

C. Morrow



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Action Service Corporation
File: B-246413; B-246413.2
Date: March 9, 1992

Sean P. Morgan, Esq., Saul, Ewing, Remick & Saul, for the protester.
Cynthia Guill, Esq., Department of the Navy, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that certain solicitation provisions under a competitive section 8(a) procurement were either technical evaluation criteria or definitive responsibility criteria, and that the procuring agency failed to consider these provisions in evaluating the awardee's proposal and responsibility are denied, where the provisions were general responsibility factors that the procuring agency could consider in making an affirmative determination of the awardee's responsibility.
2. Procuring agency properly allowed correction of the awardee's low priced total offer without opening discussions to correct a unit price for indefinite quantity work that contained an obvious error, in that it stated a monthly rate rather than the requested hourly rate, and the corrected unit price was the only reasonable interpretation of the offer and was ascertainable from the face of the offer, since the extended price for the item was correct and the estimated quantity of hours was stated in the solicitation.

DECISION

Action Service Corporation protests the award of a contract for guard services to Fajardo Private Detective and Security Guards, Inc., under request for proposals (RFP) No. N62470-91-R-5411, issued by the United States Naval Station, Roosevelt Roads, Puerto Rico. The procurement was conducted

Dis. by Navy Com. for Protest 5-1-92

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competitively pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) ((1988) and (Supp. I 1989)).¹ Action objects to the Navy's evaluation of Fajardo's proposal.²

We deny the protests.

This RFP was issued on August 13, 1991, to obtain guard services at the United States Naval Facilities, Vieques Island, Puerto Rico, under a fixed-price indefinite quantity contract for a base period from November 1, 1991, to October 30, 1992, with four 1-year options. The contractor was to furnish all labor, supervision, materials, equipment, transportation, and management necessary to meet the Navy's guard requirements.

With regard to the basic contract period, the RFP schedule primarily contained fixed-price line items for designated guard posts. The schedule also contained one line item for indefinite quantity guard services. There was a similar schedule for each of the option years. For the fixed-price line items, offerors were to submit monthly unit prices; the extended price for these items was based upon a quantity of 12 to calculate the annual price. For the indefinite quantity line item, offerors were to propose an hourly rate and the extended price was to be based upon an estimated maximum annual quantity of 1,000 hours. No technical proposals were submitted; only prices were solicited.

¹Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) § 19.805 and 13 C.F.R. § 124.311 (1991) provide for and govern competitively awarded contracts set aside for section 8(a) qualified concerns. We review competitive 8(a) procurements to ensure that they conform to applicable federal procurement regulations. See Morrison Constr. Servs., Inc., 70 Comp. Gen. 135 (1990), 90-2 CPD ¶ 499; Southwest Resource Dev., B-244147, Sept. 26, 1991, 91-2 CPD ¶ 295.

²Action also contended initially that the SBA improperly failed to make a responsibility determination of Fajardo. After receipt of the Navy's and the SBA's reports, Action abandoned this basis of protest.

Section M of the RFP provided that "the low bidder for purposes of the award shall be the conforming, responsive, responsible offeror offering the lowest total price." Section M also contained the following language:

"In addition of being the conforming, responsive, responsible offeror offering the lowest total price, the prospective contractor shall meet the requirements of Navy Acquisition Procedures Supplement (NAPS) 19.804-90:

- (1) knowledge and understanding of the work to be performed;
- (2) experience in performing requirements of similar size and scope;
- (3) resources that are available (including contingent hires) or that must be acquired for contract performance;
- (4) ability to comply with subcontracting limitation provisions (see FAR clause 52-219-14) in Section I);
- (5) ability to meet delivery schedules; and
- (6) record of performance."

On September 13, the Navy received six offers in response to the RFP, which included Fajardo's apparent low offer and Action's second low offer. On October 24, the Navy made award to Fajardo without discussions. The following day Action filed this protest in our Office. The Navy has withheld performance pending resolution of the protest.

Action basically protests that the Navy failed to evaluate Fajardo's proposal for compliance with the six criteria listed above in section M of the RFP and that Fajardo's proposal was not acceptable under these criteria. Action argues that the six criteria were technical evaluation criteria that the Navy was required to utilize in selecting an offeror for the award. In the alternative, Action argues that these criteria, particularly the "experience in performing requirements of similar size and scope" criterion, constituted definitive responsibility criteria.

We find that the referenced six items in section M cannot reasonably be considered technical evaluation criteria. Not only did the RFP provide for award to the "responsive and responsible" offeror, who offered the lowest total price, but no technical proposals or submissions were required. As indicated in the RFP, these items implement NAPS § 19.804-90, which is an internal Navy regulation listing the specific factors to be discussed when the Navy determines that the proposed section 8(a) contractor lacks the capability or capacity to perform the Navy's requirements, such as where the Navy proposes to remove the

requirement from the section 8(a) program. That is, these items are only general factors that should be considered in determining a prospective contractor's responsibility, not technical evaluation factors to determine whether an offeror has submitted an acceptable proposal.

These items also may not properly be characterized as definitive responsibility criteria. A definitive responsibility criterion is an objective standard, such as a specific number of years of particular specified experience, established by the agency to measure an offeror's ability to perform the contract. PTR-Precision Techs., Inc., B-243439, Aug. 1, 1991, 91-2 CPD ¶ 110. In effect, such a criterion reflects the agency's judgment that an offeror's ability to perform a contract must be measured not only against the traditional and subjectively evaluated responsibility factors, such as adequate facilities, financial resources, or experience, but also against more specific requirements, such as a specific number of years of particular specified experience, with which compliance can be measured objectively. Id. Here, the criteria in question are not objective standards, and, as stated above, no submissions were requested or contemplated to establish compliance with these criteria. Therefore, the listed items are not definitive responsibility criteria, but are general considerations for assessing a firm's responsibility. See FAR § 9.104.

Inasmuch as Fajardo's proposal did not take exception to any of the RFP requirements, it was properly considered to be acceptable. See Intercontinental Equip., Inc., B-224824, Oct. 10, 1986, 86-2 CPD ¶ 424, aff'd, B-224824.2, Nov. 12, 1986, 86-2 CPD ¶ 556. The record shows that the Navy affirmatively determined Fajardo was responsible and that the SBA also determined Fajardo was responsible and eligible for the award under the section 8(a) program. The Navy and the SBA examined Fajardo's active contracts, financial statements, technical capabilities and sources of credit. Although Action questions the validity of this determination because Fajardo allegedly has not performed any contracts of similar size, is recovering from bankruptcy, has numerous debts, and has only recently reestablished its corporate status, the Navy, in the exercise of its business judgment, is entitled to determine a company to be responsible despite bankruptcy and other problems which may have occurred in the past. See Hugo's Cleaning Serv., Inc., B-228396.4, July 27, 1988, 88-2 CPD ¶ 89. We will not review a protest against affirmative determinations of responsibility, which are largely a question of business judgment, absent a showing of possible fraud or bad faith on the part of contracting officials. 4 C.F.R. § 21.3(m)(5) (1991); see Hugo's Cleaning Serv., Inc., supra. Action has made no such showing in this case.

Action also contends that discussions were improperly conducted with only Fajardo in judging its acceptability. However, the record confirms that the only contacts with Fajardo were to request and obtain information to ascertain its responsibility. Contacts to assess responsibility do not constitute discussions that require that discussions be held with all offerors within the competitive range. NFI Mgmt. Co., 69 Comp. Gen. 515 (1990), 90-1 CPD ¶ 548.

Action next argues that the Navy improperly permitted Fajardo to correct its unit price for the indefinite quantity line item. Fajardo's proposal for the indefinite quantity line item reflected a unit price of \$1,385.00 per man-hour with an extended yearly price of \$16,620 for 1,000 man-hours. Since the unit price multiplied by the estimated quantity does not even approximate the extended price, this was an obvious mistake in Fajardo's offer.

The Navy reports that it did not notice this discrepancy until after award. The Navy argues, however, that the unit price was obviously in error and subject to post-award correction. Fajardo stated that it erroneously divided the total annual amount by 12 to arrive at a monthly rate rather than the requested hourly rate. The hourly unit price for the indefinite quantity work was corrected to Fajardo's intended \$16.62 per hour by dividing the extended price by 1,000. The Navy reports that this was the only reasonable interpretation of Fajardo's offer.

Action contends that the Navy should have calculated Fajardo's price for this item by multiplying the unit price by the 1,000 maximum order quantity thereby resulting in \$6,841,900 being added to Fajardo's total price, since the Navy was not permitted to reference information not in Fajardo's offer and the RFP to correct the claimed mistake. Action also argues that the RFP required unit prices to take precedence in the event of a discrepancy between unit and total pricing.

Notwithstanding solicitation provisions that give precedence to unit prices, an obviously erroneous unit price can be corrected to correspond to an extended total price where the corrected unit price is the only reasonable interpretation of the bid or offer. See Marann Inventories, Inc. d/b/a/ Inventory Acct. Serv., B-237467, Jan. 22, 1990, 90-1 CPD ¶ 89; East Bay Auto Supply, Inc., B-192012, Sept. 5, 1978, 78-2 CPD ¶ 170. The correction of such obvious mistakes can be made without opening discussions with all offerors in the competitive range, since the nature of the mistake and the intended price are both apparent from the offer itself. FAR § 15.607(c)(5); Clay Bernard Sys. Int'l, B-218423, June 17, 1985, 85-1 CPD ¶ 688.

Here, it is obvious that Fajardo's unit price for guard services was not \$1,385 per hour. That hourly rate is grossly out of line with the cost of these services³, and is unreasonable on its face. It was also obvious that Fajardo mistakenly proposed the monthly rate as had been required for the fixed-price line items, and that the hourly rate was easily ascertainable by dividing the extended total by 1,000. Fajardo's \$16.62 rate is consistent with the other offerors' prices and the government estimate. Thus, it was clear from the face of the proposal⁴ that it was susceptible to only one reasonable interpretation, such that correction of Fajardo's unit price to conform to its extended price was appropriate.⁵ Clay Bernard Sys. Int'l, supra; Marann Inventories, Inc. d/b/a Inventory Acct. Serv., supra. While it is true that this mistake should have been discovered and corrected before award, we perceive no possible prejudice to Action by the fact that correction was made after award in view of the obvious nature and correctability of the mistake.

In sum, the record shows that the Navy properly determined that Fajardo's proposal represented the lowest total price and was acceptable and that Fajardo is responsible. Thus, the award was proper.

The protests are denied.



 James H. Hinchman
General Counsel

³The wage determination for guards included in the RFP was \$6.55 per hour.

⁴The Navy did solicit and review Fajardo's proposal worksheets to confirm the correctability of the mistake. This was consistent with the procedures for processing post-award mistakes. ✓ FAR §§ 14.406-4(e)(1)(ii); ✓ 15.1005.

⁵Since the correction of Fajardo's mistake was proper, Action's contention that Fajardo's offer was materially unbalanced because of its unreasonably high unit price for this line item is not valid. As corrected, Fajardo's unit price for this item is not mathematically unbalanced since it neither provided for nominal prices or overstated prices ✓ for the RFP line items. See H. Angelo & Co. Inc., B-244682.2, Oct. 30, 1991, 91-2 CPD ¶ 407. Thus, Fajardo's proposal cannot be said to be materially unbalanced. Id.