



Comptroller General
of the United States

114255

Washington, D.C. 20548

Decision

Matter of: Marwais Steel Company
File: B-254242.2; B-254242.3
Date: May 3, 1994

J. Randolph MacPherson, Esq., Sullivan & Worcester, for the protester.
Timothy F. Noelker, Esq., Linda L. Shapiro, Esq., and Thomas C. Burke, Esq., Coburn & Croft, for Engineered Air Systems, Inc., an interested party.
Bradley S. Adams, Esq., and John E. Pettit, Esq., Department of the Air Force, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency awarded contract based on a relaxation of solicitation's mandatory delivery requirements for awardee is denied where solicitation provided for these same delivery terms.
2. Where contracting agency calculated protester's transportation costs for price evaluation purposes--as provided for in solicitation which stated that agency would calculate transportation expenses based upon information submitted in proposal or, as here, based upon other offerors' information where offeror did not provide complete information--and did not consider protester's price to be unreasonable for the shipping distance from protester's location to delivery destination, agency was not required to conduct discussions on the protester's price.
3. Protest challenging accuracy of agency's evaluation of protester's and awardee's transportation costs is denied where there is no evidence that protester has been prejudiced by alleged miscalculation since even if errors were corrected, protester still would not be the low offeror in line for award.

DECISION

Marwais Steel Company protests the award of a contract to Engineered Air Systems, Inc. (EASI) under request for proposals (RFP) No. F09603-92-R-71002, issued by Warner

Robins Air Logistics Center, Robins Air Force Base, Georgia, for 359 revetment kits, National Stock Number 5410-00-456-3307 (used to build protective wall barriers in aircraft, vehicles, and equipment) and related technical data. The protester contends that the agency relaxed the RFP's mandatory delivery terms for the awardee, failed to conduct meaningful discussions with it regarding its method of transportation and evaluated transportation costs, and improperly evaluated the awardee's and protester's prices.

We deny the protest.

The RFP, set aside for small business concerns, was issued on February 18, 1992, and amended several times. The RFP required offerors to provide unit prices for the kits, as well as first article and data costs, if applicable to the offeror. The RFP advised offerors that the agency would calculate each offeror's transportation costs and add such amount to the proposed unit prices to determine the offeror's total evaluated price. The RFP stated that award would be made to the offeror whose proposal was determined to be most advantageous to the government under the RFP's stated evaluation criteria. The following evaluation factors for award were provided in the RFP, as amended, in descending order of importance:

"(1) priced line items; (2) first article evaluation costs; (3) transportation evaluation costs; (4) evaluation - [freight on board] F.O.B. origin; (5) all or none evaluation (all); (6) duty free entry evaluation; (7) Buy American - balance of payments evaluation; and (8) evaluation of proposals requesting use of existing government production and research property."

Clause F-72 of the RFP, entitled "Guaranteed Shipping Characteristics," requested all offerors to provide information regarding the offeror's intended mode of transportation including: type of container, shipping configuration, size of container, gross weight of container, and contents, whether palletized/skidded, number of containers per pallet/skid, weight of empty pallet bottom skid and sides, size of pallet/skid and contents, number of containers or pallets/skids per railcar (including size and type of railcar), and number of containers or pallets/skids per trailer (including size and type of trailer). Clause F-72 (referencing Federal Acquisition Regulation (FAR) § 52.247-60), further advised offerors that:

"[t]his information will be used to determine transportation costs for evaluation purposes. If the offeror does not furnish sufficient data . . . [under] this clause, to permit determination by

the Government of the item shipping costs, evaluation will be based on the shipping characteristics submitted by the offeror whose offer produces the highest transportation costs or in the absence thereof, by the contracting officer's best estimate of the actual transportation costs."

The protester, an approved source of the revetment kits, had initially protested to the agency the RFP's discrepancy in delivery terms for approved and unapproved sources; it set forth a delivery schedule for approved sources on the basis of the date of award, whereas the delivery schedule for unapproved sources was based upon the date of first article approval. The protester had contended that a currently unapproved offeror would have a longer period of time (i.e., during the approval process) to obtain its steel and other supplies than an approved source. The contracting officer responded to the protester's concerns in a June 30, 1993, cover letter attaching the firm's copy of amendment No. 4 to the RFP. Amendment No. 4 amended the original RFP delivery terms to provide for 20 kits to be delivered in 30-day intervals with delivery to commence 150 days after first article approval for currently unapproved sources and 150 days after contract award for approved sources. In the cover letter to the protester's copy of amendment No. 4, the contracting officer stated that offerors required to submit first article tests do not have a competitive advantage regarding delivery under the RFP since both approved and unapproved sources must deliver the same number of kits at the same intervals except that the unapproved source's delivery schedule commences upon first article test approval. The contracting officer concluded that "[t]herefore, the first unit to be delivered under both proposals is due at the same time." In response to the contracting officer's letter, the protester acknowledged receipt of amendment No. 4 and withdrew its agency-level protest of the RFP's delivery terms.

Proposals were received from five offerors. The apparent low offeror in line for award, however, was disqualified after a successful size status protest initiated by the protester in which the Small Business Administration determined the firm to be other than a small business. In response to a challenge by the protester to the agency's earlier failure to hold discussions with the offerors, discussions were conducted with the remaining offerors and best and final offers (BAFO) were requested and received.

The protester's proposal did not provide complete shipping information as requested by the RFP. Instead of completing the RFP's request for shipping information at clause F-72, which specifically requested information concerning the size

and number of flatbed trailers proposed by the offeror to ship each revetment kit, the protester attached an enclosure to its proposal providing information about the weight of its product; this page also provided limited information regarding the size dimensions of its packaged kit. Since the protester did not provide information as to the number of flatbeds required to ship its product, the agency noted the similarity between the protester's shipping weight and that of the other offerors which proposed two flatbeds for each kit. The agency then evaluated the protester's transportation costs on the basis of two flatbeds for each kit to be shipped from Marwais's facilities in California to Warner Robins Air Force Base, Georgia. These transportation costs constituted a substantial part of the protester's evaluated price for the contract. The protester's evaluated price, including transportation costs, was higher than the evaluated price of the awardee's proposed kit. The awardee's proposal was evaluated on the basis of transportation costs of shipping each kit on two flatbeds from Missouri.

The awardee's BAFO, evaluated as offering the lowest price, was determined to be the most advantageous offer received; EASI was awarded a contract under the RFP on December 8 for \$20,449,086.79. The protester filed its protest of the award with our Office on December 17, and supplemented that protest on February 24, 1994, based on information contained in the agency's report in response to the protest and its response to the protester's supplemental document request.

The protester initially protests that the contracting officer's cover letter to amendment No. 4 mandated that delivery under the RFP was to take place for both approved and unapproved sources "at the same time." The protester essentially contends that the contracting officer's reference to "the same time" eliminated, for delivery schedule purposes, the time allotted by amendment No. 4 to allow offerors to obtain first article approval. The protester contends that the agency relaxed mandatory delivery requirements of the RFP for the awardee since the contract grants the awardee, currently an unapproved source of the revetment kits, time to obtain first article approval before commencement of the 150-day period preceding the incremental delivery schedule set out in the RFP for approved sources.

Amendment No. 4 expressly provided that the RFP's delivery terms (i.e., 20 units in 30-day intervals) would not commence until 150 days after first article approval for currently unapproved offerors. The Air Force reasonably explains that the reference to "the same time" in the cover letter describes the same 150-day period for commencement of the RFP's stated delivery requirements, which are the same

for all sources except for the event (i.e., contract award or first article approval) triggering the 150-day period. This explanation is entirely consistent with the cover letter statements that the first unit to be delivered under both proposals is due at the same time and that all offerors would be required to deliver the same number of kits at the same intervals, except that the approved sources' starting date would be different than the starting date for firms requiring first article approval for their kits. Since the RFP, as amended, allowed for the contested contract delivery terms, we deny as factually incorrect the assertion that the agency's contract with EASI contained an improper relaxation of mandatory delivery terms. The contract simply incorporates the solicitation delivery terms.

The amended RFP was clear that although the delivery intervals were the same for all potential contractors, the starting date would be later for a contractor whose product required first article approval. To the extent the protester is challenging the propriety of the delivery terms set out in amendment No. 4 or contends that the cover letter rendered those terms ambiguous, it is an untimely protest since a protest of the alleged improprieties in the solicitation would have had to be filed prior to the submission of the firm's BAFO. 4 C.F.R. § 21.2(a)(1) (1993).

The protester next contends that the agency failed to conduct meaningful discussions with it since the agency did not question the protester as to its proposed method of transportation or the agency's calculation of its transportation costs. The protester states that due to a unique packing plan it developed for this contract, it would have been able to fit one kit on one flatbed rather than the two flatbeds per kit used by the agency in evaluating the protester's price. The protester states that if the agency had told it during discussions that two flatbeds were used as the basis for calculating its costs and that the protester's transportation costs kept it from receiving the award, it would have taken the opportunity to explain its intended innovative packing strategy and could have lowered its option price, including profit, to make its evaluated price more competitive.

The agency states that it was not required to discuss its evaluation of the protester's transportation costs since the protester did not complete clause F-72 of the RFP which requested specific shipping information (such as the number of flatbeds per kit) and put the protester on notice that where such information was not given, the agency would evaluate transportation costs on the basis of other offerors' shipping information. The Air Force states that, in accordance with the RFP's notice, it considered the

similarities in weight between the protester's kit and the other offers, which required two flatbeds to ship each kit, and calculated the protester's offer on the basis of two flatbeds per kit. The Air Force states that the protester's proposal attachment, which indicated the size and weight of its packaged kit, did not alert the agency that the protester was proposing one flatbed per kit since it did not explain in its proposal that due to a unique packaging technique, only one flatbed would be necessary. Based upon the further distance involved in shipping its product than the awardee's, the agency states there was no reason to question the higher evaluated shipping costs for the protester compared to the awardee, especially since another California offeror's transportation costs were higher than the awardee's and only slightly lower than the protester's costs.

For discussions to be meaningful, an agency must advise each offeror in the competitive range of weaknesses, excesses, or deficiencies in its proposal, correction of which would be necessary for the offeror to have a reasonable chance of being selected for award, in order to give the offeror the opportunity to satisfy the government's requirements. See Bauer Assocs., Inc., B-229831.6, Dec. 2, 1988, 88-2 CPD ¶ 549. An agency has no responsibility to tell an offeror that its price is too high unless the government has reason to think that the price is unreasonable. See Warren Elec. Constr. Corp., B-236173.4; B-236173.5, July 16, 1990, 90-2 CPD ¶ 34.

Here, although the RFP specifically requested offerors to provide transportation information for evaluation purposes, the protester failed to submit complete transportation information in its proposal or set forth its unique packing plan. The agency therefore reasonably calculated its transportation costs considering the other offerors' two-flatbed delivery terms; the agency's evaluation on this basis was permitted under the RFP. Further, the agency had no reason to question the evaluated cost since it was reasonably related to the further distance to be traveled.¹ The agency was also prohibited by FAR

¹Although the protester protests the agency's discussion of transportation method with the awardee and not with itself, the record shows that the information subsequently provided was a more specific breakdown of the transportation information provided in response to clause F-72. We think this more detailed information could reasonably be viewed as clarifications not discussions since there is nothing in the record to show that this information was necessary to determine the awardee's transportation costs. We thus

(continued...)

§ 15.610(d)(3)(iii) from informing the protester that its evaluated price was too high in relation to another offeror. In these circumstances, we do not think the agency's failure to discuss transportation costs was objectionable.

In any event, the record shows that the protester has not been prejudiced by the agency's failure to discuss transportation method or by the agency's evaluation of transportation costs since the protester would not be the low offeror in line for award even if the alleged errors in the evaluation were corrected (including the errors regarding the protester's and the awardee's transportation costs). Prejudice is an essential element of a viable protest.² See Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401. Accordingly, the protest is denied.


 007 Robert P. Murphy
 Acting General Counsel

¹(...continued)
 cannot conclude that the protester was treated unfairly in this regard. See Warren Elec. Constr. Corp., supra.

²Even if discussions were held with the protester concerning its method of transportation, and its one-flatbed approach was pointed out to the agency to correct the alleged error and substantially lower the firm's evaluated transportation costs, the record provides no reason to expect the protester to have, on its own, reduced its option price for the kits by decreasing profit or otherwise.