



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

Decision

Matter of: Vertiflite, Inc.

File: B-256366

Date: May 12, 1994

Robert W. Bailey for the protester.
William L. Osteen, Esq., Tennessee Valley Authority, for the agency.
Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against agency's rejection of protester's offer as unacceptable is denied where offer did not comply with payment terms set forth in the solicitation.
2. Protest that solicitation should have allowed for progress payments or advance payments is untimely where the issue is first raised after the closing date for receipt of proposals.

DECISION

Vertiflite, Inc. protests the rejection of its offer and the award of a contract to Crescent Airways, Inc. under solicitation No. QG-102402-000, issued by the Tennessee Valley Authority (TVA) for the overhaul of an Aerospatiale AS350 helicopter. Vertiflite challenges the rejection of its offer as unacceptable.¹

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

The solicitation required that the successful offeror furnish all materials required to perform the contract, including an Allison 250 C30M Engine and conversion kit.

¹TVA notes that it does not accede to our Office's jurisdiction. Nonetheless, the agency provided all required documentation and otherwise complied with our Bid Protest Regulations. See 4 C.F.R. § 21.3(c) (1993). It is well settled that TVA is subject to our jurisdiction. See, e.g., Monarch Water Sys., Inc., 64 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146.

The solicitation contained a "TERMS OF PAYMENT" clause which provided that payment would be made "after the later of (i) receipt of a proper invoice(s) by TVA . . . or (ii) acceptance by TVA of the work, material, or equipment required by the [purchase order] at the TVA location specified in the [purchase order]."

The solicitation stated that in comparing offers and making awards, the agency may consider factors such as the offeror's skill or experience, quality of supplies or services, time of delivery or performance offered, and "any other element which would affect the final cost to TVA." The solicitation provided further that the award may be based on initial offers received, without discussions, and cautioned that each initial offer should be submitted on the most favorable terms from a price and technical standpoint.

TVA received four offers by the January 19, 1994, closing date. Vertiflite submitted the low-priced offer of \$380,663, while Crescent Airways submitted the next-low price of \$381,104. The protester's offer stated, however, that "[d]ue to the substantial acquisition cost of certain items we must require that they be paid for when acquired by Vertiflite." The offer explained further that while Vertiflite is "fully capable of performing the tasks, we do not have the assets to finance the project." Because the agency found that Vertiflite's requirement for this payment was contrary to the terms of payment clause in the solicitation, it rejected the offer as unacceptable. In addition, the contracting officer determined that the cost to the agency of such a payment would be approximately \$2,800. Accordingly, TVA determined that Crescent's offer, which was considered acceptable, represented the lowest cost to the agency. TVA awarded that firm the contract, and this protest followed.

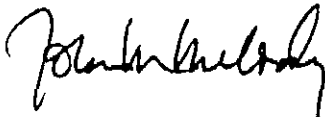
Vertiflite asserts that its offer constitutes the "lowest responsible responsive offer to the solicitation," and it argues that its requirement for progress payments is allowable by law and "has no impact upon the evaluation of the initial offer." We disagree.

It is fundamental that an agency must treat offerors equally, and that any proposal which fails to conform to material terms and conditions of a solicitation should be considered unacceptable and may not form the basis for an award. Multi-Spec Prods. Group Corp., B-245156.2, Feb. 11, 1992, 92-1 CPD ¶ 171. The protester admittedly did not offer to comply with the solicitation requirements under the specified payment terms. To consider Vertiflite's offer to perform using more favorable payment terms would provide Vertiflite with an unfair competitive advantage since the other offerors submitted their offers based upon the terms

of the solicitation. See E.C. Campbell, Inc., B-222197, June 19, 1986, 86-1 CPD ¶ 565. We therefore conclude that Vertiflite's offer was properly rejected as unacceptable. Electro-Voice, Inc., B-243463, Apr. 3, 1991, 91-1 CPD ¶ 346.

Alternatively, Vertiflite challenges the inclusion of the terms of payment clause in the solicitation by arguing that the solicitation should have allowed for advance or progress payments. We find this argument to be untimely. Protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of proposals must be filed not later than the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1). If Vertiflite objected to those terms, which were set forth in the solicitation, it was required to file a protest not later than the January 19 closing date. Since the protester failed to raise the allegation until February 4, we dismiss the allegation as untimely.² See International Sales Ltd., B-253646, Sept. 7, 1993, 93-2 CPD ¶ 146.

The protest is denied in part and dismissed in part.


 for Robert P. Murphy
 Acting General Counsel

²Vertiflite also argues that the agency failed to properly consider the price impact of transportation costs in evaluating offers. While the agency responds that such costs were considered, Vertiflite is not an interested party to raise this allegation since its proposal was properly rejected as unacceptable and could not form the basis for an award. See ISC Defense Sys., Inc.--Recon., B-236597.3, Apr. 5, 1990, 90-1 CPD ¶ 360. We therefore will not consider the issue.