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

145953

Decision

Matter of: Macro Service Systems, Inc.

File: B-246103, B-246103.2

Date: February 19, 1992

Hazel Wright for Macro Service Systems, Inc., the protester.
Herbert F. Kelley, Jr., Department of the Army, for the agency.
Sylvia L. Shanks, Esq., and Dayna K. Shah, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510, § 802, 104 Stat. 1485, 1588 (1990), amended 10 U.S.C. § 2305(b), to authorize agencies whose procurements are governed by Title 10 of the United States Code, to make contract awards, after evaluation of proposals, on the basis of initial proposals, without conducting discussions with the offerors (other than for the purpose of minor clarification), unless discussions are determined to be necessary, if the solicitation states the agency's intent to do so. Although the amendment requires consideration of cost or price, or cost-related or price-related factors in the evaluation of proposals, the amendment deletes the previous requirement under 10 U.S.C. § 2305(b)(4) that an award based on initial proposals without discussions result in the lowest overall cost to the United States.

2. Protest of the award of a contract by the Department of the Army, based on initial offers without discussions with offerors, to other than the lowest priced offeror is denied since, in accordance with 10 U.S.C. § 2305(b), the request for proposals (RFP) advised offerors of the Army's intent to award the contract based on initial offers, and evaluation of proposals was consistent with the evaluation criteria set forth in the RFP.

DECISION

Macro Service Systems, Inc., protests the award of a contract by the Department of the Army to Good Foods Service, Inc. (GFSI), under request for proposals (RFP)

No. DAHC30-91-R-0004. The contract is for the provision of full food service at the Ft. Myer dining facility, Arlington, Va., and for dining attendant service at the Ft. McNair dining facility, Washington, D.C. Macro, the incumbent contractor, alleges the Army improperly eliminated it from the competitive range and awarded the contract at a higher price than that which Macro offered, without conducting discussions or affording those offerors whose proposals were determined to be satisfactory or capable of being made acceptable an opportunity to revise their proposals.

We deny the protest.

The RFP, which was issued on August 1, 1991 as a competitive set-aside pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988),[1] contemplated the award of a fixed-price contract with 1 base year and four 1-year option periods. The RFP stated in section L (Instructions, Conditions, and Notices to Offerors) that award would be made to the responsible offeror whose conforming offer will be most advantageous to the government, cost or price and other factors considered. The RFP informed offerors of the agency's intent to evaluate proposals and make award without conducting discussions with offerors (other than for the purpose of minor clarification) unless the contracting officer determined the conduct of discussions to be necessary. In view of the agency's stated intent to award the contract without discussions, the RFP also advised that the initial offer should contain the offeror's best cost or price and technical terms and that the government may accept other than the lowest offer.

The Army received five proposals, of which three (including Macro's proposal) were determined to be "satisfactory or above" and were, therefore, included in the "competitive range." The technical evaluation scores and total evaluated prices (covering the base year and the four 1-year option periods) of the three offers rated as "satisfactory or better" were as follows:

Firm	Technical Score	Evaluated Price
GFSI	97.5	$10,990,006.00
Offeror No. 2	89.0	$10,505,997.00
Macro	81.0	$10,188,352.00

[1]The provisions of the Federal Acquisition Regulation apply to such procurements. 13 C.F.R. § 124.311(f) (1991); see Morrison Constr. Servs., Inc., 70 Comp. Gen. 139 (1990), 90-2 CPD ¶ 499.

(Government estimate: $10,785,902.00)

The RFP states at Section M that, in selecting the best overall proposal,

> "the Government will consider the value of each proposal in terms of quality offered for the price. The importance of price/cost in the selection will increase as the quality differences between proposals decrease."

Paragraph 1, Section M of the RFP, which sets forth the "Basis of Award," defines the "best overall response" as

> "the response that is evaluated as the most superior technically with a realistic estimated price; however, in the event two or more competing proposals are assessed as equal, the lower price shall be determinative."

In accordance with the evaluation committee's recommendation, the agency, without conducting discussions with offerors, selected GFSI as the offeror with the best overall response.

Macro protests that the Army improperly excluded it from the competitive range and awarded the contract, based on other than the lowest priced, technically acceptable proposal, without conducting discussions. Macro maintains that any deficiencies in its proposal were minor and could have been corrected through requests for clarification or discussions. The protester also argues that discussions should have been conducted since, as the incumbent contractor for 4-1/2 years, it had a reasonable chance of award in view of its technical proposal and its lower price.

The Army responds that Macro was not excluded from the competitive range. The purpose of a competitive range determination in a negotiated procurement is to select those offerors with which the contracting agency will hold written or oral discussions. Federal Acquisition Regulation (FAR) § 15.609(a); see Avondale Technical Services, Inc., B-243330, July 18, 1991, 91-2 CPD ¶ 72. The competitive range is determined on the basis of cost or price and other factors that were stated in the solicitation and consists of all proposals that have a reasonable chance of being selected for award. FAR § 15.609(a); Kaiserslautern Maintenance Group, B-240067, October 12, 1990, 90-2 CPD ¶ 288. Here, where the RFP stated the agency's intent to make award on the basis of initial offers without conducting discussions, and the agency in fact did so, there was no competitive range. See Associates Relocation Management Co., Inc., B-242437, April 19, 1991, 91-1 CPD ¶ 390.

The central issue in this case is whether the agency properly selected GFSI without conducting discussions.

Formerly, under a provision of the Competition in Contracting Act of 1984 (CICA), codified at 10 U.S.C. § 2305(b)(4)(A)(ii) (1988), a contracting agency could award a contract without conducting discussions with the offerors

> "when it [could] be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the United States."

This provision of CICA prohibited agencies from accepting an initial proposal that was not the lowest (considering only cost and cost-related factors listed in the RFP) where there was a reasonable chance that by conducting discussions, another proposal would be found more advantageous to the United States under the evaluation factors listed in the solicitation. Hall-Kimbrell Environmental Services Inc., 66 Comp. Gen. 280, 282 (1987), 87-1 CPD ¶ 187; Training and Information Services, Inc., 66 Comp. Gen. 327 (1987), 87-1 CPD ¶ 266.

The National Defense Authorization Act for Fiscal Year 1991, Pub.L. 101-510, § 802, 104 Stat. 1485, 1588 (1990), amended 10 U.S.C. § 2305(b)(4)(A). The amendment, which became effective March 1991, deleted the requirement that a contract award made on initial offers without discussions result in the lowest overall cost to the government.[2] As

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[2]As amended, 10 U.S.C. § 2305(b)(4)(A)(ii) now reads:

> "(4)(A) The head of an agency shall evaluate competitive proposals in accordance with paragraph (1) and may award a contract--
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> . . . . . .
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> (ii) based on the proposals received, without discussions with offerors (other than discussions conducted for the purpose of minor clarification) provided that the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary."

Paragraph (1) requires the agency head to evaluate competitive proposals and make an award "based solely on the factors specified in the solicitation." 10 U.S.C.

(continued...)

implemented by FAR § 15.610(a), this provision authorizes agencies whose procurements are governed by Title 10 of the United States Code to award contracts on the basis of initial proposals without conducting discussions if, as in this case, the contracting officer determines that discussions are not necessary and the solicitation contains the provision at FAR § 52.215-16 with its Alternate III.[3] The language of Alternate III at the time the solicitation was issued provided:

> "The Government intends to evaluate proposals and award a contract without discussions with offerors (other than discussions conducted for the purpose of minor clarification). However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint."

Thus, with respect to negotiated procurements, Department of Defense (DOD) agencies are authorized to make award based on initial offers, without discussions or negotiations, to a technically acceptable offeror who did not offer the lowest price or cost to the government,[4] if the solicitation, in accordance with FAR § 52.215-16, states the government's intention to do so and advises offerors that their initial offers should contain the best cost or price and technical terms.

The 1991 Defense Authorization Act also amended 10 U.S.C. § 2305(a)(2)(A)(i) to require that all significant subfactors, as well as their relative importance, be included in the solicitation (a listing of all significant factors and their relative importance was already mandated). Pub. L. 101-510 §§ 802(a) and (c), 104 Stat. 1588 (1990). The House Armed Services Committee, in reporting out the bill which would become law, encouraged DOD to provide as

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[2](...continued)
§ 2305(b)(1).

[3]Once an agency states its intent in the solicitation to make contract award without discussions, rationale for any reversal of this decision must be documented in the contract file. FAR § 15.610(a)(4).

[4]See H.R. Rep. No. 665, 101st Cong., 2d Sess. 299-303, reprinted in 1990 U.S. Code and Administrative News 2931, 3025-3029.

much detail as possible in describing the significant evaluation factors and subfactors, stressing the importance of the solicitation containing clear and unambiguous information concerning how offers will be evaluated, particularly for a contract which the agency intends to award without discussions.[5]

In this case, the RFP included the clauses prescribed by FAR § 15.610(a). Under "Evaluation Factors for Awards," the RFP also listed, in descending order of importance, the four factors to be used in selecting the offer most advantageous to the government:

> "(1) Work Plans in accordance with Section C [which stipulated what was to be included in that section of the proposal]
> "(2) Organizational Experience
> "(3) Staffing and Qualifications, as required in section C, paragraph c.1.2.1.
> "(4) Price/Cost"

The RFP further stated that of these four evaluation factors, "Work Plans" was substantially more important than the other three factors." It also listed the subfactors and their relative importance:

> "Subfactor (1) [Quality Control Plan] is most important; subfactor (2) [Standard Operating Procedure for Food Preparations and Cooking] is second in importance; subfactor (3) [Sanitation Training Plan] and (4) are equal and third in importance. . . ."

The Army technical evaluators found that Macro's proposal did not provide for a customer complaint program (as part of its Quality Control Plan) or address the provision of a Sanitation Training Plan, and that its statement of Organizational Experience was not fully documented. The protester does not deny the Army's statements concerning these deficiencies in its proposal.

The Quality Control Plan was the most important subfactor of the most heavily weighted evaluation factor, and the Sanitation Training Plan was also an important subfactor under the "Work Plans" factor. Thus, we think the evaluators reasonably could downgrade Macro's proposal in light of Macro's failure to address the customer complaint program and sanitation training plan under this most important evaluation criterion. Moreover, under

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[5]H.R. 665, supra, 303, reprinted in 1990 U.S. Code and Administrative News, 2931, 3029.

"Organizational Experience," second in importance among the evaluation factors, Macro's proposal listed experience in providing services at 2 dining facilities in each of the two categories, whereas GFSI's proposal listed 4 dining facilities where it had provided services in each of these categories. Thus, GFSI's proposal reasonably could be scored higher under this criterion as well.

In view of the omissions in Macro's proposal, we agree with the Army that the proposal could not have been improved through minor clarification discussions, but would have required more meaningful revision. That being so, since GFSI's proposal was rated as "the most superior technically" and considered to have a "realistic estimated price" and, thus, met the solicitation's criteria for award as the "best overall response,"[6] we have no basis to question the agency's award of the contract without discussions.

Macro argues in its comments on the agency report that the RFP did not state what weight would be given to each of the evaluation factors. Our bid protest regulations require that for a protest based upon alleged apparent defects in a solicitation to be timely, it 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). Since this protest of the RFP's statement of evaluation criteria was first raised after the agency filed its report in response to the protest, it is untimely. Remtech, Inc., B-240025, Jan. 4, 1991, 91-1 CPD ¶ 35. In any event, this allegation is without merit since set forth the relative weights of the factors, which is all that the law requires.

The protest is denied.

James F. Hinchman
General Counsel

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[6]The fact that Macro's price was lower than GFSI's is not controlling since price was the least important evaluation factor and GFSI's proposal clearly was evaluated as technically superior to Macro's.