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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lobar Incorporated

File: B-247843.3

Date: August 31, 1992

Harry R. Harmon, Esq., Harmon & Davies, for the protester.
William C. Gray for G&C Enterprises, an interested party.
Lester Edelman, Esq., and Beth Kelly, Esq., Department of the Army, for the agency.
Paul E. Jordan, Esq., Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency correctly determined that it had improperly evaluated proposals based on less stringent requirements than those identified in the solicitation, agency properly took corrective action of amending the solicitation to reflect its actual minimum requirements and reopening negotiations with all offerors.

DECISION

Lobar Incorporated protests the agency's decision to reopen negotiations, after awarding a contract to Lobar, under request for proposals (RFP) No. DACA65-91-R-0041, issued by the Army Corps of Engineers. Lobar challenges the agency's determination that its evaluation of proposals was deficient and requests our Office to uphold the original award.

We deny the protest.

BACKGROUND

The RFP sought proposals to design and build a commissary at the Defense Distribution Region East, New Cumberland, Pennsylvania. This solicitation was conducted as a "one-step" procurement under which the successful offeror was to be awarded a contract for both design and construction of the facility. Offerors' proposals were to contain sufficient information to describe the project, that is, proposals were to include design efforts of approximately 10 to 35 percent of the total project. The RFP provided that, following award, the successful offeror must develop its

proposal drawings and specifications to provide a 100-percent design/construction package.

Section M of the RFP identified five technical evaluation criteria and stated that price was less important than any of the technical factors. Section M also stated that the evaluation process would consist of four stages: proposal compliance review; technical check; quality evaluation; and price/cost evaluation. The technical check stage of the evaluation was divided into "minimum" and "detailed" segments and was described in RFP Section M, paragraph 2(b) as follows:

> "The Minimum Technical Check is intended to identify those proposals which fail to meet the minimum submission requirements of the RFP. The minimum technical criteria can be found in Attachment III to the RFP. Following completion of the Minimum Technical Check, a Detailed Technical Check of each proposal will be conducted on those proposals which have passed the Minimum Technical Check. Items for which insufficient information has been provided will be identified." (Emphasis added.)

Section L of the RFP also referred to a "Proposal Submission Checklist" at Enclosure B of the RFP, stating: "THE 'PROPOSAL SUBMISSION CHECKLIST' [Enclosure B] LISTS THE REQUIRED SUBMITTAL INFORMATION." The requirements contained in Enclosure B were less stringent than the requirements of Attachment III; accordingly, there was some confusion as to which document stated the minimum requirements that proposals must address. However, Enclosure B specifically stated: "[a]ny conflict between checklists and the rest of the RFP will be resolved by . . . responding to the more stringent requirements."

Six offerors, including Lobar and G&C Enterprises, Inc., submitted proposals by the September 27, 1991, closing date. Lobar's proposal addressed only the requirements of Enclosure B; G&C's proposal addressed the more stringent requirements of Attachment III. Despite the provision of RFP Section M that "the minimum technical criteria can be found in Attachment III," the agency evaluators measured proposals only against the requirements of Enclosure B.

Two proposals were eliminated from the competition after the initial evaluation; the proposals of Lobar, G&C, and two other offerors were included in the competitive range. The agency did not conduct discussions with all offerors, but best and final offers (BAFOs) were subsequently solicited and evaluated in a manner similar to the initial evaluation. The agency determined that the four proposals were

essentially technically equal and that Lobar's proposal offered the lowest price. Accordingly, the agency awarded a contract to Lobar.

During a debriefing following award, G&C reviewed a portion of Lobar's proposal.[1] During its review, G&C identified several areas where Lobar's proposal allegedly failed to comply with the RFP, including its failure to address the more stringent requirements of RFP Attachment III. G&C subsequently filed a protest with our Office.

In reviewing G&C's protest, the agency concluded that, in performing the technical evaluation against only the requirements of Enclosure B, it had failed to evaluate proposals in accordance with the stated evaluation criteria. However, the agency also determined that its actual minimum needs were, in fact, met by proposals that addressed the less stringent requirements of Enclosure B. Accordingly, the agency determined that the solicitation was flawed and that offerors who had prepared proposals on the basis of the defective solicitation had been prejudiced.

The agency also determined that it had advised Lobar of a change in the heating system requirements for the facility to be built without similarly advising other offerors. In this regard, the solicitation specifically provided that offerors must provide a fuel oil back-up heating system for the facility. In its report to our Office, the agency stated:

> "Althougn negotiations were not held, Lobar, Inc., did ask the District if the back up fuel oil heating system could be deleted from its offer because it planned to use the gas system, which would make the oil heating system unnecessary. Contrary to the answer given at the Preconference meeting, the District advised that Lobar could delete this requirement from its proposal."[2]

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[1]At the time of G&C's debriefing, the portion of Lobar's proposal G&C reviewed had become incorporated into the contract and, thus, was considered by the agency to be a public document.

[2]Based on this statement, it appears the agency may have conducted discussions with Lobar without similarly conducting discussions with all offerors. Such action would be contrary to the requirements of Federal Acquisition Regulation (FAR) §§ 15.610, 15.611. In light of our decision that the agency's award to Lobar was otherwise improper, we need not resolve this issue.

In light of the flaws in the procurement, the agency proposed to take corrective action by reopening negotiations with all offerors and amending the RFP to clearly state its minimum requirements. Based on the proposed corrective action, we dismissed G&C's protest as academic on April 13, 1992. Lobar subsequently filed this protest with our Office asserting that the agency's initial evaluation and award determination were proper and that no corrective action should be taken.

DISCUSSION

Lobar first protests that the agency properly evaluated proposals against the requirements of Enclosure B rather than the more stringent requirements of Attachment III. Lobar notes that Section L-5(6) of the RFP, titled "Proposal Requirements and Submission Format," stated "THE 'PROPOSAL SUBMISSION CHECKLIST' (Enclosure B) LISTS THE REQUIRED SUBMITTAL INFORMATION," and argues that this statement effectively limited the submission requirements to those identified in Enclosure B.

The agency responds that the language of RFP Section M, when considered in relation to the provisions of Attachment III and Enclosure B, more reasonably indicated that Attachment III contained the minimum technical information to be included in the proposals. We agree.

In interpreting the meaning of a particular solicitation provision, we review the provision in relation to other provisions and in light of the general purpose to be accomplished. See NBI, Inc., B-220677, Feb. 5, 1986, 86-1 CPD ¶ 132. Here, Section M of the RFP stated:

> "The Minimum Technical Check is intended to identify those proposals which fail to meet the minimum submission requirements of the RFP. The minimum technical criteria can be found in Attachment III to the RFP." (Emphasis added.)

Attachment III further stated that "[p]roposals that fail to meet the minimum criteria set forth herein may not be considered for award of contract." Finally, Enclosure B specifically provided that "[a]ny conflict between check-lists and the rest of the RFP will be resolved by . . . responding to the more stringent requirements." Thus, read as a whole, the RFP reasonably put offerors on notice that their proposals must address the requirements contained in Attachment III.

Lobar also protests that the agency improperly relied on its changed heating system requirements as a basis for the proposed corrective action. Lobar does not dispute that it

was advised of the agency's changed requirements, nor that the contract awarded to Lobar did not require a back-up heating system. Nonetheless, Lobar asserts that since its proposal, in fact, offered to provide a back-up heating system,[3] there was no impropriety requiring corrective action. We disagree.

It is fundamental that offerors must be advised of a procuring agency's actual minimum requirements and the basis upon which their proposals will be evaluated. Unisys Corp., 67 Comp. Gen. 512 (1988), 88-2 CPD ¶ 35. Where an agency fails to advise all offerors of its minimum needs or fails to identify the basis on which proposals will be evaluated, it has failed to comply with law and regulation. Id. When an agency changes its requirements, either before or after receipt of proposals, it must issue a written amendment to notify all offerors of the changed requirements. FAR § 15.606(a); Universal Techs., Inc., B-241157, Jan. 8, 1991, 91-1 CPD ¶ 63.

Here, the RFP failed to adequately disclose the agency's minimum requirements and the evaluation criteria which the agency subsequently applied. Further, the agency specifically advised Lobar of its changed heating system requirements without amending the RFP or similarly advising other offerors and providing them an opportunity to revise their proposals. Since the agency has now determined that its minimum needs no longer require proposals to address the more stringent requirements of Attachment III or, specifically, to include a back-up heating system, it is proper for the agency to amend the RFP to reflect its actual requirements and to reopen negotiations to permit all offerors to submit proposals based on those requirements.

Lobar argues that even if the procurement was flawed there was no prejudice to other offerors since Lobar's price was approximately $1 million lower than the next low proposal, and that reopening negotiations is inappropriate because Lobar's price and proposal have been exposed. Lobar further argues that it is particularly inappropriate to include the two offerors whose proposals were eliminated from the competitive range in any reopened procurement.

In situations where an agency has conducted a flawed procurement, reopening negotiations even after an awardee's price has been exposed is appropriate in instances where a reasonable possibility exists that other offerors were prejudiced by the agency's error. See Unisys Corp., supra;

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[3]The BAFO submitted by Lobar referred to a back-up heating system separately and advised the agency of Lobar's price with and without the back-up system.

Cenci Powder Prods., Inc., B-234030, Apr. 17, 1989, 89-1 CPD ¶ 381. In this case, we find sufficient evidence of prejudice to all offerors.

First, by using Enclosure B in the technical evaluations, the agency effectively waived a significant portion of the requirements which offerors reasonably understood the RFP to require; further, during the procurement, the agency specifically determined that it no longer required offerors to propose back-up heating systems. Since Lobar prepared its proposal to comply with the less stringent requirements of Enclosure B and with knowledge that the agency no longer required a back-up heating system, the agency's evaluation of proposals against those lower requirements provided Lobar a substantial benefit not afforded other offerors. There is no way to determine what type of proposal G&C and the other offerors would have prepared had they understood that only the less stringent requirements needed to be addressed. Accordingly, the other offerors were prejudiced by the agency's failure to afford all offerors an opportunity to prepare proposals against the same requirements. See Unisys Corp., supra.

We are mindful of Lobar's price advantage. However, this fact alone does not eliminate the prejudice to other offerors. On this record, we cannot conclude that Lobar would have been the awardee had the other offerors known the actual evaluation criteria and the agency's minimum needs, and had the benefit of discussions to resolve deficiencies and prepare BAFOs responsive to the agency's needs.

Finally, reopening negotiations is not precluded because Lobar's price and proposal have been exposed. The agency has taken the appropriate ameliorative measure of requiring that any offeror wishing to participate in the new round of negotiations agree to the release of its price. Where the reopening of negotiations is properly required, the prior disclosure of an offeror's proposal does not preclude reopening negotiations because the possibility that a contract may not be awarded based on true competition on an equal basis has a more harmful effect on the integrity of the competitive procurement system than the otherwise improper disclosure of proprietary information. The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425.

The protest is denied.

for James F. Hinchman
General Counsel