



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: S.P.I.R.I.T. Specialist Unlimited, Inc.
File: B-237114.2
Date: March 8, 1990

Thomas W. Walbert, and R.L. Schooling, Esq., for the protester.
Keith Loken, Esq., Office of the Assistant Legal Adviser for Management, Department of State, for the agency.
John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that currency exchange rate fixed as of award date subjects contractor to unreasonable risk is denied where risk did not discourage offerors from submitting proposals. Contracting agency may properly structure a procurement to impose maximum risk on the contractor and minimize potential burdens on the government.
2. Protest that agency improperly failed to conduct discussions and to provide notice that discussions were concluded in request for best and final offers (BAFO) is denied where the record shows that offerors were notified in writing of deficiencies in proposals and requested to address concerns in BAFO by a specified date.

DECISION

S.P.I.R.I.T. Specialist Unlimited, Inc. (SSU), protests request for proposals (RFP) No. 001-89, issued by the Department of State for guard services at the United States Embassy, El Salvador. SSU principally argues that a provision in the solicitation stating that contract payments will be made in Salvadoran currency calculated at a fixed exchange rate exposes the contractor to an unreasonable amount of risk, and therefore improperly restricts competition. SSU also alleges that the agency improperly failed to conduct discussions with it, that the agency's request for best and final offers (BAFO) failed to include notice that

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discussions were concluded, and that the agency failed properly to consider SSU's agency-level protest.^{1/}

We deny the protest.

The solicitation, issued on June 26, 1989, contemplated award of a firm, fixed-price contract for 1 year, with four 1-year options. Prices were to be denominated in dollars; however, while the solicitation also specified that the contractor's direct costs incurred in El Salvador would be paid in Salvadoran colones, it was silent as to the rate of exchange that would be used to calculate these payments. Five firms, including SSU, submitted proposals by the August 15 closing date. On November 22, following initial evaluation of proposals, the contracting officer sent a letter to each offeror providing comments on its proposal and requesting clarifications in specified areas. In addition, each offeror was asked to recalculate its costs to ensure that the proposed hourly rates for the level of effort were consistent with the proposed overall contract price. In this regard, each letter contained the following paragraph:

"Firm-fixed-prices in the contract will be denominated in dollars, however, invoices will be paid in local currency, always converted at the post exchange rate obtained on the date of award. This exchange rate will be stated in the contract and will apply for option years also."

Along with these letters, each offeror received a copy of amendment 2, which contained a request for submission of BAFOs by December 15.

SSU responded to the agency's November 22 letter by telex on November 30, requesting clarification concerning the dollar-colon exchange rate. The contracting officer confirmed by letter on December 4 that the exchange rate for calculating invoices payable in local currency would be the rate in effect on the date of award and that this rate would apply to base and option years. SSU objected to the provision by letter dated December 4. After the contracting officer reaffirmed to SSU on December 7 that the dollar-colon

^{1/} SSU also alleges that the agency's notice of a fixed exchange rate amounted to a substantive change in the solicitation, requiring issuance of a formal amendment. As the agency issued such an amendment prior to SSU's protest to our Office, this protest issue is academic. PathLab, P.A., B-236766, B-236887, Oct. 4, 1989, 89-2 CPD ¶ 309.

exchange rate would be fixed as of the date of contract award, SSU filed an agency-level protest. The contracting officer acknowledged the protest by telex on December 12 and by letter on December 13. On December 14, the contracting officer issued amendment 3, which contained the same provision regarding the fixed exchange rate that had been included in the November 22 letter to all offerors, and extended the closing date for submission of BAFOs to January 2. SSU then protested to our Office on December 20.

SSU maintains that establishing a fixed exchange rate for contract payments at the time of award imposes undue risk on offerors in pricing their proposals. SSU complains that El Salvador's volatile economic environment makes it impossible for any offeror to forecast changes in the exchange rate in order to arrive at a fixed price. SSU concludes that the exchange rate provision is restrictive and should be eliminated.

We find the exchange rate provision unobjectionable. Instead of subjecting the government to the possibility of increased contract costs in the event the Salvadoran currency continued to devalue, the agency opted to shift the burden to offerors to build this contingency into their proposed prices. While it well may be the case that the provision imposes substantial risk on the contractor, this alone does not render a solicitation improper. There is some amount of risk present in any procurement, and offerors are expected to use their professional expertise and business judgment in taking these risks into account in computing their offers. McDermott Shipyards, Div. of McDermott, Inc., B-237049, Jan. 29, 1990, 90-1 CPD ¶ _____. Agencies may decide to impose reasonable risks on contractors, thereby limiting the burdens on the government. See KCA Corp., B-236260, Nov. 27, 1989, 89-2 CPD ¶ 498. The protester has offered no evidence to establish that the dollar-colon exchange rate is so unstable and unpredictable that a reasonable offer cannot be prepared, or that offerors cannot minimize risks by subcontracts or employment contracts in El Salvador. See Rampart Servs., Inc., 65 Comp. Gen. 164 (1985), 85-2 CPD ¶ 721. Given that four other offerors submitted BAFOs without questioning the exchange rate provision, it does not appear that the risk was so burdensome as to preclude competition.

SSU maintains it would not have incurred the cost of preparing a proposal and competing had it known that a fixed exchange rate would be added to the RFP. However, the regulations permit changes in requirements and it is our view that any offeror that chooses to compete does so with the implicit knowledge that good faith changes in a

solicitation--such as the change in issue here--may be made, whether or not in any offeror's own best competitive interest. Federal Acquisition Regulation § 15.606(a).

SSU also alleges that the agency improperly failed to conduct written or oral discussions, and then issued a BAFO request (amendment 2) which did not state that discussions were concluded. However, the record here indicates that written discussions were conducted. The agency notified each offeror in writing of deficiencies or areas requiring clarification in their proposals, and requested that offerors address these concerns in their BAFOs. SSU was asked for clarification on a number of items in its cost and technical proposals, including a discrepancy between hourly rates for level of effort and total contract price, method of funding start-up costs, proposed training schedule, and number of vehicles to be utilized. Furthermore, although amendment 2 did not expressly advise that discussions were concluded, the inclusion of a request for BAFOs itself put SSU on notice that this was the case; where the agency advises an offeror that a "final" offer is due by a specified date without indicating that further discussions are planned, we think the only reasonable conclusion is that discussions have been concluded.

Finally, SSU asserts that the agency failed to consider SSU's December 12 agency-level protest. However, the record indicates that the agency did consider the merits of SSU's protest. While the agency did not formally deny SSU's protest in writing, the agency's responses to SSU's questions regarding the fixed currency exchange rate placed SSU on sufficient notice of the agency's position in that regard; the agency's acknowledgment of SSU's protest with its suggestion that SSU protest to our Office, and its issuance of amendment 3 confirming the requirement for a fixed currency exchange rate, constituted adverse agency action and amounted to a constructive denial of the agency-level protest.

As to SSU's request for its costs of proposal preparation and of pursuing the protest, we permit recovery of such costs only where it is shown that an agency's actions were

contrary to law or regulation. 4 C.F.R. § 21.6(d) (1989).
Since we find the agency's actions here unobjectionable,
there is no basis for an award of costs.

The protest is denied.


for James F. Hinchman
General Counsel