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

Decision

Matter of: Manekin Corporation

File: B-249040

Date: October 19, 1992

Neil I. Levy, Esq., and J. Douglas Baldridge, Esq., Melrod, Redman & Gartlan, for the protester.
Gary F. Davis, Esq., and Jeffrey M. Hysen, Esq., General Services Administration, for the agency.
Barbara C. Coles, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency failed to advise protester that the agency believed that its proposed delivery schedule was deficient prior to the agency's request for best and final offers and, thus, agency failed to conduct meaningful discussions with the offeror. In order to show that the protester was prejudiced by the agency's failure to conduct meaningful discussions, the protester does not have to prove that it would nave received the award but for the agency's improper action, but rather that it would have had a reasonable chance of receiving award.

2. Where contracting agency improperly awarded a lease, but termination is not possible during the base period because the lease does not contain a termination for convenience clause, the protester is entitled to the costs of proposal preparation and of filing and pursuing its protest.

DECISION

Manekin Corporation protests the award of a lease to Bellemeade Development Corporation under solicitation for offers (SFO) No. 90-088, issued by the General Services Administration (GSA). The award is for a 5-year lease with a 5-year renewal option for 75,000 net useable square feet of office space to be used by the Department of Energy. Manekin contends that the agency improperly rejected its low-priced offer because the firm allegedly could not meet the delivery schedule specified in the solicitation and failed to apprise the firm about this concern during discussions. As a result, the protester argues that the agency failed to conduct meaningful discussions.

We sustain the protest.

The SFO was issued on September 4, 1990, and requested offers for the lease of 74,000 to 77,000 of net useable square feet of commercial office space to house a portion of the Department of Energy in suburban Maryland. The solicitation required, among other things, that: (1) the space be located generally in the Gaithersburg, Maryland, area; (2) that all offers be received by GSA on or before November 15, 1990; (3) that all offers remain open until the date of award; and (4) that the space be available for occupancy during the summer of 1991. The SFO also contained a schedule for space planning and build out of the tenant improvements prior to occupancy. The SFO essentially provided for award to the low, technically acceptable offeror.

After a series of extensions of the due date for initial proposals, Manekin submitted its initial offer to GSA. The initial offer proposed to lease a 75,000 net useable square foot office building to be constructed at the Bennington Corporate Center in Gaithersburg, Maryland. Although Manekin was proposing a "to be constructed" facility, the protester states that its project had reached a developmental state such that construction of the facility could commence upon award and could be accomplished within the same time frame as the space planning and construction of the improvements.

GSA amended the SFO 10 times and extended the required occupancy date initially to winter 1991-92 and subsequently to spring/summer 1992. On September 12, 1991, GSA conducted negotiations with Manekin based on its initial offer. During discussions, GSA clarified that the spring/summer 1992 delivery date contained in amendment No. 3 required delivery on or before September 21, 1992. During this meeting, Manekin submitted a construction plan for its proposed building which indicated that site plan approval and basic design work had been completed. Manekin also advised GSA that the single level design of the building made it time-efficient to construct and that the space could be built out within 10 months after award was made. GSA accepted these documents for review by its technical experts.

In separate letters to offerors dated October 1, GSA requested that all offers be reduced to the lowest possible price; that the proposal conform to all lease requirements; and that the offerors furnish a schedule for completion of any alterations needed to meet the agency's occupancy date. On October 9, Manekin submitted its best and final offer (BAFO) which proposed $14.42 per net useable square foot and also proposed to deliver the building on September 21, 1992. Bellemeade proposed $15.37 per net useable square foot.

GSA subsequently amended the solicitation on October 31 to delete its parking requirements and requested new BAFOs. Manekin submitted a second BAFO, which offered to lease the space to GSA for the same price of $14.42 per net useable square foot in addition to offering to deliver the building on September 21, 1992.

On June 2, 1992, Manekin contacted the contracting officer to inquire about the status of the procurement and learned for the first time that GSA had awarded the contract to another offeror. On June 10, Manekin received a letter from the contracting officer which stated that GSA rejected its offer based on the agency's belief that Manekin could not meet the delivery schedule in the solicitation. Manekin's protest to our Office challenging the rejection of its offer followed.

Manekin contends that the rejection of its proposal based on the agency's belief that the firm could not comply with the delivery date required in the solicitation was improper because GSA failed to conduct meaningful discussions to inform Manekin that the agency believed the firm's proposed delivery schedule was unrealistic and, in failing to do so, GSA did not provide Manekin with a meaningful opportunity to address the perceived deficiency. Manekin also argues that GSA failed to award the lease, in accordance with the SFO, to the offeror whose offer was the most advantageous to the government, that is, the low, technically acceptable offeror. As a result, Manekin requests that the contract with the awardee be terminated and that Manekin receive the award.

In negotiated procurements, contracting officers generally are required to conduct discussions with all offerors whose proposals are within the competitive range. 10 U.S.C. § 2305(b)(4)(B) (1988 and Supp. III 1991); Federal Acquisition Regulation (FAR) § 15.610. Although discussions need not be all-encompassing, discussions are required to be meaningful; that is, an agency is required to point out weaknesses, excesses or deficiencies in proposals unless doing so would result in technical leveling. FAR § 15.610(c), (d); Mikalix & Co., 70 Comp. Gen. 545 (1991), 91-1 CPD ¶ 527; URS Int'l, Inc., and Fischer Eng'g & Maint. Co., Inc.; Global-Knight, Inc., B-232500; B-232500.2, Jan. 10, 1989, 89-1 CPD ¶ 21. Discussions cannot be meaningful if an offeror is not advised, in some way, of the weaknesses, deficiencies or excesses in its proposal that must be addressed in order for the offeror to be in line for award. See Mikalix & Co., supra; Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333.

GSA responds to the protester's allegations by admitting that "it did not inform the protester of the deficiency in its proposed schedule." In addition, GSA states that while "FAR [§] 15.610(c)(2) requires the contracting officer to '[a]dvise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the [g]overnment's requirements,' GSA did not inform the protester of the defect in the delivery schedule until after the protester submitted [both BAFOs]." As a result, GSA now concedes that "[n]otification of the flaws in the offer during the course of the negotiations would have allowed the protester time either to revise [its proposed construction] schedule so that it met the requirements set forth in the SFO or to withdraw its offer."

GSA also concedes that there was another error in the procurement process. In this regard, GSA states that even though the SFO required an occupancy date of spring/summer 1992, GSA changed the SFO after BAFOs were received to allow for occupancy in fall 1992. GSA states that it "should have issued an amendment to the SFO and reopened [BAFOs]."

Notwithstanding its concession that notification of the perceived flaws in Manekin's offer during the course of the negotiations would have allowed the protester an opportunity to revise its proposal so that it might have persuaded GSA that it met the requirements in the solicitation, GSA argues that the agency would not have been able, in any event, to award the lease to Manekin. According to GSA, the offer contained three deficiencies. These alleged deficiencies are as follows: (1) the protester's proposed approach would have required between 15 and 18 months beyond the time frame established in the SFO for delivery; (2) the offeror did not submit the lowest priced offer; and (3) the offer was substantially above the fair annual rental set forth in the appraisal.

GSA relies on the results of an in-house review of Manekin's proposed schedule as justification for its belief that the protester would not have been able to meet the agency's delivery schedule even if GSA had informed the protester that its proposed approach was believed unrealistic. As stated above, the agency reports that Manekin's proposed schedule was particularly "light on the time for shell construction [and that] [a] more accurate [time frame] for base building construction is 15 [to] 18 months" rather than the 10 months that the protester proposed.

The protester challenges the agency's conclusion and points out that it has constructed over 3,000,000 square feet of space similar to the building it proposed here in 10 to 12 months. The protester states that this time frame is typical for suburban office buildings as evidenced by the

fact that Bellemeade constructed its proposed building in 11 months.

As discussed below, we are not persuaded by the agency's attempt to justify its failure to advise Manekin about its perceived deficient construction schedule on the ground that the protester was not prejudiced by the failure because the protester would not have received award even if the agency had informed it about the deficiency. To establish prejudice, an offeror is not required to prove--contrary to the agency's position--that it would have received the award but for the agency's improper action, but rather that it would have had a reasonable chance of receiving the award. URS Int'l, Inc., and Fischer Eng'g & Maint. Co., Inc.; Global-Knight, Inc., supra.

First, the agency has not rebutted the protester's contentions or otherwise supported its blanket--after-the-fact--contention that the protester would not have been able to establish that its proposed schedule was realistic or alter its approach and schedule in order to timely construct the building. In fact, the contracting officer represents that Manekin was included in the competitive range "to allow it sufficient opportunity to prove it could meet the delivery date." Yet, the agency first denied Manekin the opportunity to address its concern and then unilaterally afforded the awardee the opportunity to have 3 additional months to satisfy the requirements. Manekin submitted its construction plan as early as September 12, 1991. The plan stated that site approval and basic design work for the building had been completed; Manekin also informed GSA that the single level design of the building it proposed made it time-efficient to construct. GSA accepted these documents so its technical experts could review them. The contracting officer included Manekin's proposal in the competitive range after the agency received and had the opportunity to review it. That being so, GSA was required to conduct sufficient discussions to lead Manekin to GSA's area of concern about its proposal, so that Manekin would have the opportunity to revise, improve or explain the feasibility of its construction schedule such that it would have a reasonable chance for award. See id. Accordingly, we find that the protester was prejudiced by the agency's failure to inform the protester of the perceived deficient construction schedule and, thus, was precluded from having a reasonable chance for award, since it did not have an opportunity to address this deficiency.

Second, after the agency made award to Bellemeade and the protester challenged the award, the agency conducted a net present value analysis of Manekin's proposed offer. Based on its analysis of Manekin's proposed price, the agency now argues that the protester was not prejudiced by its failure

to conduct meaningful discussions because the protester's offer was not the low-priced offer. The solicitation provided that "[a]fter offers are evaluated for consideration on the basis of their ability to meet handicapped requirements, awards will be made to th[e] offeror whose offer is the lowest based on the annual per net useable square foot cost . . . over the term of the lease, including any option periods." Manekin's proposed price per square foot was $14.92 and it stated that "in the event the government does not pay lump sum for the special requirements, the offeror shall amortize the special requirements over the lease term at a 0.25 constant."

In its calculation of Manekin's net present value, GSA factored in Manekin's amortization constant as an annual amortization rate rather than an amortization constant. Manekin argues that this miscalculation resulted in its net present value being higher than the amount the offeror intended. The protester states that the agency incorrectly calculated the protester's offer and subsequently erroneously added $5,971 to its proposed annual rent rather than the $3.97 which it was supposed to add. Properly calculated, the protester states that the protester's net present value was less than the net present value of the Bellemeade's offer.

The agency does not attempt to refute the protester's allegations here; rather, the agency merely states that:

> "[T]his is not the central issue of the instant protest [because] [e]ven if this point were to be proven by the protester, the protester would still not have been the recipient of the award because it did not meet the minimum requirements of the SFO and because the offer was substantially above the appraisal."

While the agency has refused to abandon the argument concerning whether Manekin was the low-priced offeror, it has not submitted any convincing evidence to rebut the protester's contention that the agency miscalculated the protester's net present value. In the absence of any evidence to show otherwise, we have no basis to find that the agency's calculation was correct or that the protester was not the low-priced offeror.

Finally, the agency argues that the protester was not prejudiced by its failure to conduct meaningful discussions with the firm on the ground that the agency discovered--while the protest was pending here--that the protester's proposed per square foot rent is more than 10 percent above the appraised fair market rent value of the protester's property. We simply note that the agency's argument is based on its

miscalculated net present value of the protester's proposed price and that the protester's price is in fact lower than the awardee's price.

REMEDY

While our recommendation under these circumstances normally would be for another round of properly conducted discussions and a fair evaluation of the BAFOs received, with a view to possible termination for convenience of Bellemeade's award, depending on the outcome, this remedy is not feasible because the lease does not contain a termination for convenience clause. In these circumstances, absent a termination for convenience clause, we cannot recommend termination of an awarded contract, even if we sustain the protest and find the contract award improper. Peter N.G. Schwartz Cos. Judiciary Square Ltd. Partnership, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353. The protester also requests a recommendation that GSA not exercise the 5-year option to extend the lease. We do not believe that such a recommendation would be appropriate. We cannot assess the relative costs to the agency of ending its occupancy so far in the future, or the potential benefit to the protester because it is highly unlikely that the protester's property still will be unoccupied 5 years from now. Since there is no basis for termination of the lease, we find that Manekin should recover its proposal preparation costs and the costs of pursuing its protest, including attorneys' fees.

The protest is sustained.

for James F. Hinchman
Comptroller General
of the United States