Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eigen

File: B-249860

Date: December 21, 1992

Charles R. Farrar, Jr., Esq., Roach & Farrar, for the protester.
Gary G. Damon, Esq., for Willis E. Nelson, an interested party.
Ernest A. Tordsen, Department of Agriculture, Forest Service, 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

Agency decision to award lease for office space to lower-priced offeror was improper where (1) record indicates that evaluation was inconsistent with terms of solicitation and does not support agency's conclusion that awardee offered to comply with solicitation requirements, and (2) cost/technical tradeoff decision was not based on actual price difference between offers.

DECISION

Eigen protests the award of a lease to Willis E. Nelson under solicitation for offers (SFO) No. R5-92-08, issued by the Department of Agriculture, Forest Service, for office space in Nevada City, California. Eigen alleges that the award was improper because it was based on an improper cost evaluation, and because Nelson's building does not meet the requirements of the SFO.

We sustain the protest.

The SFO contemplated award of a fixed-price contract for the lease of 21,545 square feet of office space for the Tahoe National Forest Supervisor's Office, for a period of 5 years with a 5-year renewal option. The SFO provided for award to the offeror (1) whose proposal was technically acceptable and (2) whose technical/cost relationship was the most advantageous to the government. In this regard, the SFO stated that price was as important as technical factors.

The technical factors, listed in descending order of importance, were as follows:

Most important	Handicapped facilities Environment and safety Energy efficiency Susceptibility of design Lateral load requirement
Very important	Location Public parking Organizational impact
Important	Occupancy date Communication system Community

With regard to the technical evaluation, the SFO required that offered buildings comply with certain standards, including the Uniform Federal Accessibility Standards (UFAS) for new construction, 41 C.F.R. § 101-19.6, Appendix A (1992), and various California state fire safety regulations and energy efficiency standards. In addition, the SFO contained requirements for the number of restroom fixtures on each floor of the building based on the number of building occupants, and set forth specifications for heating, ventilating and air conditioning (HVAC) systems. The SFO contemplated that building alterations might be necessary to meet these standards and regulations, and required (1) that detailed plans--drawings and/or a narrative description of the alterations--be submitted with proposals; and (2) that any alterations be completed prior to the effective date of the lease. Acceptability of an offered building and its systems was to be established by a joint inspection by the government and the lessor prior to government occupancy.

The agency received proposals from Eigen, Nelson (the current lessor) and one other offeror. A technical evaluation panel reviewed the proposals, assigning adjectival ratings of excellent, good, acceptable, or unacceptable for each technical evaluation factor. Eigen's proposal of a new building was rated excellent or good under all of the most important factors. Nelson's offer was rated unacceptable under the handicapped accessibility factor, as the facility did not comply with the UFAS as required by the SFO. In particular, the agency noted that Nelson planned to furnish a wheelchair lift instead of the required elevator, which Nelson indicated by crossing out the term "elevator" and writing in "chair lift" on Department of Agriculture form 1217. In addition, the agency determined that modifications would be required for both the parking lot and an entrance ramp (to meet UFAS grade specifications),

restrooms would need to be reconfigured to include accessible facilities, and an elevator would need to be installed.

Notwithstanding these deficiencies, the evaluation panel determined that Nelson's unacceptable offer could be made acceptable through discussions. Accordingly, the agency asked Nelson for "a letter stating that your building will fully meet the Uniform Federal Accessibility Standards." The discussions also addressed the agency's other areas of concern, including restroom ratio, fire safety, and HVAC efficiency. In response, Nelson furnished a letter stating that "the building will meet the Uniform Federal Accessibility Standards," and that it would comply with the restroom and fire safety requirements. A subsequent letter, submitted before best and final offers (BAFO) were due, offered to replace HVAC units that did not meet the SFO requirements.

Based on Nelson's representations that the building would meet the UFAS, the agency determined that Nelson's offer was technically acceptable. The agency then performed a present value analysis of Nelson's and Eigen's offered prices; Nelson's present value cost per square foot was $8.67, versus $11 for Eigen. In selecting Nelson for the award, the agency concluded that "[b]ased on the difference in cost from Eigen's $11 to Nelson's $8.67 and Mr. Nelson's proposal being acceptable in terms of the technical factors, the difference in technical rankings does not justify the additional $2.33 per square foot." Upon learning of the award, Eigen requested and received a debriefing. At the debriefing, Eigen pointed out an error in the agency's present value analysis; the agency agreed that Eigen's present value cost per square foot should have been $9.32 instead of $11.[1] Notwithstanding the error, the agency apparently concluded that reversal of the award decision was not warranted.[2] Eigen then filed this protest.

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[1]In fact, our review of the agency's present value calculations shows that Eigen's present value cost per square foot is actually $9.29, not $9.32. We calculated this figure using the agency's formula for a present value analysis based on a rental rate which differs each year, substituting the correct parking figures for the incorrect ones the agency had used.

[2]Although the record indicates that the agency notified the Regional Forester of the error, the record does not indicate that the agency reconsidered the award decision in light of the new present value figures.

Eigen contends that, in finding Nelson's proposal technically acceptable, the agency improperly relied upon Nelson's blanket offer to bring the building into compliance with the UFAS, without considering either the feasibility of the necessary alterations or the potential problems with enforcing Nelson's general agreement to perform them. For example, Eigen asserts, Nelson never expressly agreed to install the required elevator, and the contract document does not expressly obligate Nelson to install the elevator or to make other specific alterations. Eigen maintains that the alterations necessary to bring the building into compliance with the SFO requirements would take far longer than Nelson proposed, and speculates that the agency will ultimately waive the requirements when Nelson fails to make the required modifications. Eigen also challenges the agency's cost/technical tradeoff decision favoring Nelson's lower price over its own technical superiority.

In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is unacceptable and therefore may not form the basis for award. Picker Int'l, Inc., 68 Comp. Gen. 265 (1989), 89-1 CPD ¶ 188.

Nelson's proposal clearly did not conform to the terms of the SFO. The record shows that extensive alterations--characterized as "massive" by the agency--would be necessary to bring Nelson's building into compliance with various solicitation requirements, including the UFAS. As discussed, the required modifications included the installation of an elevator meeting UFAS standards; alteration of restrooms to meet both the required facilities-to-occupants ratio in the solicitation and the UFAS wheelchair turning circle requirement; improvements to correct fire code violations; and replacement of HVAC units to meet SFO and California standards. Despite the fact that the agency recognized the need for these alterations, Nelson's proposal did not comply with the SFO requirement for detailed plans showing or explaining how those alterations would bring the offer into compliance with the solicitation requirements. Nelson did not submit any plans or explanation with its initial proposal, and in its BAFO, in response to the agency's request for a blanket offer of compliance, merely confirmed its intent to comply with the solicitation requirements with statements such as "the building will fully meet the Uniform Federal Accessibility Standards," "restrooms will meet ratio in SFO," and "downstairs will be remodeled to meet state and local codes." The agency's conclusion that Nelson's offer was acceptable was based on these blanket offers of compliance. In other words, the agency waived the SFO requirement for a detailed plan for the alterations, and thereby effectively ignored the SFO's basis for evaluating the proposals.

As a result of the agency's disregarding the evaluation scheme--i.e., evaluating Nelson's proposal without the required detailed information--the agency had an insufficient basis for concluding that Nelson's proposal was technically acceptable. While the SFO clearly contemplated that the agency would include in the evaluation its determination as to the sufficiency of proposed alterations and the feasibility of making them, the absence of a detailed treatment of necessary alterations made it impossible for the agency to make this determination at least with regard to the areas of Nelson's proposal initially deemed deficient, including compliance with the UFAS. Where a solicitation requires submission of detailed technical information deemed necessary for evaluation purposes, a blanket offer of compliance generally is not sufficient to meet this requirement. See AEG Aktiengesellchaft, 65 Comp. Gen. 418 (1986), 86-1 CPD ¶ 267; McKenna Surgical Supply, Inc., 56 Comp. Gen. 531 (1977), 77-1 CPD ¶ 261.

Further, it is not clear that Nelson's blanket offer, even without detailed information, covered all requirements. As Eigen points out, for example, there was no indication in Nelson's contract of how the existing restroom facilities would be reconfigured to meet the ratio and accessibility requirements.[3] There also was no indication that Nelson changed its initial offer of a wheelchair lift to an elevator as required. In fact, there is some evidence in the record that Nelson did not intend to offer an elevator. In this regard, although Nelson did not cross out the term "elevator" on the standard form included in its BAFO, it did not expressly withdraw its prior exception to the requirement, and the form continued to state the maintenance cost ($600) associated with the chair lift in its initial proposal.

The absence of detailed information also precluded the agency from considering the likelihood that Nelson could complete the necessary alterations within the required time frame. While Nelson's BAFO stated that its alterations would be completed within 60 days after execution of the lease (which would be consistent with the SFO requirement

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[3]Significantly, Nelson has stated in his response to Eigen's protest that he will provide adequate maneuvering clearance in two of the restrooms by removing one toilet from each room. However, this scheme will further reduce the facilities-to-occupant ratio, which Nelson's offer had promised to correct; Nelson's protest response does not address this requirement. The record thus indicates that Nelson's blanket offer of compliance in fact did not contemplate meeting this requirement.

that alterations be completed by the October 1 effective lease date), there is no indication that the agency considered whether this was feasible. There is no evidence in the record that the agency considered how long such extensive modifications should take, and Nelson did not furnish any information supporting its assertion that the work could be completed in 2 months. Considering that the proposed alterations were extensive and that Nelson proposed to do the work almost exclusively during evenings and weekends to avoid disrupting agency activities, we think the agency's conclusion that Nelson could complete the work in 2 months was unsupported by the record given the absence of the required detailed information on the proposed alterations. Indeed, the record shows that, as Eigen speculated would happen in its protest, the agency did in fact extend the deadline for Nelson to complete the alterations to December 31. In the letter to Nelson extending the deadline for alterations, the agency also stated that any modifications not completed by December 31 would be completed by the government with the costs therefor deducted from the monthly rental.

We conclude that Nelson did not furnish the detailed alteration evaluation information required by the SFO, and that by waiving this failure the agency made it impossible to evaluate Nelson's proposal for compliance with the specific requirements of the SFO; the SFO contemplated an evaluation based on this detailed information, not on blanket offers of compliance. See AEG Aktiengesellchaft, supra.

We also find that the agency's cost/technical tradeoff decision was unreasonable. As discussed above, the decision that Eigen's technical superiority was not worth its higher cost was grounded on the agency's erroneous calculation of a difference between Eigen's and Nelson's offers of $2.33 per square foot; there is no indication in the record that the agency reconsidered its award decision after learning that the actual present value cost difference between the two offers was only .65. Given the solicitation's equal emphasis on technical and cost factors, and Eigen's clear technical superiority, the cost/technical tradeoff decision could have been different if the agency had taken into account the actual price difference between the two offers. See Sonshine Enters., B-246268, Feb. 26, 1992, 92-1 CPD ¶ 232 (agency improperly failed to consider awardee's price contingencies in tradeoff decision). Accordingly, we sustain the protest.

While our recommendation under these circumstances normally would be either reevaluation of proposals or termination of Nelson's contract for the convenience of the government, this remedy is not feasible in this instance because the

lease does not contain a termination for convenience clause. We have held that, absent such a clause, we will not 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. We find Eigen entitled to the recovery of its proposal preparation costs and the costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d); see Manekin Corp., B-249040, Oct. 19, 1992, 92-2 CPD ¶___.

The protest is sustained.

for Milton J. Socolar
Comptroller General
of the United States