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Comptroller General
of the United States

Washington, D.C. 20548

146037

Decision

Matter of: Wetlands Research Associates, Inc.

File: B-246342

Date: March 2, 1992

Michael Josselyn, Ph.D., for the protester.
Clarence Austin and René L. Walls, Department of
Agriculture, for the agency.
Guy R. Pietrovento, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

In a negotiated procurement by a civilian agency, award on the basis of initial proposals without discussions was improper where the low-priced protester was clearly acceptable but for an informational deficiency that was easily correctable through discussions and thus award on initial proposals may not result in the lowest overall cost to the government.

DECISION

Wetlands Research Associates, Inc. protests the award of a contract to Biotic Consultants, Inc. under request for proposals (RFP) No. SCS-WNTC-20-91, issued by the Soil Conservation Service, Department of Agriculture, for an illustrated field guide. Wetlands contends that, as the low-priced offeror, it was entitled to award and that the agency did not conduct discussions.

We sustain the protest.

The RFP, issued August 12, 1991, contemplated the award of a fixed-price contract for an illustrated botanical field guide to assist in the identification of various plant species. The RFP provided that award would be made to the responsible offeror whose conforming offer was the most advantageous to the government, cost and other factors

considered. Technical factors were set forth, in descending order of importance, as follows:

- "1. Ability to prepare professional quality illustrated botanical field guides suitable for use by personnel with limited botanical training (provide example of work).
2. Knowledge of plant species, plant taxonomic nomenclature, plant distribution and habitat, wetland plant ecology, key plant identification characteristics, and ability to describe plants vegetatively and floristically.
3. Ability to produce high quality line drawings, color photographs, and range maps of plant species. Color photograph and line drawings of smooth phlox¹ will be submitted for a standard comparison of ability to illustrate. Source of the photograph to be submitted is to be determined by the supplier.
4. Ability to produce high quality botanical manuals by extensive publication of articles in scientific journals, botanical texts, illustrated field guides for non-professional botanists and other working documents to assist in plant identification (provide examples of work)."

The RFP did not state the relative weight assigned to cost, and accordingly, cost was approximately equal in weight to the technical considerations. See Jack Faucett Assocs., B-233224, Feb. 3, 1989, 89-1 CPD ¶ 115, aff'd, B-233224.2, June 12, 1989, 89-1 CPD ¶ 551. Offerors were also informed of the possibility of award on the basis of initial proposals without discussions.

¹"Phlox" is a genus of American annual or perennial herbs that have red, purple, white or variegated flowers, a salverform corolla with the stamens on its tube, and a 3-valved capsular fruit.

Agriculture received four offers by the September 12 closing date, which it scored as follows:²

<u>Offeror</u>	<u>Factor 1</u> (20 pts)	<u>Factor 2</u> (12 pts)	<u>Factor 3</u> (6 pts)	<u>Factor 4</u> (2 pts)	<u>Total</u> <u>Score</u>	<u>Price</u>
Biotic	20	12	6	2	40	\$86,630
Wetlands	16	12	0	2	30	79,846
A	16	9	4	1	30	89,125
B	12	6	6	0	24	--

Agriculture determined that only the proposals of Biotic and Offeror A were technically acceptable, and that the proposals of Wetlands and Offeror B were technically unacceptable. Wetlands's proposal was considered "technically sound" overall, but was found unacceptable solely because it failed to provide a photograph and line drawing of smooth phlox as required by the third most important technical evaluation factor.³ Offeror A--whose proposal received the identical overall technical evaluation score as Wetlands's proposal--was found acceptable despite submitting only a line drawing of the phlox but not a photograph as required by the RFP. Offeror B failed to submit a cost proposal and was found unacceptable on this basis.

Agriculture elected not to conduct discussions. Instead, Agriculture eliminated Wetlands's and Offeror B's proposals from consideration as unacceptable, and determined that since Biotic's offer was higher-rated and lower-priced when compared to Offeror A's offer, award should be made on an initial proposal basis to Biotic.

Award was made on September 24 and this protest followed. Performance of the contract has not been suspended since the protest was not filed within 10 calendar days of the date of award.

Under the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b(d)(1)(B) (1988), an agency may make award on the basis of initial proposals where the solicitation advises offerors of that possibility and the competition or prior cost experience clearly demonstrates that acceptance of an initial proposal will result in the lowest overall

²The agency's numerical scoring was not disclosed in the RFP.

³Nevertheless, Agriculture noted that Wetlands had submitted other photographs and illustrations that were "good."

cost to the government.⁴ Where it appears that acceptance of an initial proposal will not result in the lowest overall cost to the government, the agency may not make award on an initial proposal basis, but instead must conduct discussions in an attempt to obtain lowest overall cost or to otherwise determine the proposal most advantageous to the government. Training and Info. Servs., Inc., 67 Comp. Gen. 327 (1987), 87-1 CPD ¶ 266; TFA, Inc., B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239.

Here, we find that Agriculture improperly made award on the basis of initial proposals without conducting discussions because Wetlands's low-priced proposal was acceptable but for its failure to provide a color photograph and line drawing of phlox, and this relatively minor deficiency was easily correctable through discussions.

The record shows that Wetlands's proposal, apart from its failure to provide a photograph and line drawing of phlox, was technically acceptable.⁵ Under the two most important technical evaluation factors--technical ability to produce a field guide and technical knowledge--Wetlands received a higher combined score than that received by Offeror A, whose proposal was evaluated to be acceptable overall. Moreover, Wetlands's score under factor 1 was only four points less than the awardee's, and Wetlands received the identical score to the awardee's for factor 2.

⁴This requirement was recently rescinded for procurements covered by Title 10 of the United States Code. Specifically, 10 U.S.C. § 2305(b)(4)(A) was amended by the National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510, § 802(d)(3)(A), 104 Stat. 1485, 1589 (1990), to delete the requirement that award based on initial proposals must be made to the lowest-priced offeror. See Raytheon Co.--Recon., B-240333.2, Mar. 28, 1991, 91-1 CPD ¶ 334. This change is not applicable to Agriculture's procurements.

⁵Agriculture has virtually no documentation supporting its evaluation and award selection. Federal Acquisition Regulation (FAR) § 15.612(d)(2) requires that documentation supporting selection decisions show the relative differences among proposals; their strengths, weaknesses and risks; and the basis and reasons for the decisions. This required documentation provides protesters and this Office a basis upon which to judge the reasonableness of the agency's decision and, ultimately, its compliance with procurement statutes and regulations. Amtec Corp., B-240647, Dec. 12, 1990, 90-2 CPD ¶ 482, recon. denied, B-240647.2, Feb. 26, 1991, 91-1 CPD ¶ 211.

Wetlands received 0 points (out of a maximum of 6 points) under the third most important evaluation factor--the ability to produce photographs and illustrations of plant species--for its failure to provide the requisite photograph and line drawing of phlox. Agriculture, however, specifically noted that Wetlands had provided other photographs and illustrations that were "good." This indicates that Wetlands's proposal, despite the absence of a photograph and line drawing of phlox, demonstrated the firm's ability to produce high quality line drawings and color photographs and was otherwise acceptable.

Since the protester stated in its technical proposal that it would provide the color photograph and line drawing of phlox, we conclude that the failure to provide a photograph and a line drawing of phlox with its proposal could easily have been corrected through discussions. Wetlands mistakenly assumed that the photograph and line drawing of phlox need only be supplied after contract award. The RFP does state in section C that the contractor will provide, following award and prior to commencement of the contract work, a color photograph and line drawing of phlox, but section M also required its submission as a part of the evaluation. Phlox is not a particularly uncommon plant species, and it would seem that pictures and drawings of this plant could be readily obtained.⁶

Given the apparent ease with which Wetlands's informational deficiency could have been corrected, we think that Wetlands had a reasonable chance of being selected for award, considering its low price.⁷ Accordingly, the agency could not reasonably find that award to Biotic on the basis of initial proposals would necessarily result in the lowest

⁶The RFP specifically provided that the supplier could determine the source of the photograph.

⁷This case is different from Panasonic Comms. & Sys. Co., B-239917, Oct. 10, 1990, 90-2 CPD ¶ 279, in which we found proper the rejection of an initial proposal that did not contain a required sample that was so significant that essentially no meaningful proposal had been submitted; to allow this omission to be cured after the time set for receipt of initial proposals would have been inconsistent with the clause governing late proposals. See FAR § 15.215-10(a). Here, the photograph and line drawing were required as a part of the third most important evaluation factor. More importantly, Wetlands demonstrated its technical ability and knowledge and was technically acceptable apart from the failure to provide the required photograph and drawing.

overall cost to the government. See Hartridge Equip. Corp., B-228303, Jan. 15, 1988, 88-1 CPD ¶ 39, aff'd, B-228303.2, May 24, 1988, 88-1 CPD ¶ 491 (agency could not properly reject a low offer, which did not provide the required first article price, and make award to a higher-priced offeror, on the basis of initial proposals without discussions); see also JGB Enters., Inc., B-225058, Mar. 13, 1987, 87-1 CPD ¶ 283; AMP, Inc., B-239287, Aug. 16, 1990, 90-2 CPD ¶ 131.

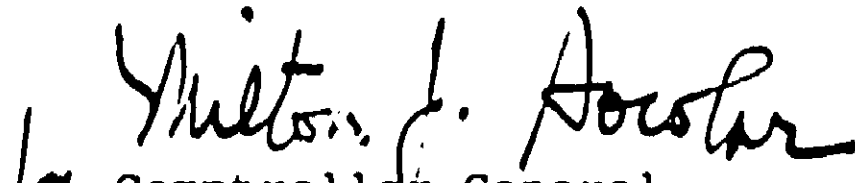
In its award notification letter to Wetlands, Agriculture stated that although Wetlands's proposal was technically sound, the agency elected to forego discussions with the low-priced Wetlands because of the impending close of the fiscal year, at which time the appropriated funds would no longer be available. There is no exception to the statutory obligation to conduct meaningful discussions based upon the possible lapse of appropriated funds. Jones & Co., 66 Comp. Gen. 283 (1987), 87-1 CPD ¶ 201. In any case, we fail to understand why these photographs and drawings could not be obtained in the over 2 week period from receipt and evaluation of initial proposals to the end of the fiscal year.

Finally, Agriculture suggests that even if Wetlands's offer had been considered, award would still have been made to Biotic as the offeror whose proposal was most advantageous to the government. As noted above, award could not properly be made on initial proposals to other than the offeror offering the lowest overall price to the government. In other words, a cost/technical tradeoff made before discussions is improper because the technical rankings and offered prices could be significantly different after the conduct of discussions. National Sys. Mgmt. Corp., 70 Comp. Gen. 443 (1991), 91-1 CPD ¶ 408; Pan Am Support Servs., Inc.--Recon., 66 Comp. Gen. 457 (1987), 87-1 CPD ¶ 512.

We recommend that Agriculture conduct discussions with the three competitive range offerors and terminate Biotic's contract if Biotic is not entitled to the award after best and final offers are evaluated. We recognize that because performance of the challenged contract was not required to be suspended and continued, it may not be feasible to conduct discussions at this time. If the agency concludes that this is so, Wetlands is entitled to its costs of proposal preparation. 4 C.F.R. § 21.6(d)(2) (1991). In any case, Wetlands is entitled to its costs of filing and

pursuing the protest, including reasonable attorneys' fees.
4 C.F.R. § 21.6(d)(1). Wetlands should submit its certified
claim for its protest costs directly to the agency within
60 working days of receipt of this decision. 56 Fed.
Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(f)(1)).

The protest is sustained.


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