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Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: The H.J. Osterfeld Company

File: B-257630

Date: October 24, 1994

Charles W. Mahan, Esq., Dunlevey, Mahan & Furry, for the protester.

Gail A. Nettleton, Esq., Franch & Jarashow, P.A., for Four Seasons Environmental, Inc., an interested party.

Clarence D. Long, Esq., Department of the Air Force, for the agency.

Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that contracting agency improperly failed to provide notice of proposed award prior to award is denied where the agency properly waived the prior notice requirement by reasonably determining (in writing) that the urgency of the requirement necessitated the award without delay.

2. Protest that agency engaged in technical leveling by conducting successive rounds of discussions with other offerors is denied where the additional discussion questions merely sought clarification of minor points that did not affect the acceptability of proposals or address any inherent weaknesses in proposals, and where all offerors were permitted to submit best and final offers.

DECISION

The H.J. Osterfeld Company protests the Air Force's award of a contract to Four Seasons Environmental, Inc. under request for proposals (RFP) No. F33601-93-R-0220, which was issued as a total small business set-aside for civil engineering support for laboratories at Wright-Patterson Air Force Base in Ohio. Osterfeld alleges that the Air Force improperly failed to provide any pre-award notice of the proposed award, thereby depriving Osterfeld of its right to file a timely size challenge, and that the agency's evaluation of the technical and cost proposals was improper. We deny the protest.

The RFP contemplated the award of a time-and-materials contract for a base period of less than 1 year with four 1-year option periods. The solicitation was amended five times, to include provisions not relevant to the protest. The solicitation advised offerors that proposals would be evaluated under the following criteria, listed in descending order of importance: technical, management, quality control, and cost. In addition, proposals would be reviewed to assess the risks associated with the offeror's proposed approach, and performance risk would be assessed by considering the offeror's relevant current and past performance. The RFP stated that the contract would be awarded to the responsive, responsible offeror within the competitive range whose offer, conforming to the solicitation, offered the best overall value to the government.

Four offerors, including Four Seasons and Osterfeld, submitted technical and cost proposals, as called for by the RFP. After the evaluation teams reviewed the proposals and eliminated one offeror's proposal, three proposals including those of Four Seasons and Osterfeld remained in the competitive range. On January 13, 1994, the agency conducted written discussions with the three remaining firms by issuing clarification requests (CRs) and deficiency reports (DRs). After the firms' responses were evaluated, all three were considered technically acceptable, although some further clarification questions were sent to Four Seasons and the other remaining offeror in February; no additional information was requested from Osterfeld. After the offerors' responses had been reviewed by the evaluation teams, the three firms were instructed to submit their best and final offers (BAFO) by May 19, 1994.

Four Seasons's BAFO offered the lowest price. Because the evaluation teams determined that the three competing firms were technically equivalent, the source selection authority (SSA) concluded that Four Seasons's proposal represented the best overall value to the government, and on June 2, selected Four Seasons for award. The Air Force did not issue a pre-award notice to offerors since, as allowed under Federal Acquisition Regulation (FAR) § 15.1001(b)(2), the agency made a written determination that the urgency of the requirement necessitated award without delay.¹ The Air Force awarded the contract to Four Seasons on June 6, and notified the unsuccessful offerors of the award that same day by facsimile. Osterfeld requested a debriefing, which was held on June 14. This protest followed.

¹The agency did issue two required pre-award notifications to Congress.

Osterfeld claims that the award to Four Seasons was improper because the firm is affiliated with a large business, the Fred B. DeBra Company, and that the agency's failure to provide pre-award notice deprived Osterfeld of any meaningful opportunity to file a timely size challenge with the Small Business Administration (SBA).

The Small Business Act, 15 U.S.C. § 637(b)(6) (1988), gives the SBA, not our Office, exclusive and conclusive authority to determine matters of small business size status for federal procurements, 4 C.F.R. § 21.3(m)(2) (1994); Isidor Stern Enters. Corp., B-243265, July 17, 1991, 91-2 CPD ¶ 65. Therefore, our role in cases involving disputed size determinations is limited to considering whether the contracting agency has met its regulatory procedural responsibilities. See Superior Eng'g and Elecs. Co., Inc., B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698.

In a small business set-aside, upon completion of negotiations and a determination of responsibility, but prior to award, the contracting officer is required to inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror, FAR § 15.1001(b)(2). Notice is not required, however, when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay. Id. The contracting officer made such a determination in this case, concluding that the contract must be awarded as soon as possible because no options remained under the incumbent's contract and the awardee needed to hire its personnel and obtain work trailers and equipment in time to begin work without any disruption in service. The Air Force reports that an interruption in these maintenance services would have threatened ongoing research and development programs.

Where an agency does not provide pre-award notice in a small business set-aside because it determines that urgent circumstances prevent it from doing so, we examine the record to ascertain the reasonableness of the determination. If the determination is reasonable, any subsequent SBA determination that the awardee is not a small business applies only prospectively and does not require termination of the contract. See Dawkins Gen. Contractors & Supply, Inc., B-243613.11, Sept. 21, 1992, 92-2 CPD ¶ 190. The urgency of a requirement is primarily for determination by the contracting agency, which is most familiar with the criticality of its needs. See Superior Eng'g and Elecs. Co., Inc., supra.

Here, the record reasonably supports the contracting officer's conclusions. While the protester argues that its own contract (as the incumbent contractor) could have been

extended to cover a transition period, the Air Force report shows that the contract had already been extended to its permissible limit of an additional 6 months and thus could not be extended further.² Osterfeld also contends that the awardee should not need an extensive transition period because the protester, when it was awarded the previous contract for virtually the same services, was required (and able) to accomplish the necessary transition tasks in a period of less than 10 days. However, the Air Force report cites several circumstances that distinguish the current situation from the previous one: the awardee is being required to furnish its own office and workshop, whereas the agency provided building space for Osterfeld's contract performance; the current awardee is responsible for its own utilities and hookup, requiring it to dig new water and sewer lines, which Osterfeld was not required to do; and the awardee has proposed using a mix of union and nonunion workers and thus will not simply assume the work force of the previous (unionized) contractor, as Osterfeld was able to do. In our view, the contracting officer's urgency determination was reasonable.

Osterfeld also protests that the contracting officer had an obligation to file a size status protest with the SBA, since the protester had raised the question of Four Seasons' size with the agency before the contract was awarded. However, in the absence of a size status protest from an offeror, there is no absolute requirement that the contracting officer refer size status questions to the SBA. Rather, this is a matter of discretion, the exercise of which must be measured against a standard of reasonableness in the particular case. Putnam Mills Corp., 61 Comp. Gen. 667 (1982), 82-2 CPD ¶ 301. Here, the contracting officer did take several steps to investigate this question, including filing a challenge with the SBA (which was dismissed as premature) and reviewing a recent (1994) SBA determination that concluded that Four Seasons and The Fred B. DeBra Company were not affiliated. We think the contracting officer's actions were entirely reasonable in these circumstances.

Osterfeld also protests that the award decision was tainted by improper agency conduct throughout the evaluation of proposals, discussions, and source selection. The protester contends that the agency did not evaluate competing proposals on an equal basis because Four Seasons was given

²Moreover, there is no requirement for a procuring agency to extend an incumbent's contract on a sole-source basis rather than to award a new contract to alleviate an urgent situation. Automation Management Consultants, Inc., B-243805, Aug. 29, 1991, 91-2 CPD ¶ 213.

additional opportunities to improve its proposal. After the initial round of discussion questions, in which all three offerors responded to the Air Force's CRs and DRs, the other two offerors competing with Osterfeld were given additional CRs. Osterfeld argues that discussions were therefore unequal, and that the source selection process should have taken into consideration the fact that the other two offerors required this additional time and effort to bring their proposals up to the level of Osterfeld's.

An agency is obligated to individualize the evaluated deficiencies of each offeror during discussions. Pan Am World Servs., Inc., et al., B-231840; et al., Nov. 7, 1988, 88-2 CPD ¶ 446; see also Indian Community Health Servs., Inc., B-217481, May 15, 1985, 85-1 CPD ¶ 547. Because of the varying degree of weaknesses or deficiencies in proposals, it is proper for an agency to conduct appropriately different discussions with each offeror. TRS Design & Consulting Servs., B-218668, Aug. 14, 1985, 85-2 CPD ¶ 168.

Here, the agency's technical team determined after the first round of discussions that all three offerors' technical proposals were acceptable. The record shows that the additional CRs that were issued to Four Seasons concerned only the cost portion of its proposal and only sought clarification of minor matters, such as the transposition of figures and clarifications concerning accounting methodology with reference to direct and indirect cost rates; they did not involve any "inherent weaknesses" in the awardee's proposal. Although the protester alleges that it took three rounds of questions to bring the other offerors' proposal up to the level of Osterfeld's technical proposal, this assertion is not supported by the record.

Regarding the source selection process, Osterfeld contends that a technical chart that was presented to the SSA during the source selection contained inaccuracies, and that a proposal analysis report was based on generalities rather than specifics. The protester argues that these alleged improprieties led the SSA to award the contract to Four Seasons. We simply find no basis for these allegations. The "inaccuracy" that Osterfeld complains of was that a chart in the record inadvertently represented Four Seasons as having a high risk rating, whereas the overall ratings chart that was used to brief the SSA shows the firm having a low risk rating. The agency report shows that the risk rating on the initial chart was made in error, and that the information upon which the SSA relied was accurate and sufficiently detailed.

Osterfeld has not presented any specific challenge to the technical evaluation itself, or to the agency's determination that the three technical proposals were

essentially equal; nor does the protester argue that Four Seasons's proposal did not represent the best value to the government.³ Under these circumstances, we have no basis to question the agency's selection decision.

The protest is denied.

for Paul Liberman
Robert P. Murphy
Acting General Counsel

³Osterfeld's initial protest submission included a variety of complaints that were abandoned after it received the agency report, including allegations that the agency had failed to "give due consideration" to Osterfeld's responses to its CRs, had failed to perform a proper cost realism analysis, and had failed to perform a price/technical tradeoff. In light of the agency's response to these issues and the protester's abandonment of them, we will not discuss them.