that it determined that Hamstra did have a sufficient commitment to obtain the requisite utilities, and that the determination relates to the responsibility, not to the responsiveness or technical acceptability, of Hamstra's offer. We agree with the VA.

Both protesters emphasize that the utilities requirement is contained in a section of the solicitation entitled "How to Offer," rather than in the section entitled "Evidence of Capability to Perform," contending that the VA clearly intended to make it a matter of responsiveness. However, the question of the nature of the requirement is not determined by the characterization contained in the solicitation. For example, we have held that zoning is an aspect of an offeror's responsibility even where the solicitation expresses the requirement in terms of responsiveness or technical acceptability. TRS Design & Consulting Services, B-218668, Aug. 14, 1985, 85-2 C.P.D. ¶ 168; William S. Stiles, Jr.; Piazza Construction, Inc., B-215922; B-215922.2, Dec. 12, 1984, 84-2 C.P.D. ¶ 658.

The question is whether the requirement for the availability of utilities pertains to the offeror's ability or capacity to perform as promised, in which case it is a responsibility

matter, or whether it pertains to the offeror's unequivocal promise to comply with a material requirement of the solicitation. Aviation Specialists, Inc.; Aviation Enterprises, Inc., B-218597; B-218597.2, Aug. 15, 1985, 85-2 C.P.D. ¶ 174. While the concept of responsiveness is not directly applicable here since the procurement is negotiated, the protesters are essentially contending that the utilities requirement is sufficiently material to render noncompliance the basis for a finding of technical unacceptability.

VA asserts that since the availability of public utilities relates to the adequacy of the contractor's facilities, the requirement pertains to the offeror's responsibility. D.J. Findley, Inc., B-215083, July 24, 1984, 84-2 C.P.D. ¶ 106. The protesters characterize the requirement as pertaining to "responsiveness" primarily because they contend that the timing of the obtaining of the utilities has a material affect on price, and the requirement relates to the facility which Hamstra has offered. In our view, the answer is provided by the fact that the availability of public utilities to the site is, as argued by St. Anthony's, a prerequisite to obtaining a building permit. We have frequently held that such a requirement, the obtaining of a state building permit or license, or the possible need for zoning variances, relates to capacity to perform, and therefore is a matter of responsibility. Carolina Waste Systems, Inc., B-215689.3, Jan. 7, 1985, 85-1 C.P.D. ¶ 22; TRS Design & Consulting Services, B-218668, supra; 51 Comp. Gen. 565 (1972).

The same result is required here; the obtaining of utilities is a prerequisite to being able to perform the construction and provide the facility. It cannot be seriously maintained that Hamstra would be able to construct the facility without first obtaining the utilities. We find that the matter is one of responsibility, and that the requirement may be met after the submission of the proposal. In this regard, we have held that such a permit or license may be obtained by the offeror as late as the time performance is required. Hewlett-Packard Co., Medical Products Group, B-216125.2, May 24, 1985, 85-1 C.P.D. ¶ 597.

The protesters next allegation concerns the square footage offered by Hamstra. VA Venture asserts that Hamstra's building provides less than the required minimum, and St. Anthony asserts that Hamstra overstated its nusf in a manner which led to an inaccurate calculation of Hamstra's price per nusf. In this regard, VA Venture also asserts that St. Anthony's building provides less than the required minimum nusf, based on St. Anthony's misunderstanding of the calculation formula.

Hamstra's best and final offer indicated that it was offering 40,000 nusf, and VA's cost calculations were based on this figure. However, after the protest VA recalculated and concluded that Hamstra was actually offering only 38,045 nusf. In reviewing Hamstra's building plans upon which the nusf calculations are based, we note that there is a minimum of 600 square feet of equipment room area which, under the above-quoted nusf calculation formula must be deducted, but which the VA failed to deduct. Accordingly, the actual nusf offered by Hamstra is approximately 37,400 nusf. We note that St. Anthony also offered less than 38,000 nusf, based on its mistaken belief that the nusf formula provided for only one blanket deduction of 5.5 percent of the gross footage to cover all of the listed items. In our view, the previously quoted deduction formula reasonably can only be read to mean that the 5.5 percent deduction applies to corridors exclusively, otherwise the listing of the other deduction areas is superfluous. The fact that St. Anthony's may have received oral advice to the contrary from contracting personnel provides no basis for varying the written solicitation terms. I.E. Levick and Associates, B-214648, Dec. 26, 1984, 84-2 C.P.D. ¶ 695.

Both VA Venture and St. Anthony contend that the lower nusf number results in displacement of Hamstra as low offeror. However, both base their calculations on the assumption that the total extended price indicated in Hamstra's offer for yearly rental of 40,000 nusf will be the price paid by the VA rather than the also-stated price per one nusf, contained in the offer. This is incorrect. The solicitation expressly provides that:

"The base price offered will be the rate per net usable square foot of space. This price shall be used to determine the total annual rental to be paid, adjusted for any discrepancies in the quantity of space delivered, as against the amount offered and accepted as described else where in the Solicitation." (Emphasis added.)

The award document provides that after completion of the facility, the actual nusf will be measured by government and contractor personnel, and that the rental paid will be based on this number. Thus, it is clear that the actual number of nusf provided by the offeror will determine the yearly rental--based on the rental expressed in terms of one nusf. We have recalculated Hamstra's offer using the reduced actual square footage, and it remains low. The only affect of the reduction in nusf is to increase the cost of Hamstra's amortized lump-sum payment by approximately 1/2 cent per

nusf, with a corresponding increase in Hamstra's evaluated price for one nusf, which does not displace its offer. St. Anthony's offer increases similarly per nusf because of its own overestimate of the offered nusf. In any event, the change does not result in displacement of Hamstra as low offeror, which is the crux of St. Anthony's argument, and one of the arguments propounded by VA Venture.

VA Venture also contends that the Hamstra offer should have been rejected outright because of this deficiency. We do not believe, as VA Venture seems to assume, that this deficiency renders the offer unacceptable per se. Since this is a negotiated procurement, the concept of responsiveness is not applicable. However, even under a negotiated procurement, a proposal which fails to conform a material term of the solicitation should be considered unacceptable and may not form the basis for an award since it is fundamental that all offerors be permitted to compete on an equal basis. South Central Bell Advanced Systems, B-216901, Aug. 19, 1985, 85-2 C.P.D. ¶ 188.

Here, the solicitation provided a range of approximately 2,000 nusf within which to offer, and also provided explicit specifications for the kinds of rooms and equipment which were necessary. All of the offerors were found to have met the agency's minimum needs with respect to the space and room configurations. Moreover, since the evaluation was based on the unextended cost per one nusf, whether Hamstra actually offered 38,045 or 37,400 nusf did not affect the award determination. Furthermore, St. Anthony, based on our calculation, also offered less than 38,016 nusf. However, all three offerors met the more stringent room and facility requirements of the SFO and were found acceptable.

Both protesters also assert that the procurement should be subject to the Davis-Bacon Act, and that Hamstra will be using nonunion labor. Both protesters further assert that the Department of Labor (DOL) issued a ruling on August 15, 1986, holding that the Davis-Bacon Act is applicable to the construction/renovation portions of this contract, and that the contract must incorporate the appropriate wage determination. However, we note that VA has 60 days within which to appeal this decision, and VA has not yet determined what, if any, action it will take in response to the DOL ruling. The solicitation clearly indicated that the project was not subject to the Davis-Bacon Act, and neither protester

raised the issue until after the award of the contract. An allegation regarding such an alleged apparent solicitation impropriety must be raised, under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986), prior to the closing date for receipt of initial proposals. Accordingly, this aspect of the protest is untimely.

Finally, the protesters assert that there was improper congressional influence exercised over the conduct of the procurement. The VA has explicitly denied that any congressional pressure was applied with respect to their selection process. In our view, the protesters have shown nothing more than the fact that there was congressional interest in the conduct of the procurement, and have not provided any evidence of improper influence. In any event, we have reviewed the matter on the merits and it is for denial and there is no evidence to support the protester's allegations. See W.H. Compton Shear Company, B-208626.2, Oct. 3, 1983, 83-2 C.P.D. ¶ 404.

Accordingly, we deny the protests in part and dismiss them in part. We also deny the protesters' claims for proposal preparation costs and attorneys fees.

for 
Harry R. Van Cleve
General Counsel