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Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Kishwaukee AG Services Corporation

**File:** B-244554

**Date:** September 16, 1991

Willie E. Stokes for the protester.  
James I. Stopples for Madison Property Management, Inc., an interested party.  
Crystal Christensen, Farmers Home Administration, for the agency.  
Steven Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. In procurement for farm management services, post-award protest that deficiencies in protester's proposal were attributable to failure of solicitation to state the actual number of properties to be managed is untimely; protester's argument that, under the circumstances, its initial and final proposals could not have been written differently, should have been raised not later than 10 days after agency advised protester in discussions that its initial proposal, so written, was deficient.
2. Where request for proposals required offerors to propose a single, fixed unit price for each line item, protester's proposal properly could be excluded from consideration where protester offered several different unit prices that depended on how many tasks actually would be performed under the contract.
3. Agency was not required to refer decision not to make an award to protester, a small, disadvantaged business, to Small Business Administration for certificate of competency determination, where decision was based on stated evaluation criteria and agency did not reach the question of offeror's responsibility.

## DECISION

Kishwaukee AG Services Corporation protests the award of a contract to Madison Property Management under request for proposals (RFP) No. 58-00-1-082, issued by the Farmers Home

Administration (FmHA), Department of Agriculture, to provide farm management services. The protester challenges the FmHA's determination that Kishwaukee's proposal was less advantageous to the government than Madison's.

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

#### BACKGROUND

The RFP, issued as a small business set-aside, provided for award of a firm-fixed-price contract for management of farm properties held by FmHA in certain counties in Wisconsin. The solicitation provided that award would be made to the responsible offeror whose offer, conforming to the solicitation, will be most advantageous to the government, technical, price, and other factors considered, and required the submission of separate technical and cost proposals. With respect to cost proposals, the solicitation specifically instructed offerors to enter their proposed prices on the solicitation's pricing schedule, which listed various management services as separate line items in the following manner:

Item No.	Item Description	Estimated Number of Farms	Price Per Farm	Total Estimated Amount
02	Clean up	2	_____	_____

The RFP advised offerors to bear in mind in completing this pricing schedule that "not every task will be assigned on every farm." In contrast to line item 02, above, for example, the line item "snow removal" was estimated to be required for eight farms. Further, the RFP stated that the number of farms to be included under the contract and the total number of tasks to be performed were estimates only; the actual number of management services to be provided under the contract would be determined on the basis of the agency's actual requirements during the contract period.<sup>1/</sup>

Kishwaukee's initial cost proposal used the RFP's pricing schedule. The proposal included the statement, however, that the proposed price was contingent on management of, at a

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<sup>1/</sup> In this regard, the solicitation also stated that:

"[I]f the government's requirements do not result in orders in the quantities described as 'estimated' . . . in the schedule, that fact shall not constitute the basis for an equitable price adjustment."

minimum, the number of farms stated in the RFP. In April 1991, FmHA held discussions with Kishwaukee and advised the firm that, as stated in the RFP, the estimates were not a guarantee of a minimum quantity of farms to be managed or services to be performed under the requirements contract; since the solicitation contemplated no minimum quantity of services to be ordered and paid for, the agency advised Kishwaukee that its cost proposal, contingent as it was on such a minimum, was unacceptably qualified and must be revised.

In its best and final offer (BAFO), Kishwaukee proposed two different total prices (\$32,765 and \$25,370), as well as various sets of unit prices. Kishwaukee did not use the solicitation pricing schedule in this proposal; rather, instead of providing a single unit price for each line item--that is, for each management task--Kishwaukee proposed a number of different unit prices, depending on how many farms were under management. With respect to the "clean up" task, for example, which the RFP indicated would be required for two farms, and for which a single unit price was to be proposed, Kishwaukee indicated that if the task was required for only one farm, its unit price would be \$2,600; if required for 2 to 5 farms, \$1,505; and, if required for 6 to 12 farms, \$1,450. The agency concluded that, in effect, Kishwaukee's prices still were qualified, since each price was contingent on a minimum quantity of farms under management.

Further, in view of the multiple unit and total prices, the agency was uncertain as to how the cost proposal should be evaluated. For purposes of comparing the proposal to Madison's, the agency assumed that Kishwaukee's total proposed price was \$32,765 (compared to Madison's price of \$38,335); the other "total" price proposed by Kishwaukee, \$25,370, was described in the proposal as a minimum price for the contract, payable by the agency even if only one farm was actually managed. The RFP estimate was that 8 or 9 farms would be covered by the contract. The agency interpreted this to mean that there would be a minimum obligation on the part of the government for that amount if Kishwaukee's proposal were accepted, regardless of the agency's actual requirements--contrary to the provisions of the RFP stating that numbers provided were only estimates and that no minimum obligation would be incurred. Consequently, the agency concluded that the revised proposal had not remedied the pricing deficiency pointed out to the firm in discussions.

With respect to technical proposals, FmHA's technical evaluation panel (TEP) found Kishwaukee's proposal "marginally acceptable" and assigned it a score of 69 (out of a possible 100), compared to Madison's technical score of 93. In discussions, FmHA advised Kishwaukee of major technical

weaknesses noted by the TEP--namely, inadequate detail or documentation in two major areas, management plan and experience of personnel, which together accounted for 80 percent of the score under the RFP's stated evaluation criteria. Kishwaukee's BAFO included minor revisions that resulted in a slightly higher final score, 71. The TEP, however, still evaluated the proposal as only marginally acceptable. (Madison did not revise its technical proposal, since the agency had not noted any deficiencies during discussions with that firm.)

Even assuming that Kishwaukee's proposed price (which the agency had difficulty evaluating) was in fact lower than Madison's, FmHA still concluded that Madison's technically superior proposal was most advantageous overall, and awarded the contract to Madison on that basis.

#### ALLEGEDLY IMPROPER EVALUATION

Kishwaukee does not dispute the agency's interpretation of its cost proposal as requiring a minimum obligation on the part of the government, and it does not challenge the agency's conclusion that its prices were contingent on minimum quantities. Further, the firm does not contest the agency's conclusion that its management plan and the experience of its personnel were stated only in general terms. Instead, the protester merely argues that, since the government lacked adequate information on the quantity of each task to be performed or the exact number of farms to be managed, Kishwaukee was correct in using the type of pricing structure that it did, and that it could not have provided more detail regarding its management plan. Thus, according to the protester, the agency's objections to Kishwaukee's weaknesses in these areas were unfounded, because the alleged weaknesses were caused by the agency's own lack of sufficient information, as reflected in the solicitation.

Kishwaukee's assertion that the solicitation contained inadequate information to prepare a better proposal is untimely. Under our Bid Protest Regulations, protests based upon alleged solicitation improprieties apparent prior to the time set for receipt of initial proposals must be filed prior to that date. 4 C.F.R. § 21.2(a)(1) (1991); Hogan Property Co., B-242795; B-242795.2, June 7, 1991, 91-1 CPD ¶ 549. Since, as explained above, the solicitation clearly stated that figures relating to the number of tasks to be performed were estimates only, if Kishwaukee believed that this required it to structure its proposal in a manner that did not comport with solicitation requirements or would otherwise cause it to be downgraded, the firm was required to protest the defect prior to submitting its initial proposal. See Nationwide Health Search, Inc., B-237029, Feb. 1, 1990, 90-1 CPD ¶ 134.

Even if Kishwaukee was not aware that the lack of firm figures in the solicitation was a problem when it submitted its initial proposal, the record shows--and Kishwaukee does not argue otherwise--that FmHA advised the firm in April, in the course of discussions, of the technical and pricing deficiencies that resulted in the downgrading of its proposal. On April 19, for example--a week before Kishwaukee submitted its BAFO and 2 months before Kishwaukee filed its protest with our Office--Kishwaukee was told, "the government will not guarantee that the estimated number of . . . services will be ordered during the term of the proposed contract. Please adjust your price proposal accordingly." Similarly, with respect to its technical proposal, on the same day, Kishwaukee was advised that "the technical evaluation panel noted weaknesses . . . stating that the management plan and experience of the principals involved in the management of the proposed contract lacked detail/documentation." If, as Kishwaukee maintains, the government's lack of firm figures on the number of farms to be managed compelled it to structure its proposal as it did, notwithstanding the agency's admonitions that the proposal as submitted was inadequate, then under our Regulations Kishwaukee was required to object not later than 10 days from the time it first became aware of that basis for protest on April 19. 4 C.F.R. § 21.2(a)(2). Kishwaukee, however, did not protest the matter until after award had been made, 2 months later. Consequently, its protest is untimely.

To the extent that Kishwaukee's protest can be read as otherwise challenging the evaluation, we find that the agency properly evaluated Kishwaukee's proposal. Despite Kishwaukee's assertion that its manner of pricing was the only one feasible under the circumstances, the cost proposal submitted by Madison (the only other offeror) provided firm unit and extended prices based solely on the estimates provided in the RFP's pricing schedule, with no conditions as to the number of farms actually to be managed under the contract. Similarly, our review of the technical proposals indicates that Madison's proposal contains far more detail concerning the areas identified as problems in Kishwaukee's proposal, and that based on the greater level of specificity the agency had a reasonable basis for rating Madison's proposal considerably higher. Although Kishwaukee expresses general disagreement with the result of the agency's technical evaluation, it has presented no evidence or argument showing that the evaluation was unreasonable. See Nationwide Health Search, Inc., supra (agency reasonably determined that protester's proposal was technically unacceptable where protester, advised of deficiencies in its proposal, failed to correct them; protest merely reflected disagreement with agency's evaluation).

Further, the agency would have been justified in excluding Kishwaukee from further consideration on the basis of its cost proposal alone. In a negotiated procurement, any proposal that fails to conform to the material terms and conditions of the solicitation is unacceptable and may not form the basis for award. Cajar Defense Support Co., B-237522, Feb. 23, 1990, 90-1 CPD ¶ 213. Here, as explained above, the solicitation clearly required a single unit price for each management service category, and the evaluation was to be based on those unit prices, multiplied by the estimated quantities. The protester's offer of multiple unit prices, each of which was contingent on a minimum number of services being performed under the contract, was inconsistent with the required pricing scheme, and the specific advice provided during discussions, and made it impossible for FmHA to evaluate Kishwaukee's proposed cost relative to other proposals. Where, as here, an RFP requires fixed prices, and a proposal does not offer fixed prices, the proposal as submitted cannot be considered for award. See Computer Network Corp., et al.--Recon., 56 Comp. Gen. 694, 697 (1977), 77-1 CPD ¶ 422; Burroughs Corp., 56 Comp. Gen. 142 (1976), 76-2 CPD ¶ 472.

#### OTHER ALLEGATIONS

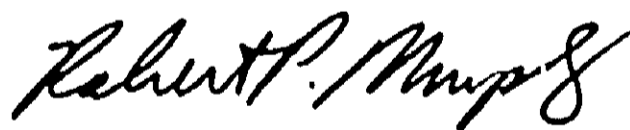
Kishwaukee argues that the agency improperly failed to consult the Small Business Administration (SBA) once it had determined that the cost and technical proposals of the firm --a minority-owned small business--were unacceptable. According to Kishwaukee, the reason for the agency's improper evaluation of its proposal, and for the agency's failure to refer the matter to the SBA, was that FmHA apparently knew that the firm was "black-owned" and was biased against the firm for that reason. In response, FmHA reports that it did not find Kishwaukee nonresponsible, and in fact did not undertake a responsibility determination at all, because it found the firm's cost and technical proposals inferior to Madison's and, therefore, not eligible for the award in any case; accordingly, there was no requirement to refer the matter to the SBA. Further, the agency reports that the certifications in Kishwaukee's proposal that indicated the firm was a small disadvantaged business were not sent to the technical evaluators, and that the TEP therefore had no way of knowing that the business was owned by a member of a racial minority. According to the agency, Kishwaukee's proposal was downgraded solely because the deficiencies in its cost and technical proposals which, although pointed out to the offeror during discussions, were not corrected in its BAFO.

Where, as here, a protester asserts that agency officials were improperly motivated by racial prejudice or by prejudice against small disadvantaged business concerns, the protester

must submit evidence to support the allegations. See Banger Contractors Corp., B-240071, Oct. 16, 1990, 90-2 CPD ¶ 295. Here, as indicated above, we find ample support in the record for the agency's conclusions regarding the evaluation of Kishwaukee's proposal; on the other hand, other than Kishwaukee's general assertion that FmHA was motivated by prejudice against the firm, the protester has provided no explanation or documentation supporting that assertion. Such a bare allegation is not sufficient to establish that the award decision was motivated by prejudice. See Wallace & Wallace, Inc., B-209859, et al., Dec. 2, 1982, 82-2 CPD ¶ 501.

Kishwaukee's contention that the SBA should have been consulted also is without merit. It is true that no small business may be precluded from award because of nonresponsibility without referral of the matter to the SBA for a final determination under its certificate of competency procedure. 15 U.S.C. § 637(b)(7)(A) (1988); Pacific Sky Supply, Inc., 64 Comp. Gen. 194 (1985), 85-1 CPD ¶ 53. Kishwaukee, however, was not found nonresponsible, that is, incapable of meeting the obligations that it would incur if awarded the contract. See Pais Janitorial Service & Supplies, Inc., B-244157, June 18, 1991, 91-1 CPD ¶ 581. Rather, Kishwaukee's proposal was eliminated from the competitive range based on an evaluation under the criteria specified in the RFP. In this circumstance, a small business may be eliminated from consideration for award without referral of the question to the SBA, and FmHA thus did not act improperly in this regard. Id.

The protest is denied in part and dismissed in part.

  
for James F. Hinchman  
General Counsel