



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

55025

J. Maeder

Decision

Matter of: Brooks Towers, Inc.
File: B-255944.2
Date: April 28, 1994

James M. Lyons, Esq., and Andrew P. McCallin, Esq., Rothgerber, Appel, Powers & Johnson, for the protester. Leigh Ann Holt, Esq., General Services Administration, for the agency. Jacqueline Maeder, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected protester's proposal as technically unacceptable where the protester took exception to a material requirement of the solicitation.

DECISION

Brooks Towers, Inc. protests the rejection of its offer and the award of a contract at a higher price to 1999 Broadway Partnership under solicitation for offers (SFO) No. 93-16, issued by the General Services Administration (GSA) for the lease of office space for the Office of Surface Mining (OSM) in Denver, Colorado. The agency rejected Brooks Towers' proposal because it failed to meet a mandatory requirement of the solicitation.

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

The solicitation contemplated the award of a firm, fixed-price contract for the lease of a minimum 27,115 square feet to a maximum 28,470 square feet of office and related space for a 5-year base period with a 5-year option. The solicitation required that the space include a 3,000-square-foot library with a minimum floor load capacity of 100 pounds per square foot. Also, the solicitation required a 1,100-square-foot computer room with a minimum floor load capacity of 200 pounds per square foot. Award was to be made to the responsible offeror which submitted the lowest-priced proposal which conformed to the requirements of the solicitation.

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Offerors were required to submit initial offers by July 9, 1993. Four initial offers were received; Brooks Towers, the incumbent, did not submit an initial offer. On October 6, a representative of Brooks Towers met with the contracting officer. According to the protester, it informed the contracting officer of its intent to submit an offer which would include additional square footage for the library and computer room at no extra cost. The protester states that the additional square footage would allow the agency "to spread out its library and computer facilities, thereby obviating the need for the floor load requirements." The protester alleges that the contracting officer never objected to the use of additional free space as a means of satisfying the floor load requirements and never indicated that such an alternative would be unacceptable.

On October 15, Brooks Towers submitted a proposal offering 28,470 square feet of office space with a floor load capacity of 75 pounds per square foot.¹ In response to the special floor load capacities for the library and the computer room, Brooks Towers offered to expand the agency's required 3,000-square-foot library and 1,100-square-foot computer room. The protester stated that, while it believed that the floor loading in its building would serve the agency's needs "as is," Brooks Towers would "provide additional space at no charge for areas which need additional loading so that weight might be distributed in a manner as to meet this requirement." Brooks Towers' total rental cost for the 10 years was \$3,328,650.

The agency found the protester's proposal technically unacceptable because Brooks Towers' floor load capacity of 75 pounds per square foot did not comply with the solicitation's requirement of a floor load capacity of 100 pounds per square foot and 200 pounds per square foot for the library and computer room.² The agency made award to 1999 Broadway based on its low-priced, technically acceptable offer. The awardee's rental cost for the 10 years is \$3,683,163.

¹GSA allows the acceptance of late initial offers under solicitations for the lease of real property. GSA Order PBS P 1600.1A, June 22, 1981.

²The agency reports that its floor load capacity is "mandatory to ensure the safety of the occupants and the integrity of the structure." The agency believes that there is no assurance that at some time during the lease the library "would not be overloaded and possibly cause structural damage and/or bodily harm to building occupants."

Brooks Towers contends that the awardee's proposal does not represent the most cost effective lease for OSM's needs, and that it should have been awarded the contract because it submitted a less expensive proposal. The protester does not rebut the agency's determination that its offered space did not meet the floor load requirements, but argues instead that it "proposed a cost effective solution to accommodate OSM's library and computer needs." The protester argues that "by providing more space, the heavy loads can be spaced safely over the larger area, thus accomplishing the intended purpose." The protester alleges that because it "reasonably relied on the [contracting officer's] tacit acquiescence to the addition of free floor space" as a means of satisfying the floor load requirements, the agency "cannot contend now that Brooks Towers' proposal is nonresponsive."

In a negotiated procurement, an offeror has an obligation to submit a proposal which fully demonstrates the technical acceptability of its offered product and a proposal that fails to conform to a material solicitation requirement is unacceptable and may not form the basis for award. International Sales Ltd., B-253646, Sept. 7, 1993, 93-2 CPD ¶ 146; Picker Int'l, Inc., 68 Comp. Gen. 265 (1989), 89-1 CPD ¶ 188. Here, Brooks Towers concedes that the space it offered in response to the SFO does not conform to the floor load requirements of the solicitation. Under the circumstances, the proposal was unacceptable and could not result in an award. Id.

Although the protester suggests that its alternate method of meeting the agency's requirements will accommodate OSM's needs, this contention is simply an untimely challenge to the terms of the SFO. Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules specifically require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1) (1993); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. Since the protester did not challenge the floor load requirements until after award, this contention is untimely and will not be considered.³

³To the extent that the protester believes that GSA should have discussed with Brooks Towers the agency's concern regarding its alternate method of meeting the agency's needs, we note that Brooks Towers did not submit an initial offer, only a BAFO. Therefore, there was no opportunity for GSA to address its concerns in discussions. In addition, there is no obligation to reopen discussions so that an offeror may remedy defects first introduced in a BAFO.

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In addition, the protester's assertion that the agency cannot reject its offer because the contracting officer allegedly did not object to Brooks Towers method of satisfying OSM's floor load requirements is without merit. Brooks Towers and all other offerors were informed by the solicitation of the floor load requirements. In addition, the protester does not state that the contracting officer told the firm that its offer would be considered acceptable if it offered an alternative to the solicitation's requirements. In any event, it is well established that offerors who rely on oral advice that alters the written terms of the solicitation do so at their own risk. Kollmorgen Corp., 70 Comp. Gen. 551 (1991), 91-1 CPD ¶ 529.

Finally, Brooks Towers argues that the agency improperly accepted 1999 Broadway's proposal of 3-months free rent after the expiration of the firm term of the contract. The solicitation indicated that rental concessions, for example, free rent or reduced rent, would be accepted only during the firm term of the lease. The protester argues that the agency improperly accepted 3-months free rent in months 61 through 63, at the start of the option period.

Brooks Towers is not an interested party to advance this argument. A party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a). Here, given the proper rejection of Brooks Towers' proposal as technically unacceptable, even if we were to sustain Brooks Towers' allegation that the awardee's proposal was unacceptable, Brooks Towers would not be in line for award. Rather, there is another technically acceptable proposal which would be in line for award. Under these circumstances, since Brooks Towers would still not be eligible for award, we dismiss this protest issue. Monopole, S.A., B-252745, July 23, 1993, 93-2 CPD ¶ 51.

The protest is denied in part and dismissed in part.



for Robert P. Murphy
Acting General Counsel

³(...continued)

See Potomac Research, Inc., B-250152.8; B-250152.11, July 22, 1993, 93-2 CPD ¶ 109.