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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: JANA, Inc.
File: B-247889.2
Date: August 11, 1992

Donald O. Ferguson, Esq., and Charles Payne Tobey, Jr., Esq., Gardner & Ferguson, Inc., for the protester. Douglas E. Perry, Esq., and Joseph D. West, Esq., Jones, Day, Reavis & Pogue, for HEBCO, Inc., an interested party. Susan P. McNeill, Esq., Department of the Air Force, for the agency. Catherine M. Evans, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency decision to amend solicitation and request second round of best and final offers after identifying protester as apparent successful offeror is denied where agency action was necessary to correct solicitation defect.
2. Second round of best and final offers (BAFO) does not constitute prohibited auction, notwithstanding disclosure of protester's standing as apparent successful offeror, where (1) prices were not disclosed and (2) second round of BAFOs was required in the process of correcting defective solicitation.

DECISION

JANA, Inc. protests the Department of the Air Force's decision to amend, and request revised proposals under, request for proposals (RFP) No. F09603-91-R-52464, for data preparation and drafting services. JANA, the apparent successful offeror after the agency's initial evaluation, claims that the agency did not have a valid basis to reopen the competition, and that as the initial apparent successful offeror it is entitled to the award.

We deny the protest.

The RFP, which provided for award of a firm, fixed-price contract based on price and price-related factors, requested prices for individual contract line items (CLIN). Amendment 0003 to the solicitation added CLINs X017AA through X017AE,

which requested per-page prices for technical order reprint packages based on the number of pages in the package, as follows:

<u>CLIN</u>	<u>Quantity</u>	<u>Price</u>
X017AA	1-100 pages	\$ _____
X017AB	101-250 pages	\$ _____
X017AC	251-500 pages	\$ _____
X017AD	501-1000 pages	\$ _____
X017AE	1000 pages & up	\$ _____

Although the amendment contained a "not to exceed" quantity of 2,000 packages, and amendment 0004 added that the average package size would be approximately 200 pages, there was no estimate of the expected total number of pages that would be required per year. Therefore, HEBCO, Inc., one of the prospective offerors, asked the contracting officer what estimate would be used for evaluation purposes. The contracting officer responded that the CLINs would be evaluated based on 2,000 pages per year.

Following evaluation of the proposals, the agency sent offerors a preaward notice identifying JANA as the apparent successful offeror (to afford the other offerors the opportunity to protest JANA's small business status). Upon learning that JANA was the proposed awardee, HEBCO filed a protest in our Office, essentially alleging that the agency's evaluation of CLINs X017AA-X017AE was improper because the RFP did not reflect the agency's actual quantity requirements (400,000 pages per year) for those items.

In response to HEBCO's protest, the Air Force determined that the RFP in fact was defective, and that this in turn led to a defective evaluation. First, the RFP did not inform offerors of the agency's actual 400,000-page quantity requirement. Because of the way CLINs X017AA-X017AE were set forth in the RFP, requesting unit prices for five different page quantity ranges per package, the Air Force had evaluated proposed prices for these CLINs by calculating extended totals for each; this was accomplished by multiplying the prices for each CLIN by the maximum quantity for each (i.e., 100 pages for CLIN X017AA and 250 pages for CLIN X017AB). For CLIN X017AE, a quantity of 1,000 pages was used as the multiplier. These extended totals were then added together for a total price. This price, however, represented a total quantity of only 2,850 pages. As a result, the evaluation of proposals for CLIN X017 was not based on the Air Force's actual quantity requirement. Moreover, since the RFP allowed offerors to propose a different per-page price for each page quantity range, it was impossible to tell whether the proposal with the low total price for CLINs X017AA-X017AE represented the lowest

overall cost to the government in terms of contract performance. The Air Force concluded that it was necessary to revise CLIN X017 to request a single per-page price based on a firm quantity estimate (ultimately determined to be 300,000 pages). Upon learning of the agency's decision to amend the RFP and request BAFOs, HEBCO withdrew its protest and JANA filed this protest.

JANA asserts that the Air Force's decision to amend the solicitation in response to HEBCO's protest was improper because (1) the protest was untimely, and (2) HEBCO was not prejudiced by the solicitation defect. JANA argues that a second round of BAFOs will only lead to an improper auction because its position as the low priced, technically acceptable offeror has been disclosed.

The Federal Acquisition Regulation (FAR) provides that while the contracting officer generally should not reopen discussions after the receipt of BAFOs, he may do so when it is clearly in the government's interest, e.g., where it is clear that the available information is not sufficient to reasonably justify contractor selection. FAR § 15.611(c). The Department of Defense FAR Supplement (DFARS) provides further that additional BAFO requests should be used only when necessary and unavoidable, and only after approval at the appropriate level above the contracting officer. DFARS § 215.611(c). Thus, in a Department of Defense procurement, an RFP may be revised after the receipt of initial BAFOs and an additional round of BAFOs sought if the appropriate agency official considers it necessary and unavoidable. See General Eng'g Serv., Inc., B-242618.2, Mar. 9, 1992, 92-1 CPD ¶ 266.¹ We will review the agency official's determination to decide whether it was reasonable. See generally id.; Harris Corp., B-237320, Feb. 14, 1990, 90-1 CPD ¶ 276.

We find that the agency properly amended the solicitation to restructure CLINS X017AA-X017AE. In this regard, we agree with the agency that the solicitation was defective because it did not state the agency's actual quantity requirement for those CLINS or provide for evaluation of prices based on the actual quantity requirement; offerors' prices therefore were not based on the quantities the agency would actually be ordering. Furthermore, the RFP did not provide a proper basis for award of those CLINS because in the absence of quantity estimates for each CLIN the agency could not

¹DFARS § 215.611(c) was amended in December 1991 to replace language requiring that additional BAFOs be limited to circumstances of "[u]navoidable changes in requirements or funding or other compelling reasons" with the requirement that they be issued "only when necessary and unavoidable."

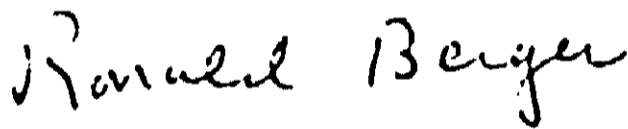
determine which proposal represented the lowest overall cost to the government based on the total work to be awarded, as is required for determining the most favorable cost to the government. See Southwestern Servs., Inc. and Worldwide Servs., Inc., 56 Comp. Gen. 668 (1977), 77-1 CPD ¶ 390; Square Deal Trucking Co., Inc., B-183695, Oct. 2, 1975, 75-2 CPD ¶ 206; cf. Tennessee Valley Serv. Co., B-188771, July 20, 1977, 77-2 CPD ¶ 40 (where cancellation was not required despite a defective evaluation provision because a proper evaluation on the basis of total estimated quantities could be made without prejudice to any bidder). Since the defective pricing structure did not allow the agency to properly evaluate proposals, the agency properly determined that an additional round of BAFOs based on an amended solicitation was necessary and unavoidable. See Harris Corp., supra; Action Mfg. Co., B-222151, June 12, 1986, 86-1 CPD ¶ 546. That the agency may have learned of the need for corrective action through an untimely protest does not affect the reasonableness of its conclusion. See Amarillo Aircraft Sales & Servs., Inc., B-214225, Sept. 10, 1984, 84-2 CPD ¶ 269.

We reject JANA's argument that the agency's additional BAFO request will result in an improper auction. Even where, as here, there is information available, at the time the competition is reopened, that a certain firm was in line for award based on initial proposals, the request for BAFOs does not give rise to an improper auction absent a price leak or some other disclosure. See Braswell Shipyards, Inc., B-233287; B-233288, Jan. 3, 1989, 89-1 CPD ¶ 3. The record contains no evidence of any disclosure of JANA's price. Moreover, even where prices have been disclosed, a second request for BAFOs does not necessarily result in an improper auction. For example, where proposals are improperly evaluated based on undisclosed criteria, reopening negotiations after award and requesting BAFOs in order to make a proper award benefits the integrity of the competitive procurement system; this benefit outweighs the risk of an auction. See The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425. Since amendment of the solicitation was necessary here to ensure that (1) offerors were aware of the basis for evaluation of their proposals, and (2) award would be based on the agency's actual quantity requirements, the agency's second BAFO request does not constitute a prohibited auction.

JANA also alleges that the Air Force could not properly amend the solicitation when it did because it already had a binding contract with JANA.² To the extent that it is arguing that an agency may not reopen a competition to remedy a defective solicitation after award has been made, JANA is incorrect. As noted above, post-award corrective action may be required to remedy an improper award and maintain the integrity of the competitive procurement process; the corrective action may take the form of a solicitation amendment and request for BAFOs. See, e.g., Mine Safety Appliances, Racal Corp., B-233268.3; B-233268.4, July 14, 1989, 89-2 CPD ¶ 46.

Finally, JANA requests that, in the event we find reasonable the agency's decision to request new BAFOs, we recommend limiting the scope of the BAFO to CLIN X017. However, in addition to changing the CLIN X017 pricing structure, the RFP amendment changed the quantity requirement for CLIN X018, and added CLIN X030. Further, the Air Force advises that the amendment also made other changes that could affect prices, such as adding marking instructions and changing the inspection and acceptance provisions. Under these circumstances, there is no basis for requiring the agency to limit the scope of the BAFO request.

The protest is denied.


James F. Hinchman
General Counsel

²In fact, the agency had not yet made an award to JANA when it decided to amend the solicitation. JANA's argument to the contrary is based on the fact that it incurred precontract costs in reliance on the agency's assertion that award was imminent. The fact that JANA incurred costs in expectation of a contract, however, does not itself support a conclusion that an implied-in-fact contract existed. See TMG & Partners, Architects, B-206077.2, June 14, 1982, 82-1 CPD ¶ 576. While an offeror may be entitled to recovery of those costs under a quantum meruit theory if the offeror has conferred a benefit upon the agency, we note that JANA did not confer any benefit upon the agency that would entitle it to recovery of costs. See id.