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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Howard Finley Corporation

File: B-226984

Date: June 30, 1987

DIGEST

Where there is no determination that the low offeror's proposal, which was rejected from the competitive range, was technically unacceptable, and the agency did not consider price proposals in establishing the competitive range, the agency violated the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.609(a) (1986).

DECISION

Howard Finley Corporation protests the award of a fixed-price contract to James R. Keogh & Associates, Inc., under request for proposals (RFP) No. 7PSD-53223/C5/7FXI, issued by the General Services Administration (GSA) for the procurement of consulting services for a study of a GSA distribution facility and recommendations for its design. Finley contends that it was improperly excluded from the competitive range.

GSA has notified us that award was made on March 24, 1987, and performance of the contract has begun, notwithstanding the pendency of this protest. A determination was made by GSA that urgent and compelling circumstances exist which would not permit awaiting our decision in the matter. 31 U.S.C. § 3553(d)(2) (Supp. III 1985); 4 C.F.R. § 21.4(b)(2) (1986).

The protest is sustained.

Offers were solicited in October 1986, and by the closing date for receipt of initial proposals, January 6, 1987, 26 offers were received. The RFP required offerors to submit technical and price proposals in separate sealed envelopes. Although the RFP stated that technical factors would be valued at 80 percent and price "represents 20 percent of the evaluation process," the solicitation provided that the competitive range would be determined strictly on the basis of the numerical ratings of the technical proposals without

consideration of the price proposals, and that the price proposals of only those offerors in the technical competitive range would be opened and evaluated.

The technical proposals of all offerors were evaluated separately by all six members of a technical evaluation panel which assigned point scores on the basis of six different areas of technical experience as outlined in the RFP. The total point scores for each offeror were then divided by six giving each offeror an average technical point score.

The contracting officer reviewed the average technical scores for the 26 offerors, which ranged from a low of 25.3 points (out of 100 possible) to a high of 84.3 points. The contracting officer found that there was a gap of 4.2 points between the average score of the sixth and seventh ranked offer. The record shows that based on the fact that there were six offers above this gap, that the seventh offer had a technical score of 66 out of 100 and because the emphasis in the procurement was to be 80 percent technical, the contracting officer determined that the six offerors with a technical score above 66 constituted the technical competitive range. There is no indication in the record that the protester's technical proposal which scored 50.5 points and was ranked twelfth of 26 firms and the other firms' technical proposals which were scored below those in the competitive range were determined unacceptable.

According to GSA, only after the technical competitive range was determined were any price proposals opened, and then only the price proposals of the six firms in the technical competitive range. The 80 percent technical and 20 percent price factors stated in the RFP were then calculated for each of the six offerors in the competitive range and a total evaluated score for each offeror was thereby obtained. Because the offeror with the highest technical score (Keogh) also offered the lowest price of all those in the technical competitive range, GSA determined that Keogh's price was reasonable and that discussions or negotiations were not necessary. GSA awarded the contract to Keogh after GSA determined Keogh to be a responsible contractor.

Finley challenges the award to Keogh at "more than 200 percent higher than [Finley's] price [$44,641]," and argues that the project "should cost substantially less than half of the amount quoted ($145,000) by the winning contractor." In addition, Finley disputes its firm's exclusion from the competitive range based upon the technical evaluation and the allegedly superior experience and capability of the

awardee. Finally, Finley argues that GSA violated the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.609(a) (1986), by determining the competitive range based only on technical factors without considering price.

With regard to Finley's last argument, GSA has argued that because the RFP evidenced GSA's intention to exclude price in the determination of the competitive range, Finley's protest on this issue is untimely because it was not raised before the date for receipt of proposals. See 4 C.F.R. § 21.2(a)(1) (1986). GSA is correct in pointing out that under our Bid Protest Regulations protests based upon alleged improprieties in the RFP which are apparent prior to the closing date for receipt of proposals should be filed prior to that date. However, Finley's protest also challenges the propriety of its exclusion from the competitive range without consideration of price as a violation of procurement laws and regulations, which it could not protest until it was advised of its exclusion and the reason it was excluded. Therefore, Finley is protesting more than a solicitation impropriety. This issue was timely protested within 10 working days of Finley's receipt of GSA's notice of award. See 4 C.F.R. § 21.2(a)(2).

GSA also argues that Finley is not an interested party to maintain the protest under our Bid Protest Regulations, 4 C.F.R. § 21.0, because it is not within the competitive range. This argument is without merit since Finley is protesting its exclusion from this competitive range.

In reviewing complaints about the reasonableness of the evaluation of a technical proposal, and the resulting determination of whether an offeror is within the competitive range, our function is not to reevaluate the proposal and to make our own determination about its merits. That determination is the responsibility of the contracting agency, which is most familiar with its needs and must bear the burden of any difficulties resulting from a defective evaluation. Procuring officials have a reasonable degree of discretion in evaluating proposals, and we therefore determine only whether the evaluation was arbitrary, that is, unreasonable or in violation of procurement laws and regulations. Pharmaceutical Systems, Inc., B-221847, May 19, 1986, 86-1 C.P.D. ¶ 469. However, here we need not decide if each of the technical findings of the evaluation panel was reasonable because of the following discussion.

As Finley argues, FAR, 48 C.F.R. § 15.609(a), requires that the competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award. Here, GSA

did not consider price in its determination of the competitive range even though there was no determination that Finley, and others, were technically unacceptable and, on this basis, we sustain the protest. See HCA Government Services, Inc., B-224434, Nov. 25, 1986, 86-2 C.P.D. ¶ 611, aff'd on reconsideration, B-224434.2 et al., Apr. 24, 1987, 87-1 C.P.D. ¶ 434; Simpson, Gumpertz & Heger, Inc., B-202132, Dec. 15, 1981, 81-2 C.P.D. ¶ 467.

We have held that an agency does not have to include an offeror in the competitive range even though cost or price is not evaluated where the offeror is found technically unacceptable. Proffitt and Fowler, B-219917, Nov. 19, 1985, 85-2 C.P.D. ¶ 566; Advanced ElectroMagnetics, Inc., B-208271, Apr. 5, 1983, 83-1 C.P.D. ¶ 360. In our opinion, however, it is unreasonable to conclude that a technically acceptable offer should be excluded from the competitive range without consideration of price. HCA Government Services, Inc., B-224434, supra; Simpson, Gumpertz & Heger, Inc., B-202132, supra.

As noted previously, the record contains no indication that all of the offerors excluded from the competitive range (including Finley) were determined to be technically unacceptable. Moreover, because Finley's price was very close to the government's estimate and was less than one-third of the awardee's price, had price been considered when the competitive range was determined, Finley would have had a substantial chance of being included in the competitive range and considered for the award. The FAR requires that the prices of all technically acceptable offerors be evaluated in determining the competitive range. Since Finley's price proposal was significantly lower than those of the offerors found in the competitive range, and there is no indication in the record that Finley's proposal was considered to be technically unacceptable, Finley's exclusion from the competitive range, without consideration of its price proposal, was improper. See HCA Government Services, Inc., B-224434, supra. Accordingly, we sustain Finley's protest. Because we have sustained the protest on this basis, it is not necessary for us to address the other allegations raised by Finley.

In view of GSA's urgent and compelling need for the consulting services, we do not recommend termination. However, since Finley was unreasonably excluded from the competition and it has lost the chance of receiving the award, we allow

recovery of Finley's costs of pursuing its protest, including attorney's fees. See Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 C.P.D. ¶ 398; EHE National Health Services, Inc., 65 Comp. Gen. 1 (1985), 85-2 C.P.D. ¶ 362. Finley should submit its claim for costs directly to GSA. 4 C.F.R. § 21.6(f); Topley Realty Co., Inc., 65 Comp. Gen. 510, supra.

for Milton J. Socolar
Comptroller General
of the United States