



The Comptroller General
of the United States

Washington, D.C. 20548

Tammelle - B

Decision

Matter of: Fairfield Machine Company, Inc.
File: B-228015, B-228015.2
Date: December 7, 1987

DIGEST

1. Where the protester's proposal has been evaluated and rejected as technically and commercially unacceptable, the protester is an interested party for purposes of protesting that its proposal was improperly evaluated.
2. A disappointed offeror in a negotiated procurement is an interested party to file a protest, even though the contracting agency contends that the protester's offer expired before the contract was awarded, because: (1) the protester's offer, though containing an ambiguity as to the offer acceptance period, can reasonably be construed as conforming to the solicitation's offer acceptance period requirement; and (2) the protester's active pursuit of the protest exhibits the protester's willingness to accept a contract award.
3. A protester may wait until after it has been debriefed to file a protest, where the information available to the protester before the debriefing did not contain sufficient detail for the protester to determine whether it had a basis for protest. Doubt as to the timeliness of a protest is resolved in favor of the protester.
4. Protest alleging that evaluators unilaterally increased the labor hours and, consequently, the price contained in the protester's proposal for a fixed-price contract is denied. The record contains no evidence that the protester's lowest proposed price was increased and, in fact, shows that the protester's proposal, which was eliminated from the competitive range because of technical and commercial/management considerations, was never evaluated at all under cost/price criteria.
5. Protest alleging that the protester's proposal was improperly evaluated and excluded from the competitive range even though the protester offered the lowest price is denied, where the record shows that the protester's proposal contained numerous material informational deficiencies,

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justifying exclusion of the proposal on technical and commercial/management criteria alone.

DECISION

Fairfield Machine Company, Inc., protests award of a subcontract to Wright Industries, Inc., by Stearns Catalytic Corporation pursuant to request for proposals (RFP) No. D03C-01. The contract calls for Wright to supply Stearns with three multipurpose demilitarization machines, with options for an additional 16 machines. Stearns is buying the machines in accord with the terms of its prime contract with the Army Corps of Engineers (Contract No. DACA87-84-C-0081), which requires Stearns to procure, install and test process systems and equipment to be used in disposing of chemical warfare agents in an environmentally sound and safe manner.

Fairfield complains that Stearns awarded the firm, fixed-price subcontract to Wright even though Fairfield's proposal was technically acceptable and represented the lowest-priced offer. Fairfield contends that Stearns unilaterally increased the number of labor hours proposed by Fairfield and, consequently, increased Fairfield's evaluated cost to more than the price proposed by Wright. In addition, Fairfield alleges that Stearns' evaluation of its proposal was arbitrary and capricious, resulting in Fairfield's proposal being unfairly excluded from the competitive range. We deny the protest.

THRESHOLD ISSUES

Jurisdiction/Standard of Review

Generally, our Office does not review subcontract awards by government prime contractors, except where the award of the subcontract is "by or for" the government. 4 C.F.R. § 21.3(f)(10) (1987). Here, it is undisputed that Stearns was purchasing the multipurpose demilitarization machines for the government in its capacity as an agent of the government under its prime contract with the Corps of Engineers. We review such subcontract procurements to determine whether the awards were consistent with the fundamental principles of federal procurement law as set forth in the statutes and regulations that apply to direct federal procurement. Union Natural Gas Co., B-224607, Jan. 9, 1987, 87-1 C.P.D. ¶ 44. Our review of the evaluation of proposals is limited to examining whether the evaluation was fair, reasonable, and consistent with the stated evaluation criteria. We will question the prime contractor's determinations concerning the technical merits

of proposals only upon a clear showing of unreasonableness, abuse of discretion, or violation of federal statutes or regulations. Water Resources Education, B-224684, Jan. 7, 1987, 87-1 C.P.D. ¶ 25.

Interested Party

The Corps contends that Fairfield is not an interested party to protest the award to Wright, because Fairfield's proposal was fundamentally deficient and, therefore, Fairfield would not be eligible for award in any event. The Corps is wrong. Fairfield is protesting that Stearns evaluated its proposal incorrectly and in a manner that did not conform to the RFP criteria. If Fairfield's protest were sustained, we would necessarily be holding that the evaluation of Fairfield's proposal was improper. In that case, it is entirely possible that Fairfield would be in line for award if its proposal were reevaluated, especially in view of the fact that Fairfield's proposed price was the lowest of all proposals received. Fairfield thus is an interested party for the purpose of protesting the low evaluation and ultimate rejection of its own proposal.

The Corps also argues that Fairfield was not eligible for award on July 27, 1987, the date the contract was awarded to Wright, because Fairfield's offer expired by its own terms 60 days after May 26, and therefore is not an interested party on that basis anyway.

The RFP stated that offers were to be open for acceptance for 60 days after the May 27 closing. Admittedly, Fairfield's offer contained an ambiguity, because its cover letter said the offer acceptance period would be 60 days after May 26 (the day before closing) while the proposal elsewhere indicated an acceptance period of 60 days after closing. However, we think it was reasonably clear that Fairfield was attempting to give Stearns the acceptance period required by the RFP. There is nothing anywhere else in the record to indicate that Fairfield was trying to limit its offer acceptance period to less than the required 60 days. Moreover, as this was a negotiated procurement, this ambiguity could easily have been clarified during negotiations if Fairfield had been included in the competitive range. The cases cited by the Corps as support for its arguments in this connection all involve competitive bidding procurements and are therefore easily distinguished from the present situation. Further, Fairfield's subsequent active pursuit of this protest exhibits its willingness to accept award even at this time. Accordingly, we conclude that Fairfield is in fact an interested party. See Computer Sciences Corp., 57 Comp. Gen. 627, 635 (1978), 78-2 C.P.D. ¶ 85.

Timeliness

The Corps argues that Fairfield's protest is untimely with regard to the charge that Stearns evaluated Fairfield's proposal improperly. (This issue was raised in a supplement to Fairfield's initial protest, which concerned only the alleged unilateral increase in Fairfield's labor hours and proposed cost.) The Corps contends that Fairfield was told why its proposal was rejected during telephone conversations on July 27 and July 30. According to the Corps, during those conversations, Fairfield was told the areas of its proposal that had been found deficient. The Corps points out that Fairfield waited more than 10 working days after it knew this basis for protest to file a letter with our Office, on August 17, raising this protest issue. Thus, the Corps believes, the protest should be dismissed under section 21.2(a)(2) of our Bid Protest Regulations, 4 C.F.R. part 21 (1987), which requires that a protest be filed within 10 working days after the protester knew or should have known its basis for protest.

We consider the protest to be timely because it was filed within 10 working days of the August 3 debriefing at which the protester was informed in some detail of the evaluation of its proposal, and because we recognize that a protester may properly delay filing its protest until after a debriefing where the information provided to the protester earlier left uncertain whether there was any basis for protest. See Intelcom Educational Services, Inc., B-220192.2, Jan. 24, 1986, 86-1 C.P.D. ¶ 83. Moreover, it is our practice to resolve doubts about timeliness in favor of the protester. See Bancroft Investors, B-219915, Nov. 18, 1985, 85-2 C.P.D. ¶ 564. Here, Fairfield denies that the two telephone conversations contained the detail necessary for it to determine that it had a basis for protest or that Stearns informed it that its proposal was considered technically and commercially unacceptable at any time before the debriefing. Accordingly, we will consider the merits of the protest. Instruments & Controls Service Co., 65 Comp. Gen. 685 (1986), 86-2 C.P.D. ¶ 16.

EVALUATION OF FAIRFIELD'S PROPOSAL

The RFP set forth the following evaluation scheme:

"In order to be acceptable, all offers must first satisfy or exceed all requirements stated in the request for proposal. If that condition is met, the offer will be evaluated on the technical criteria outlined under paragraph A below and, if judged technically acceptable, evaluated further

on the basis of commercial/management criteria and cost as described in B and C below. The evaluation criteria [are] listed below in the order of importance. That is the technical criteria [are] of first importance, followed by the commercial criteria and finally cost. The individual factors within each section are also listed in order of their importance."

Following this general statement, the RFP set out a list of specific evaluation subcategories under the technical, commercial/management, and cost/price evaluation criteria. The RFP also reserved to Stearns the right to accept other than the lowest-priced proposal.

Eight offers were received, including the low offer of \$875,714.82 from Fairfield and the second-low offer of \$1,093,618.47 from Wright. While the Stearns evaluators found that none of the proposals was both technically and commercially acceptable, they determined that all proposals, except Fairfield's, could be made technically and commercially acceptable through negotiations and, therefore, had a reasonable chance of being made acceptable for award. Fairfield's combined score for the technical and commercial/management evaluations was the lowest of the eight proposals. In fact, Fairfield's proposal was evaluated as substantially below all other proposals in the technical area--the most important aspect of the evaluation. The contracting officer determined that Fairfield's proposal was so deficient in both the technical and commercial/management areas that it could not be made acceptable through negotiations and, therefore, excluded Fairfield's proposal from the competitive range.

The evaluators next evaluated the seven remaining proposals on the basis of price and concluded that yet another offer should be excluded from the competitive range because its proposed price was so high. After negotiations were conducted with the remaining six offerors, the evaluators determined that only two offers were acceptable under both the technical and commercial/management criteria. Of those two fully acceptable offers, Wright's proposal was evaluated as higher in both the technical and commercial/management areas, while Wright's proposed price was lower. The contract was awarded to Wright on July 27.

Increase In Labor Hours in Fairfield's Proposal

Fairfield complains that Stearns unreasonably and improperly increased the number of labor hours proposed by Fairfield, and then repriced Fairfield's proposal based upon that increase in labor hours. Fairfield argues that Stearns'

unilateral increase in the number of labor hours and price proposed by Fairfield caused Fairfield's proposal to be displaced as the lowest-priced offer.

We deny the protest on this point. There is no evidence in the record to support Fairfield's allegation. In fact, the record shows that Fairfield's proposal was never evaluated under the cost/price criteria at all, as it was eliminated from the competitive range on technical and commercial considerations alone. It appears that Fairfield has misinterpreted certain remarks made by Stearns' Procurement Task Manager who spoke to Fairfield's representatives before the debriefing and tried to explain in general terms why Fairfield had been eliminated from the competition. Among other things, the Stearns employee stated that Fairfield's proposal contained less than half the average number of labor hours included in all other proposals and that this was considered by the evaluators to be an important technical deficiency. The Stearns representative also stated that, if Fairfield had included sufficient labor hours to satisfy the evaluators regarding Fairfield's capability to fabricate and assemble the multipurpose demilitarization machines in a timely manner, Fairfield's proposal would probably have been the fourth-lowest priced proposal rather than the lowest-priced proposal. Since the Stearns representative's statements in this regard were offered gratuitously in the nature of a post-evaluation explanation and did not have any effect upon the evaluation itself, this allegation provides no reason to invalidate the award to Wright.

Exclusion of Fairfield From Competitive Range

After it was debriefed, Fairfield filed a supplementary protest alleging that Stearns evaluated its proposal in an arbitrary and capricious manner. For example, Fairfield contends that Stearns improperly downgraded the proposal for failing to provide information on certain points when, in fact, Fairfield did provide such information in its proposal. Fairfield also contends that it should have been given credit in the evaluation for proposing the lowest price, and that ultimately it should have been awarded the contract based upon its low price.

It is not the function of our Office to evaluate technical proposals de novo or resolve disputes over the scoring of technical proposals. Rather, we will examine an evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria. Potomac Scheduling Co., et al., B-213927, et al., Aug. 13, 1984, 84-2 C.P.D. ¶ 162 at 4. The determination of the relative merits of a proposal, particularly with respect to technical considerations, is

primarily a matter of administrative discretion, which we will not disturb unless it is shown to be arbitrary or in violation of the procurement laws or regulations. Zuni Cultural Resource Enterprise, B-208824, Jan. 17, 1983, 83-1 C.P.D. ¶ 45. Moreover, the protester bears the burden of clearly establishing that an evaluation was unreasonable. ATI Industries, B-215933, Nov. 19, 1984, 84-2 C.P.D. ¶ 540 at 5.

The Corps argues that Fairfield's proposal was so deficient in the technical and commercial/management areas that the proposal was properly eliminated from the competitive range before any evaluation of prices was conducted. In essence, the Corps reports that Fairfield's proposal was deficient in a number of areas because Fairfield had failed to provide material information necessary to evaluate the proposal in each criterion listed in the RFP.

There is generally no requirement to include in the competitive range offers that are unacceptable as submitted and that would require major revisions to be made acceptable. Twin City Construction Co., B-222455, July 25, 1986, 86-2 C.P.D. ¶ 113. The burden is on the offeror to submit an initial proposal that is written adequately, and an offeror runs the risk of having its proposal rejected if it does not do so. Id. at 3. In reviewing the rejection of a proposal as technically unacceptable for discerned informational deficiencies, this Office examines the record to determine, among other things, whether the RFP called for the detailed information and the nature of the informational deficiencies, e.g., whether they tended to show that the offeror did not understand what it would be required to do under the contract. Century Brass Products, Inc., B-190313, Apr. 17, 1978, 78-1 C.P.D. ¶ 291.

The RFP stated that technical proposal should contain:

"Technical data in sufficient detail and in such format to allow the Buyer to make a thorough evaluation and arrive at a valid conclusion as to whether or not the equipment and services offered can satisfactorily meet the requirements and specifications of this proposal."

The Corps reports that Fairfield's proposal received only 155 evaluation points out of a maximum total of 300 points in the most important technical category, concerning the adequacy and availability of personnel, facilities, and equipment. On this ground alone, the Corps contends that Fairfield could have been excluded from the competitive range. The evaluators considered the manpower proposed by Fairfield to be, at best, marginal for production of the

basic quantity of machines and inadequate for any option items orders. As previously noted, Fairfield proposed less than half the average labor hours of all other offerors. Moreover, Fairfield was downgraded because the machine shop foreman was responsible for all quality control functions, a dual function which the evaluators considered inadequate. As to adequacy and availability of facilities, Fairfield submitted only its standard brochure; evaluators deducted evaluation points because they could not evaluate accessibility, arrangement, or condition of those facilities from the preprinted material. Concerning adequacy and availability of equipment, Fairfield again relied solely on its standard brochure; the evaluators determined from this material that the type and quantity of inspection equipment was inadequate, and downgraded the proposal accordingly.

In the second most important technical category, quality control programs, Fairfield received only 139 out of a possible 200 evaluation points. Again Fairfield relied upon its standard quality control manual. The evaluators found that it "lacked good detailed instructions and form," and was deficient in the areas of documentation instruction, inspection and test records, corrective action procedures, measuring and test equipment, and receiving inspection procedures.

In the third most important technical category, technical approach and fabrication techniques, Fairfield neither submitted a response nor explained why it did not respond. It was only after it protested that Fairfield explained that it did not respond because it intended to subcontract all fabrications.

In the most important commercial criterion, relating to compliance with the RFP terms, Fairfield's proposal was downgraded because it took exception to the progress payments provision of the RFP. Fairfield also proposed that it receive advance payments, a proposal that was unacceptable to Stearns. Accordingly, Fairfield received only 56 out of a possible 80 evaluation points.

In another commercial category (the fourth of eight listed in the RFP), financial capability and capacity, Fairfield received only 12 of a possible 40 evaluation points. Fairfield submitted obsolete financial data from 1984 and 1985. The financial data also indicated that Fairfield and its affiliates had been named in various lawsuits. The evaluators downgraded the proposal because they could not assess the current financial posture of Fairfield.

We have listed just a few of the numerous deficiencies that the evaluators found in Fairfield's proposal. The Corps

reports that many of the above deficiencies are considered to be of such magnitude that standing alone they justify elimination of Fairfield from the competitive range. In general, the evaluators found that Fairfield's proposal did not comply with the RFP requirements, lacked content, was poorly organized, and was difficult to interpret.

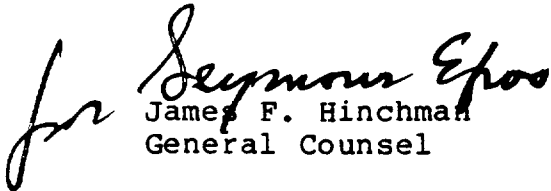
Our review of the record establishes that the evaluation had a reasonable basis. In our view, the informational deficiencies were material because they related closely to the exact evaluation criteria set forth in the RFP. Furthermore, once Fairfield's proposal was properly determined to be outside the competitive range, Stearns was not required to conduct discussions with Fairfield. See Proffitt and Fowler, B-219917, Nov. 19, 1985, 85-2 C.P.D. ¶ 566. While it is conceivable that some of the deficiencies could have been resolved during discussions, we agree with the Corps that this would have involved a significant rewriting of the proposal. We have held that an agency should not permit an offeror to remedy major proposal defects when to do so would necessitate extensive revision. Midcoast Aviation, Inc., B-223103, June 23, 1986, 86-1 C.P.D. ¶ 577. Here, the deficiencies taken together precluded Stearns from making an informed evaluation, and in the aggregate justified Fairfield's exclusion. Id. at 6. Once Fairfield was determined to be outside the competitive range based upon technical and commercial/management evaluations, Fairfield's potentially lower price was irrelevant, since an offer that is not in the competitive range cannot be considered for award. Proffitt and Fowler, B-219917, supra.

Accordingly, the protest is denied on this point.

COSTS

Fairfield has requested that our Office award it costs in accord with section 21.6(d) of our Bid Protest Regulations. However, as we find the protest to be without merit, we deny the claim for costs. COMSAT International Communications, Inc., B-223953, Nov. 7, 1986, 86-2 C.P.D. ¶ 532 at 6.

The protest and the claim for costs are denied.


James F. Hinchman
General Counsel