



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Rider Land and Development Co.

**File:** B-245434

**Date:** December 30, 1991

Roger M. Hughes, Esq., and Susan J. Wolfe, Esq., Bell, Rosenberg & Hughes, for the protester.  
L. James Tillman, Department of Energy, for the agency.  
Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest of alleged ambiguity in functional specifications is untimely where it is not raised prior to the closing date for receipt of initial proposals.
2. Failure to notify protester that its proposal was eliminated from the competitive range until after award is a procedural matter which does not affect the validity of the award.

### DECISION

Rider Land and Development Co. protests the award of a contract to lease office space under request for proposals (RFP) LA-240945, issued by Westinghouse Hanford Company (WHC), a management and operating contractor for the Department of Energy (DOE).<sup>1</sup> Rider contends that the RFP requirements were ambiguous and that the agency should have advised it earlier that its proposal had been eliminated from consideration.

<sup>1</sup>Our Office generally does not review the award of subcontracts except, where, as in this case, a government prime contractor is acting on behalf of the government. We review the procurement to assure that it was conducted consistent with the "federal norm," i.e., fundamental principles of federal procurement as set forth in the statutes and regulations. Integrated Measurement Sys., Inc., B-243037.2, Aug. 2, 1991, 91-2 CPD ¶ 119.

We dismiss the protest in part and deny it in part.

The RFP was for the lease of 45,000 square feet of office space for a term of 10 years, with an option to extend the lease for one term of 5 years. The RFP set forth functional requirements which could be met by modifying existing facilities or by providing a newly constructed building. The RFP required that WHC be permitted to cancel the lease upon 30 days notice. Award was to be made to the responsible low-priced offeror whose proposal satisfied four requirements: occupancy by August 1, 1991; compliance with all general requirements set forth in the RFP; compliance with safety and security requirements; and submission of all required forms and data. The RFP advised offerors that negotiations were contemplated, but that WHC reserved the right to exercise its "sole judgment with respect to any proposal received."

Prior to the closing date for receipt of proposals, Rider submitted a number of questions regarding the lack of specificity in the requirements and WHC provided responses on April 8, 1991, which emphasized the functional nature of the specifications. Rider did not raise any additional questions prior to submitting its proposal by the April 17 closing date. Stevens Center submitted the only other proposal.

In evaluating the proposals, WHC found that Stevens Center met all requirements including the August 1 occupancy date, while Rider proposed delivery of the leased space within 120 days after contract award. With regard to the general requirements, the evaluators found that Rider's proposal was vague, because its drawings showed only a building shell without offices. Since there were less than 120 days between the closing date and August 1, the evaluators decided not to evaluate or seek clarification of Rider's compliance with the general requirements, and Rider's proposal was determined unacceptable for failure to meet the occupancy date requirement. Without first notifying Rider that its proposal was considered unacceptable, WHC negotiated price and other matters with Stevens Center. On April 30, WHC recommended award to Stevens Center and sought approval from DOE.

By letter of July 12, 1991, WHC requested that Rider extend the acceptance period of its offer for 30 days and Rider agreed. On July 19, WHC notified Stevens and Rider that the RFP was amended to call for a 90-day notice for cancellation of the lease and asked them to submit best and final offers (BAFOs) by July 25. Subsequently, WHC amended the RFP to

provide for a 1-year notice of cancellation and extended the BAFO due date to August 14. In its requests for a BAFO, WHC did not advise Rider of the deficiencies in its proposal.

Rider submitted a BAFO on August 14 in which it noted that, since the August 1 occupancy date could not be met, it assumed new criteria would be used for evaluation and that sufficient time would be allowed for completion of the building. It also advised that it might insert a clause in the lease providing for WHC to pay a cancellation fee if the lease was canceled before the end of the 10-year term.

Stevens Center submitted a BAFO reflecting annual full service rent of \$15.47 per square foot and \$17.40 per square foot for the option years. Rider's BAFO for annual full service rent was \$16.21 per square foot and \$25.00 per square foot for the option years. By letter of August 15, DOE approved award to Stevens and WHC awarded the lease to Stevens the same day. When WHC notified Rider of the award, Rider protested to our Office.

Rider first contends that the specifications in the original RFP were ambiguous and that this ambiguity affected its ability to price the requirements. DOE argues, and we agree, that this protest basis is untimely since it was filed after the closing date for receipt of BAFOs.

Protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to the time for closing. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Here the alleged ambiguities which Rider protests concern the RFP's functional requirements for the office layout and were apparent from the solicitation. Since Rider filed its protest against the alleged ambiguities after the closing date, we dismiss this protest basis as untimely.

Rider also contends that WHC treated it unfairly by asking it to keep its offer open without advising it of the decision to award to Stevens Center, which Rider states caused it to incur expenses, such as payment of a non-refundable escrow deposit to hold options on the property it proposed to lease to WHC. In general, an agency is required to notify an offeror that it has been eliminated from the competitive range at the earliest practicable time. See Federal Acquisition Regulation (FAR) § 15.609(c). However, the failure to promptly notify a firm that it is no longer

in consideration for award is procedural in nature and does not affect the validity of an otherwise properly awarded contract. Pauli & Griffin, B-234191, May 17, 1989, 89-1 CPD ¶ 473.

The protest is dismissed in part and denied in part.

  
James F. Hinchman  
General Counsel