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

Decision

Matter of: Louisiana Dock Services, Inc.

File: B-241671

Date: February 25, 1991

Lars E. Anderson, Esq., and Marc Stec, Esq., Bogle & Gates, for the protester.
Barbara A. Duncombe, Esq., Vorys, Sater, Seymour and Pease, for Diversified Group, Inc., an interested party.
Alan W. Mendelsohn, Esq., and John J. Blanchard, Esq., Department of the Navy, for the agency.
Anne B. Perry, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Award of contract to offeror whose performance schedule indicated that it will not be able to meet the delivery date specified in the solicitation does not constitute unequal treatment of offerors and was not prejudicial to protester where the performance schedules submitted by all offerors indicated that they would not be able to meet the specified delivery date, and no offeror had been informed that the original earlier delivery date no longer reflected the agency's minimum needs.

DECISION

Louisiana Dock Services, Inc. (LDS) protests the award of a contract to Diversified Group, Inc. (DGI) under request for proposals (RFP) No. N00033-90-R-4009, issued by the Military Sealift Command, Department of the Navy (MSC), for the provision of layberth services for two Fast Sealift Ships. The award to DGI calls for a delivery date later than was specified in the solicitation. LDS contends that its offer was based on the earlier date specified in the solicitation, and that the agency's failure to advise LDS that a later delivery date met the agency's minimum needs prejudiced its competitive position.

We deny the protest.

Fast Sealift Ships are activated to transport equipment to support an Army division or other units. As necessary, the equipment is loaded aboard these ships for rapid, point-to-point sealift from the United States to support worldwide operations. When not activated, the Fast Sealift Ships are placed in reduced operating status at layberth sites such as those being solicited here. The layberth services specified in this procurement consist of the provision, operation and maintenance of a technically acceptable, safe berthing facility at a port which is navigable 24 hours a day. The operator of the layberth is also responsible for providing pierside services including utilities, and port services such as pilots and tugs.

Proposals were to be comprised of separate technical and cost volumes. The technical volume, which was to be incorporated into any resulting contract, was to present the offeror's understanding of the scope of work and an overall approach to providing the required services. The technical volume was to be comprised of five separate sections, of which only section 1 is relevant to this protest. Section 1 was required to demonstrate that the offeror was proposing a technically adequate, safe berth, and was to include a facility improvement plan addressing those improvements necessary to meet all requirements, and a plan of action and milestones (POA&M) of each key event in the facility improvement process.

The RFP provided that the required performance commencement date was December 1, 1990. The solicitation provided for a performance period of 5 years from December 1 through November 30, 1995, with anticipated arrival of the first ship on December 1, and the second ship on March 1, 1991. The solicitation contained a liquidated damages provision which provided that:

> "[i]f the contractor fails to deliver the supplies or perform the services called for by F-1 [the performance period clause] to commence on Dec. 1, 1990, or any extension, the Contractor shall, in place of actual damages, pay to the Government fixed, agreed, and liquidated damages, for each calendar day of delay, the sum of $5,000."

Proposals were to be evaluated on the basis of: technical acceptability of all required services, for example, safe berth, layberth area, and services at the berth and within the port complex; and cost to the government. Award was to be made to the lowest cost, technically acceptable offeror.

The solicitation was issued on March 23, 1990, with a closing date for receipt of initial proposals of April 23.1/ Three proposals were received by the closing date, with LDS proposing to commence performance 120 days after award, and DGI proposing to commence performance 20 weeks (140 days) after the date of award. Initial discussions followed on May 24 and 25. On June 2, the contracting officer, anticipating that the technical evaluation and award of this contract would take longer than expected, rendering it impossible for a contractor to comply with the December 1 delivery date, published a notice in the Commerce Business Daily (CBD) which stated that the agency proposed to extend the predecessor contract for a period of 3 to 6 months. Amendment 0003 was issued on June 18, to modify the surge requirements (which concern waves generated by passing ships), and to decrease the requirement for a 24-foot causeway to a 20-foot causeway.2/ Another round of discussions followed and revised technical proposals were due on June 29. The surge force calculations were modified and clarified in three more amendments, 0004, 0005, and 0006, issued July 27, August 22, and September 17, respectively. Revised technical proposals were due after the issuance of Amendment 0004 on August 10, and after Amendment 0005 on August 27, and best and final offers (BAFOs) were due after Amendment 0006 on September 24.3/ Since DGI's proposal price was approximately $170,000 less than LDS's price, the contracting officer awarded the contract to DGI as the low priced, technically acceptable offeror. This award was made on October 5, with a February 23 commencement date, in accordance with DGI's BAFO which proposed to commence performance 20 weeks after the award date.

LDS challenged the award of the contract to DGI in a protest filed in our Office on October 15, generally on the grounds that the agency improperly relaxed the delivery requirements only for DGI. Specifically, LDS alleges that MSC conducted

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1/ Two amendments were issued before initial proposals were due, one on March 28, and the second on April 10.

2/ The latter change was the result of LDS's request, since in the past a 20-foot causeway was sufficient, and LDS proposed to lease the incumbent contractor's facility which has the narrower causeway, but which would have to be expanded at significant cost to meet the 24-foot requirement.

3/ The cover letter which accompanied DGI's BAFO stated that its offer was open until September 30, since if awarded later there would be construction delays due to water levels which occur in the winter months. On September 28, however, DGI extended its acceptance period until October 5, and on October 5, extended the period until October 8.

post-BAFO discussions with DGI, at which time it informed DGI of the later required commencement date, and allowed DGI to take exception to the liquidated damages clause of the solicitation, thus enabling DGI to offer a lower price. LDS alleges that it was prejudiced by the agency's failure to inform it of the relaxed delivery date because LDS's price was based on additional costs for accelerated construction to meet the delivery requirement, and on the liquidated damages for which it would be liable in the event it completed the construction late.

MSC contends that because of the delays in the procurement it should have been apparent to all offerors that the delivery date set forth in the original solicitation was no longer viable, and even though it failed to issue an amendment to this effect no competitive prejudice occurred to any offeror, since no offeror had proposed to comply with the December 1 delivery date.4/ As established by the POA&Ms submitted with their offers, both DGI and LDS proposed delivery dates in February 1991, and the third offeror proposed delivery in May. The agency asserts that it did not conduct any discussions with DGI after the submission of BAFOs, and that the only post-BAFOs contact between the parties were letters from DGI to the government which extended its proposal acceptance period.5/ The agency states that there is no evidence in the record to substantiate LDS's claim that the agency gave preferential treatment to DGI during the course of this procurement, and argues that since the delivery requirement stated in the RFP was waived for all offerors, no prejudice resulted from the agency's failure to explicitly notify offerors that the start date had changed.

LDS disputes the agency's conclusion that its start date went beyond December 1, arguing that when the agency modified the

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4/ Apparently the December 1 delivery date requirement became unnecessary as a result of the build-up of Operation Desert Shield, because the two ships were needed to bring supplies to support the troops in the Persian Gulf.

5/ The agency also argues that even though it did not formally extend the delivery date in an amendment, it did publish a notice in the CBD of the proposed extension of the incumbent contractor's contract for a period after December 1, and that since LDS was proposing to lease this facility to perform the contract, it should have known that a slippage of the delivery date was imminent. We do not find this argument convincing because we find no basis for the proposition that CBD notice of another potential contract action amends a related solicitation.

solicitation by reducing the causeway from 24 feet to 20 feet, 85 days were eliminated from its POA&M, which left only 35 days that it would need from the award date to complete the necessary improvements. LDS also argues that the POA&M is subordinate to the delivery clause in the solicitation, and since LDS promised in its proposal to comply with all material terms and conditions of the RFP, the agency should have known that LDS intended, and was able, to comply with the December 1 delivery date. The protester contends that it had no expectation that the agency was anticipating waiver of the specified start date, since during the course of the competition the agency strictly refused to extend various submission deadlines. LDS argues that it suffered prejudice by virtue of the fact that it could have decreased its price in an amount equal to certain construction acceleration charges and for the liquidated damages for which LDS anticipated it would be liable if delivery were due on December 1.

While the agency should have amended the solicitation to reflect the changed circumstances, it is apparent from the record that LDS did not suffer any competitive disadvantage as a result of this failure. LDS's POA&M clearly provided a delivery date of 120 days after award, despite what LDS now alleges it intended.6/ LDS's POA&M does not demonstrate that the widening of the causeway takes 85 days and that all of the other improvement work will take 35 days; rather, LDS's POA&M simply indicates that the causeway widening will be completed on the 85th day after award. This is significant, because the POA&M does not contain start dates; it only specifies completion dates. Thus, the contracting officer was not provided with any clear indication that the other work, which is listed as being completed on the 120th day, takes only 35 days from start to finish. It is also conceivable from the POA&M provided by LDS that the other tasks themselves take 120 days from start to finish. Moreover, despite the repeated submissions of proposals, LDS never modified its POA&M to show a shorter delivery schedule, and we do not find it unreasonable for the agency to rely on the information supplied by the protester in its proposal. It is the protester's responsibility to ensure that its proposal adequately sets forth the information necessary for the agency to fairly evaluate its proposal. See Southeastern Center for Elec. Eng'g Educ., B-230692, July 6, 1988, 88-2 CPD ¶ 13.

6/ LDS alleges in its protest it can really complete this work in 2 weeks. However, there is nothing in its proposal demonstrating this, and in fact, the letter submitted with the protest to support this proposition states that it will take at least 4 weeks to complete a portion of the work.

LDS also argues that the delivery schedule clause of the RFP takes precedence over the POA&M.7/ This argument is without merit since it is based on the premise that once an offeror promises to comply with all material terms and conditions of an RFP by signing the proposal, an agency is not permitted to find that in actuality the offeror has taken exception to the terms of the RFP or is unable to fulfill its promise. This is not a reasonable proposition since, notwithstanding a blanket offer of compliance, an agency is entitled to evaluate a technical proposal in order to determine whether or not the information provided shows that the proposal is technically acceptable. See, e.g., Aydin Corp. (West), B-237450, Jan. 18, 1990, 90-1 CPD ¶ 69.

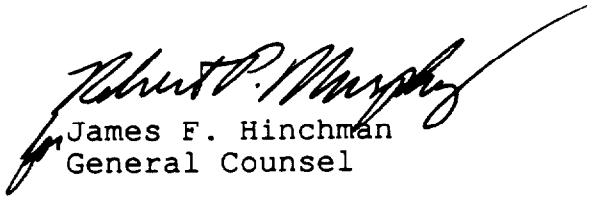
Accordingly, we find that the only reasonable reading of the LDS proposal is that LDS did not offer to meet the delivery date required in the solicitation, and conclude that the agency's relaxation of the delivery date therefore resulted in no competitive prejudice to LDS. Consolidated Photocopy Co., Inc., and Downtown Copy Center, A Joint Venture, B-225526, Mar. 20, 1987, 87-1 CPD ¶ 322.

LDS also challenges the acceptability of DGI's proposal on the grounds that DGI took exception to the liquidated damages and delivery clauses of the RFP by changing the start date from 20 weeks after award to 20 weeks after receipt of the necessary permits and licenses. LDS also argues that DGI's extensions of its proposal acceptance period, and the agency's change of the delivery date to February 23, 20 weeks after award, constituted discussions after receipt of BAFOs, which the agency conducted only with DGI. We disagree.

DGI's extension of its acceptance period does not constitute discussions necessitating the reopening of negotiations. See, e.g., Ocean Technology, Inc., B-236470, Aug. 29, 1989, 89-2 CPD ¶ 189. To the extent that DGI's statement in a cover letter did change the date from which the completion date was calculated, since the record establishes that DGI possessed all of the permits before award, and in fact, the possession of all necessary permits was a precondition of award, we find no meaningful difference between the two expressions of the delivery date. The change of the commencement date to February 23 from December 1 by the agency in its award letter to DGI simply reflected the acceptance of DGI's proposal which contained a delivery date of 20 weeks after award.

7/ We note that if LDS's interpretation was correct here, then DGI's proposal equally shows that it will comply with the December 1 delivery requirement.

While the establishment of a new delivery date should have been communicated to the offerors through a solicitation amendment, the agency's failure to do so did not result in any competitive prejudice to LDS. Accordingly, the protest is denied.



James F. Hinchman
General Counsel