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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tower Corporation

File: B-254761.3

Date: March 8, 1994

Matthew S. Simchak, Esq., Wiley, Rein & Fielding, for the protester.
Thomas J. Madden, Esq., Venable, Baetjer, Howard & Civiletti, for Larken, Inc., an interested party.
Stephen Lee, Esq., Office of Personnel Management, for the agency.
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of amendment to solicitation which changed a mandatory location requirement to an evaluation factor is untimely when not filed by the next closing date for receipt of proposals following amendment. Protester's agency-level protest was not timely because it was filed as part of protester's proposal submission.

2. Award to offeror with higher technical rating and lower cost than that proposed by the protester is unobjectionable where evaluation was conducted in accordance with amended solicitation and was reasonably based.

DECISION

Tower Corporation, d/b/a Executive Tower Inn, protests the award of a contract to Larken, Inc., d/b/a Holiday Inn Southeast, under request for proposals (RFP) No. OPM-RFP-93-03649, issued by the Office of Personnel Management (OPM) for certain leased space and services at the OPM Western Management Development Center (WMDC). Tower challenges the propriety of OPM's amendment of the RFP and the agency's decision to award to Larken. Tower seeks either cancellation and reissuance of the solicitation or award of the contract.

We dismiss the protest in part and deny it in part.

BACKGROUND

The WMDC is located in Denver, Colorado and provides policy and management training for senior-level federal executives and managers. The RFP, issued April 26, 1993, contemplated award of a fixed-price contract for the lease of training and office space and food and lodging services for the WMDC for a base year with up to four option years. The lease term was intended as an interim arrangement while OPM procured a permanent facility in the Denver area.

The RFP provided for evaluation of technical proposals on the basis of four factors, listed in descending order of importance: Location and Environment; Training Facility; Lodging and Food Services; and Organizational Capabilities. Award was to be made to the responsible and technically acceptable offeror whose proposal was determined to offer the best value to OPM considering primarily the offeror's technical merit, with cost and other factors considered.

Of the 55 firms sent copies of the RFP, only Tower and Larken submitted proposals by the June 2, 1993, closing date. The technical evaluation panel reviewed both proposals and conducted site visits of the facilities proposed. The evaluators concluded that Larken's proposal was acceptable as submitted and that Tower's proposal was conditionally acceptable. Among other matters, the evaluators found that Tower's proposal was general in nature and did not specifically identify the space offered for lease. However, since Tower was the incumbent contractor for more than 10 years, the panel considered Tower's proposal based on what the protester had provided under the existing contract.

Following receipt of the evaluators' report, the contracting officer determined that neither offeror met the following RFP mandatory location/environment requirement:

> "The location and surrounding environment for the WMDC must be attractive and conducive to a learning environment and away from heavy traffic, interstate highways, railroads, airport noise, commercial strip development, industrial and/or warehousing areas, highway on/off ramps and similar activities and situations that could adversely impact on the quality of the training experience."

Larken's facility was located next to an interstate highway and Tower's facility was bounded by busy city streets. Since the RFP provided that offerors whose proposed facilities failed to meet this or other mandatory requirements would be eliminated from the competition, the

contracting officer considered the adverse ramifications of canceling the solicitation: disruption of scheduled training upon the expiration of Tower's contract on September 30. The contracting officer determined that amendment of the RFP and continuation of the procurement with the existing offerors was in the government's best interests, and on July 12 the Competition Advocate of OPM executed a Justification for Other than Full and Open Competition (JOFOC).

On July 16, OPM issued amendment 0004, which changed the mandatory location/environment requirement to an evaluation factor. That same day, OPM also sent each offeror written discussion questions. On July 19, OPM conducted telephone discussions with the offerors, and on July 22, both Tower and Larken submitted revised proposals in response to the discussion questions. Included in Tower's submission was a challenge to the propriety of amendment 0004 and its effect on the competition. The agency treated this challenge as an agency-level protest.

After the conclusion of continued discussions, both offerors submitted best and final offers (BAFOs) on August 6. After reviewing the revised and BAFO proposals, the evaluators determined that both offerors' proposals were acceptable, but were not entitled to any increased score. The agency also evaluated the BAFO prices and conducted a real estate appraisal of the offerors' facilities. Based on these evaluations, the contracting officer concluded that Larken's proposal, with its higher technical rating and lower price, was most advantageous to the government. On August 27, OPM awarded the contract to Larken, and denied Tower's protest. After learning of the award and the denial of its protest, Tower filed a protest with our Office on September 3. Performance of the contract was not stayed, based on the agency's determination that the best interests of the government required continued performance by Larken.

AMENDMENT 0004

Tower first challenges the propriety of amendment 0004 to the RFP which changed the location requirement to an evaluation factor. Since only the two offerors which responded to the original RFP were included in the continued competition, Tower argues that OPM avoided the requirements for full and open competition under the Competition in Contracting Act of 1984, 41 U.S.C. § 253 et seq. (1988).[1]

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[1]Tower has protested the exclusion of other offerors which might have participated, had they known of the amendment. However, Tower is not an interested party to raise this
(continued...)

It also contends that the change made by Amendment 0004 was so substantial that OPM was required to cancel the solicitation. See Federal Acquisition Regulation § 15.606(b)(4).

The protest on these issues is untimely. Although Tower asserts that the protest is timely because it protested here within 10 working days of the denial of its agency-level protest, where, as here, a protest is first filed with the contracting agency, a subsequent protest to our Office will be considered only if the initial protest to the agency was filed within the time limits for filing a protest with our Office. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1993); Tandy Constr., Inc., B-238619, Feb. 22, 1990, 90-1 CPD ¶ 206. Tower does not meet that requirement.

Tower's protest concerns an alleged solicitation impropriety incorporated into the RFP after the initial closing date. Such improprieties must be protested not later than the next closing time for receipt of proposals following their incorporation in the solicitation. 4 C.F.R. § 21.2(a)(1). Amendment 0004 was issued on July 16, and Tower first protested the propriety of the amendment in its revised proposal, submitted on July 22, the closing date for receipt of such revisions. A protest included in a proposal does not constitute a timely pre-closing time protest to the agency, since there is no requirement that an agency open or read proposals on or before the closing date, when a protest of this type must be filed. Paramount Sys., Inc., B-229648.2, Dec. 30, 1987, 87-2 CPD ¶ 646. The fact that OPM considered the untimely protest on the merits does not alter this result; our timeliness regulations may not be waived by action or inaction on the part of the contracting agency. WildCard Assocs., B-241295; B-241300, Oct. 19, 1990, 90-2 CPD ¶ 321. Thus, since Tower's initial protest to OPM was untimely, its subsequent protest to our Office is also untimely.

Tower attempts to avoid this untimeliness rationale by arguing that its challenge to amendment 0004 was not a protest since it was not identified as a protest and did not request relief. Tower asserts that it was unaware of the amendment's impact until after award. According to Tower, its protest is timely because it was filed within 10 days of when it learned that only two offerors were included in the competition and that the other offeror, Larken, should have been excluded based on the original location requirement. We find Tower's arguments unpersuasive.

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issue on their behalf. See Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275.

First, as noted above, Tower originally represented that it considered its filing with the agency to be a protest. Second, even absent Tower's identification of its filing as a protest, we believe OPM reasonably considered Tower's complaints to be a protest since Tower's expressions of dissatisfaction with amendment 0004 implicitly sought corrective action by the agency. See American Material Handling, Inc., B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183.

Third, Tower's criticism of the amendment evidences its early knowledge of the protest grounds. In its revised proposal, Tower noted OPM's position that the amendment was necessary to allow Tower's continued inclusion in the competition: its location in a "heavy traffic" area otherwise would have eliminated Tower's proposal. Tower disputed the agency's position and observed that its 10 years of successful operation indicated that its premises were "conducive to a learning environment." Tower also observed that the amendment, "if deemed to be in effect," would allow offerors to remain in contention who would otherwise have been eliminated. Alternatively, Tower noted that had the amendment been issued prior to the response date, other potential offerors would have been in a position to enter the competition. Tower concluded that the "net effect of the amendment appear[ed] to unfairly change the 'playing field.'" These are essentially the same untimely grounds Tower has raised before our Office.[2]

THE EVALUATION

Tower next argues that the agency misevaluated Tower's and Larken's proposals with regard to the issue of traffic. Tower contends that its proposal should have been scored higher and that Larken's proposal should have been downgraded more than it was.

In reviewing a protest of allegedly improper evaluations, we will not reevaluate proposals; the evaluation of proposals is within the discretion of the contracting agency, since it is responsible for defining its needs and for deciding on the best method of accommodating those needs. Engineering Mgmt. Resources, Inc., B-248866, Sept. 29, 1992, 92-2 CPD

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[2]Tower also alleges the existence of various flaws in the JOFOC which make it illegal and ineffective. While Tower argues that it was unaware of the flaws in the JOFOC until it reviewed the document, this protest ground is essentially a restatement of Tower's untimely challenge to the agency's decision to issue an amendment instead of canceling the solicitation. Thus, we conclude that this protest ground also is untimely. See Golden Mfg. Co., Inc., B-255347, Feb. 24, 1994, 94-1 CPD ¶ ___.

¶ 217; TLC Sys., B-243220, July 9, 1991, 91-2 CPD ¶ 37. However, we will examine the record to determine whether the evaluators' judgments were reasonable and in accord with the listed criteria. Id. A protester's mere disagreement with the agency does not render the evaluation unreasonable. Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115.

The record shows that Tower's facility is bordered on three sides by four-lane, one way streets, in downtown Denver. The daily traffic volume on these streets ranges from 6,800 to 10,000 vehicles and a block away is a street carrying 14,100 vehicles daily.[3] Larken's facility has significantly higher traffic volumes (located at the intersection of an interstate and four-lane highway with daily traffic volumes ranging from 62,800 to 95,000 vehicles on each road). In evaluating proposals on overall location/site quality and attractiveness, among other aspects, the evaluators considered whether traffic and similar activities "could adversely impact on the quality of the training experience." The evaluators gave Tower's proposal 680 points out of a possible 800 and did not mention any adverse impact from traffic noise. They gave Larken's proposal 560 points on this subfactor, but specifically noted that no road noise was apparent during their visit to the Larken facility. With regard to environment and impact on training, the evaluators concluded that both proposals were acceptable.

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[3]Based on these figures, Tower also protests the agency's initial determination that its facility was located in a "heavy traffic" area. This also is untimely. To the extent this is properly viewed as encompassed by Tower's Amendment 0004 protest, it is untimely for the reasons stated above. To the extent it can be viewed as an independent basis for protest not involving a solicitation impropriety, it is untimely because while it was apparently timely filed with OPM within 10 working days of Tower's learning of the agency's initial evaluation, the subsequent protest to our Office was not filed within 10 working days of "actual or constructive knowledge of initial adverse agency action," as required by 4 C.F.R. § 21.2(a)(3). Subsequent to the filing of the protest with OPM, but prior to the agency's written denial of the protest, OPM issued a request for BAFOs on July 30, and Tower submitted its BAFO on August 6. The request for BAFOs was prejudicial to Tower's protest position because it made clear that the agency was continuing to conduct the procurement in accordance with Amendment 0004 instead of returning to its original solicitation approach, and thus constituted "adverse action." See Consolidated Indus. Skills Corp., B-231669.2, July, 15, 1988, 88-2 CPD ¶ 58. Tower did not file its subsequent protest to us within 10 days of learning of that adverse action.

From our review of the record, we find no basis to conclude that these evaluations are unreasonable. The evaluations were based on review of proposals and site visits and resulted in a higher score for Tower's proposal on this subfactor. In this regard, while Tower argues that Larken was scored too high on this subfactor, it does not suggest what score would be more appropriate or why. Likewise, it does not suggest any specific basis for increasing its score. In short, Tower has presented no evidence to establish that the evaluators' assessment was unreasonable; in essence, Tower's contentions merely reflect disagreement with the agency's evaluation and do not establish that the evaluation was unreasonable. Litton Sys., Inc., supra.

Even assuming there was some error in scoring, it does not appear that the award decision would have been affected. If Larken's proposal had been awarded 0 points for location/site quality and attractiveness, its combined score on all evaluation criteria would be reduced from 4,928 points to 4,368 points, still more than 200 points higher than the protester's proposal score of 4,108 points. Moreover, if Tower's proposal had received the maximum possible 800 points, its total would have been 4,228 points. Thus, even with such an extreme revision to the scoring, Larken's proposal would apparently remain technically superior to Tower's proposal. Since Larken's proposal represented a savings of approximately $3 million, it appears that the agency would have awarded Larken the contract in any event.

The protest is dismissed in part and denied in part.

Robert P. Murphy
Acting General Counsel