



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Patio Pools of Sierra Vista, Inc.
File: B-228187; B-228188
Date: December 31, 1987

DIGEST

1. Where the contracting agency evaluated proposals on the basis of criteria not stated in the solicitation, protest that the evaluation was unfair is sustained.
2. The protester is entitled to recover the costs of filing and pursuing its protest, including reasonable attorney's fees, as well as proposal preparation costs, where the protester was improperly denied fair and equal opportunity to compete and other corrective action is not appropriate under the circumstances.

DECISION

Patio Pools of Sierra Vista, Inc., protests the award of a lease to Haymore Plaza Associates Limited Partnership under solicitation No. AZ-87-34 (No. 34), issued by the Army Corps of Engineers for office space at or in the vicinity of Sierra Vista, Arizona, to replace space destroyed by a fire at Fort Huachuca, Arizona. Patio Pools contends that the Corps evaluated proposals on the basis of factors that were not included in the solicitation.

We sustain the protest.

The Corps, on July 14, 1987, first issued solicitation No. AZ-87-33 (No. 33) to satisfy an immediate requirement for 3,785 net usable square feet of office space in Sierra Vista. Shortly afterward, the Corps decided it actually needed a total of 75,000 square feet of space. The Corps did not cancel or amend solicitation No. 33, however, but instead issued solicitation No. 34, dated July 17, requesting proposals for the lease of between 3,000 to 25,000 net

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square feet of space.^{1/} Seventeen proposals were received in response to the two solicitations. In the meantime, the Fort reduced its space requirement to approximately 7,315 net usable square feet.

Because of the revised space requirement, the Corps, in evaluating proposals, eliminated from consideration 10 proposals for less than 7,000 net usable square feet of space. Four proposals offering space along or near Highway 92 (including Patio Pools' two proposals) were eliminated because of travel time and expense and the extra costs of communications services (estimated at \$17,000 annually) and automated data processing (ADP) lines attendant to locating there instead of just outside the Fort. This narrowed the Corps' consideration to three proposals, all offering space located within one mile of the Fort's main gate. The Corps conducted negotiations exclusively with Haymore, and awarded it the lease on September 8. The Haymore space was ready for occupancy on September 30.

Patio Pools contends that its proposals were improperly evaluated and eliminated because the solicitation did not include evaluation factors related to distance from the Fort, travel time, or the costs of communications services and ADP lines. Further, Patio Pools refutes the Corps' contention that there would be an increase in the cost of communications services to Highway 92 and has provided a letter from Mountain Bell, the provider of the services, which indicates that there would be no appreciable difference in the communications charge from either the awardee's Haymore Plaza or Patio Pools' Highway 92 locations.

The Corps concedes that it should have canceled the solicitations and issued a new solicitation reflecting its requirement for 7,315 square feet of office space within one mile of the Fort, but since time was of the essence and solicitation No. 34 had already been issued for between 3,000 to 25,000 square feet of space, it decided to make an award on the basis of the 17 proposals received in response to both solicitations. The Corps maintains that Patio Pools was not prejudiced by the failure to cancel the solicitations and resolicit because if a new solicitation

^{1/} The solicitation was issued for up to 25,000 square feet instead of 75,000 square feet of space because the Corps' survey of space in Sierra Vista revealed that no space in excess of 25,000 square feet was available at a single location.

had imposed a one-mile restriction, neither of the protester's proposals would have been considered anyway.

Whether Patio Pools' proposals would have been rejected under a solicitation that contained a one-mile restriction is not relevant here. The Corps was required to adhere to the criteria set forth in the RFP, see Tower Corp., B-225617, Mar. 23, 1987, 87-1 C.P.D. ¶ 329, and the issue is whether the agency did so. In our view, it did not. The RFP did not include any standards relating to distance from the Fort, travel time and costs, or communications costs. Thus, Patio Pools' proposals should not have been eliminated on the basis of such standards. In effect, the protester, was induced to compete on the basis of undisclosed standards, and never had a chance of winning the competition. See I.L.C. Dover, Inc., B-227839.2, Nov. 9, 1987, 87-2 C.P.D. ¶ ____.

If revised standards were to be used, the Corps should have issued an amendment to the solicitation as required by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.606 (1986). Although the Corps maintains that it did not amend the solicitations to reflect its actual requirements because time was of the essence, we note that the FAR, 48 C.F.R. § 15.606(a) (1986), authorizes contracting officers to give oral advice of solicitation changes when time is of the essence.

Accordingly, since the Corps evaluated offers based on criteria that had not been disclosed to prospective offerors, we sustain the protest.

The only remaining issue is the appropriate remedy. The Corps states that the Haymore lease does not contain a termination for convenience clause; thus, termination of the lease is not a viable option. See SWD Associates, B-226956.2, Sept. 16, 1987, 87-2 C.P.D. ¶ 256. We also note that the Corps believes it would not be in the government's best interest to terminate the lease in any case because Haymore already has built out its space and the Fort needs to occupy the space immediately.

We find that the protester is entitled to its protest and bid preparation costs. Our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1987), provide that the costs of filing and pursuing a protest, including attorney's fees, may be recovered where the agency has unreasonably excluded the protester from the procurement. Our regulations also allow recovery of costs for proposal preparation where the protester was unreasonably excluded and no other remedy is appropriate. See EHE National Health Services, Inc., 65 Comp. Gen. 1 (1985), 85-2 C.P.D. ¶ 362. Patio Pools should

submit its claim for such costs directly to the Corps.
4 C.F.R. § 21.6(f).

The protest is sustained.

Milton J. Fowler
Comptroller General
of the United States