



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ogden Government Services--Protest and
Request for Modification of Remedy; Tate
Facilities Services, Inc.--Protest

File: B-253350.3; B-253350.4; B-253350.5

Date: April 4, 1994

Donald E. Barnhill, Esq., and Joan K. Fiorino, Esq., East & Barnhill, for Ogden Government Services; and William D. Blakely, Esq., and Gretchen L. Lowe, Esq., Piper & Marbury, for Tate Facilities Services, Inc., the protesters. Laura A. Naide, Esq., National Archives and Records Administration, for the agency. Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's terminating contract and reopening acquisition to provide offerors an opportunity to submit revised proposals --rather than leave the award intact or make award to another offeror--is appropriate where agency determined after award that the awarded contract was based on an approach which was not prohibited under the solicitation, but did not reflect the agency's actual minimum needs.

DECISION

Ogden Government Services and Tate Facilities Services, Inc. protest the National Archives and Records Administration's (NARA) actions under request for proposals (RFP) No. NAMA-92-N7-P-0020, for operation and maintenance services at NARA's headquarters building in Washington, D.C. Both protesters argue that NARA improperly terminated contracts awarded them under the RFP; each argues that it was entitled to the award. In addition, Ogden requests modification of the recommendation in our decision Ogden Gov't Servs., B-253350, Sept. 14, 1993, 93-2 CPD ¶ 161, in which we sustained Ogden's protest against NARA's rejection of its offer as materially unbalanced and recommended that the agency reevaluate cost proposals.

We deny the protests and the request for modification of our earlier recommendation.

The original RFP required firms to submit technical and pricing proposals for two groups of services for a base year and four 1-year options. The first group of services consisted of NARA's operation and maintenance requirements for the 5 years. The second group of services consisted of maintenance to utility systems, and heating, ventilation and air conditioning systems (collectively referred to as the USRO systems). For this second group of services, firms were required to prepare proposals based on three different levels of effort. The first level of effort (option 3a) called for providing the USRO systems services during one 8-hour shift per day, 7 days per week. The second level of effort (option 3b) called for providing these services for two 8-hour shifts per day, 7 days per week, and the third level of effort (option 3c) called for providing the USRO systems services 24 hours a day, 7 days per week. The RFP provided that, in evaluating cost proposals, NARA would select from among these three options. Award was to be made on a best value basis, with technical considerations being more important than price, although price could become determinative for award purposes where two or more proposals were deemed technically equal.

NARA received nine initial proposals, eight of which NARA found to be acceptable and technically equal; the award decision was therefore based on price. NARA determined that option 3c was the most likely scenario, and thus used the firms' option 3(c) prices in the evaluation. This resulted in Ogden's being determined the apparent successful offeror. However, because Ogden's option 3c price was lower than its option 3b price, the contracting officer ultimately determined that Ogden's pricing as between the three options was materially unbalanced. The agency then made award to Tate as the lowest-priced firm eligible for award.

Ogden argued in its protest that its proposal was not unbalanced and that its rejection therefore was improper, since its lower option 3(c) price was due to an innovative personnel configuration by which Ogden was able to eliminate one full-time employee. For option 3c, Ogden eliminated two of the base contract's three general mechanics and proposed to use two USRO engineers and a general mechanic (it also upgraded the qualifications of the project engineer/lead mechanic to make that employee a chief engineer); Ogden relied, in part, on its USRO engineers to perform some of the base contract requirements. We sustained Ogden's protest, finding that it was Ogden's unique approach (to which, the record indicated, the evaluators had not objected), not unbalancing, that explained Ogden's lower option 3(c) price. We recommended that NARA reevaluate cost proposals after first redetermining which combination of the three options it was most likely to exercise, and make award to the low-priced firm.

In its reevaluation, NARA found that Ogden's price was slightly lower than Tate's over the life of the contract. NARA therefore terminated Tate's contract on November 9, 1993, and made award to Ogden. Shortly thereafter, however, NARA determined that Ogden's alternate staffing plan under option 3c in fact was unacceptable--that Ogden's approach of eliminating one full-time employee did not meet its needs. On November 15, NARA terminated Ogden's contract and stated that it would reopen the acquisition.

Both protesters argue that they are entitled to award of the contract. Ogden argues that NARA acted improperly in terminating its contract because it was the low-priced, technically acceptable offeror. Ogden maintains in this regard that the RFP permitted its option 3c staffing approach and that it therefore meets all solicitation requirements. Ogden contends that the agency's current position that its technical approach does not meet its needs is not supported by the record. Tate, on the other hand, maintains that it should receive the award because Ogden's staffing approach was impermissible under the terms of the solicitation. Tate therefore contends that it should receive award as the low-priced, technically acceptable offeror. In addition, both firms argue that it would be improper for NARA to reopen the acquisition because of the possibility of an improper auction.

Both protesters' arguments are without merit. First, regardless of whether Ogden's technical approach was permissible under the terms of the RFP as originally drafted, the fact is that NARA now has determined that it wants separate staff for the base services and option (USRO) services. Although the technical evaluators did not object to Ogden's approach during the evaluation, the record shows it ultimately was their view that, due to the watch and tour functions associated with the heating and air conditioning equipment, the USRO engineers would be unable to effectively perform both the general mechanic and USRO engineer duties, as proposed by Ogden. There is nothing in the record that would lead us to question NARA's determination of its minimum needs in this regard. See Corbin Superior Composites, Inc., B-242394, Apr. 19, 1991, 91-1 CPD ¶ 389.

Where an agency makes award to a firm based on a solicitation which does not accurately reflect the agency's minimum needs, the award should be terminated and the procurement reopened to allow competing firms an opportunity to respond to the agency's revised requirements. Budney Indus., B-252361, June 10, 1993, 93-1 CPD ¶ 450; see also, Federal Acquisition Regulation (FAR) § 15.606 (where an agency's needs change during an acquisition, the agency should reopen the procurement and afford competing firms an opportunity to respond to its revised requirements). This is the appropri-

ate action even where prices have been revealed, since award under a solicitation that does not accurately reflect an agency's needs is prejudicial to the interests of the government--the agency contracts for something other than its actual requirements. Id. Consequently, Ogden's protest is without merit. Since the record shows that Ogden's proposal was based on an approach the agency ultimately determined is unacceptable to it, Ogden was not entitled to the award based on that proposal; rather, NARA's proposed action--reopening the competition to provide offerors an opportunity to respond to its actual requirements--is proper.

Tate's position that the proposed clarification of the requirement and reopening are inappropriate since the RFP already made it clear that Ogden's approach was prohibited, also is without merit. As we read the RFP as amended (Tate's argument turns on language in amendment No. 3), there was no prohibition against Ogden's approach. We need not discuss our conclusion further, however, since even if Tate were correct that the RFP did prohibit Ogden's approach, this would not have required rejection of Ogden's proposal as unacceptable; rather, this is a matter that the agency could have raised with Ogden during discussions. The agency's proposed reopening will serve this purpose.

Ogden also argues in its request for modification of remedy that, rather than recommending reevaluation of the cost proposals, we should have recommended that NARA make award to Ogden. In view of our conclusion above that the proposed reopening of the competition--rather than award to

¹Both protesters request reimbursement of their protest and proposal preparation costs. The protesters are not entitled to protest costs since we have held that the agency's actions were proper. See 4 C.F.R. § 21.6(d)(1) (1993); Norfolk Shipbuilding & Drydock Corp., B-247053.5, June 11, 1992, 92-1 CPD ¶ 509. The protesters are not entitled to proposal preparation costs since both firms will be included in the reopened competition, and there is no indication of fraud or bad faith, or that the agency's actions were arbitrary. Comspace Corp., B-250863, Jan. 5, 1993, 93-1 CPD ¶ 14.

Ogden or Tate--is proper given the agency's current needs,
we deny Ogden's request.

The protests and the request for modification of our earlier
recommendation are denied.

Robert P. Murphy
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Acting General Counsel