



Decision

Matter of: Better Service
File: B-256498.2
Date: January 9, 1995

Daniel A. Weiss for the protester.
Michelle Harrell, Esq., General Services 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 reasonably excluded protester's initial proposal from competitive range where the proposal contained numerous deficiencies--many of which, standing alone, would have been adequate to eliminate proposal from further consideration--and correction of the deficiencies would require submission of virtually a new proposal.

DECISION

Better Service protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. FCGR-92-0041-N, issued by the General Services Administration (GSA) for photocopying equipment and related maintenance services. Better Service maintains that GSA improperly rejected its proposal without conducting discussions with the protester.

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

The RFP was originally issued by GSA on September 1, 1992, and contemplated the award of multiple contracts under GSA's Federal Supply Schedule (FSS) group 36 IV (purchase, rental, maintenance, and lease to purchase of photocopiers, supplies, and accessories). Awards under the original solicitation were to be for a period of 3 years. By amendment No. 8 to the RFP, issued on April 28, 1994, GSA provided prospective offerors an open-season opportunity to contract with GSA under the FSS for the remaining period of performance, which is scheduled to run until September 30, 1996.

In response to the open-season amendment, GSA received numerous initial proposals, including one from Better Service. After evaluating these proposals, the contracting officer made a competitive range determination and eliminated a number of proposals--including Better Service's--from further consideration. Among the most significant deficiencies associated with the Better Service proposal were (1) it offered photocopying machines that were not current production models of the original equipment manufacturer, as required under the RFP; (2) Better Service had failed to properly execute the solicitation's Discount Schedule and Marketing Data form; and (3) Better Service had failed to submit a commercial price list as required under the RFP.

Better Service maintains that exclusion of its proposal from the competitive range was improper because many of the alleged proposal deficiencies in fact did not exist, and any deficiencies that did exist were minor in nature and could easily have been resolved through discussions.¹ Better Service contends that the agency's actions reflect bias against minority-owned small businesses.

In establishing a competitive range, agencies are required to include only those firms whose proposals are determined to have a reasonable chance of receiving award. Federal Acquisition Regulation (FAR) § 15.609. Thus, for example, where a proposal lacks sufficient information for the agency to determine whether it is compliant with the requirements of the RFP, it may properly be excluded from further consideration without discussions. Offerors have an affirmative obligation to submit an adequately written proposal, and agencies are not required to include a proposal in the competitive range where, in order to be acceptable, it would have to be revised to such an extent

¹Better Service also maintains that the solicitation improperly precluded firms from offering only service and maintenance, and that the agency improperly removed a solicitation clause which obligated original equipment manufacturers to sell spare parts to any firm holding an FSS contract for photocopiers. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1994), allegations such as these, concerning alleged solicitation improprieties, must be raised before the deadline for submitting offers. Since Better Service did not file its protest until well after it submitted its offer, these allegations are untimely and not for consideration.

that it would be tantamount to a new proposal. Cyber Digital, Inc., B-255225, Feb. 18, 1994, 94-1 CPD ¶ 123; Jack Faucett Assocs., B-253329, Sept. 7, 1993, 93-2 CPD ¶ 154; aff'd, Jack Faucett Assocs.--Recon., B-253329.2, Apr. 12, 1994, 94-1 CPD ¶ 250. Where a protester challenges an agency's elimination of its proposal from the competitive range, our review is limited to considering whether the evaluation and competitive range determination were reasonable and in accordance with the terms of the RFP and applicable regulations and statutes. Cyber Digital, Inc., supra.

We find that GSA acted reasonably in excluding Better Service's proposal from further consideration. Our review confirms that Better Service's proposal contained numerous significant deficiencies, many of which, standing alone, provide a sufficient basis for excluding the firm from the competitive range. We discuss some of these deficiencies below.²

COMMERCIAL PRICE LIST

The RFP required offerors to submit a copy of their current, published commercial descriptive price list/catalogue and cautioned firms that "special catalogs or price lists printed for the purpose of this offer and showing only net prices to the government . . . are not acceptable." This requirement was significant because, as stated in the RFP, "prices for items to be awarded under this solicitation normally will be negotiated on the basis of discounts from an offeror's established catalog or market prices." (In addition, a firm's commercial price lists are used by the agency to determine whether a firm is exempt from the requirement to submit cost or pricing data in support of its offer in accordance with FAR § 15.804-3.)

Better Service did not include commercial price lists with its offer. Instead, the firm submitted price lists that had been prepared specifically for this requirement; this is evidenced by the fact that the price lists are not dated and contain no other indication that they are published for purposes of marketing the firm's products to either the government or the general public. In addition, each price list is captioned with certain of the special item numbers contained in the solicitation. While Better Service describes its price lists as "prototype" price lists, the

²We need not consider all of the deficiencies found by GSA, since it is clear that those discussed here provided a reasonable basis for excluding Better Service's proposal from the competitive range.

firm has made no showing that they reflect Better Service's commercial pricing; in fact, Better Service does not even allege that it offers its products for sale commercially.

DISCOUNT SCHEDULE/MARKETING DATA

Better Service also did not provide any meaningful information in its Discount Schedule and Marketing Data form. This form requires certain information from all offerors, including detailed information relating to sales of the offered product--both commercially and to the government--during the preceding year, information on the product models being offered for sale to the government, and information relating to the offeror's warranty. Better Service provided virtually no information on its Discount Schedule and Marketing Data form. As a result, GSA was unable to determine, for example, which models were being offered to the government, the terms of Better Service's offered discounts, and whether Better Service had made any sales in the preceding year. Better Service did indicate on this form that it was offering a warranty equal to its commercial warranty, but it did not describe the terms of that warranty; GSA therefore was unable to ascertain the terms of Better Service's warranty from its offer.

CURRENT PRODUCTION MODELS

The solicitation required that a firm's offered photocopiers be the current production models of the manufacturer. Better Service's price lists refer to 19 models of Kodak photocopiers. To the extent that it could be determined from Better Service's price lists which models it was offering to the government, none of the offered models was acceptable, since none was a current Kodak production model. Thus, in order for its offer to be acceptable, Better Service would have to offer an entirely different group of photocopiers.

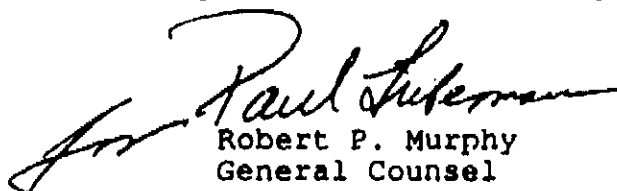
Better Service maintains that GSA improperly failed to provide it with a copy of Kodak's FSS catalogue when the firm requested it, and that it would have offered current production models if it had been able to review this list. This argument is without merit. First, to the extent that Better Service is offering to supply Kodak products as a dealer for Kodak (the firm does not allege that it is a manufacturer), the solicitation required, as a condition of award, a letter of commitment from the manufacturer or other evidence to establish that the offeror would have an uninterrupted supply of the offered products; this information was not included in Better Service's offer. In any case, the solicitation precluded awards to more than one firm for the same product, and Kodak already has a contract for all of the models listed in its FSS catalogue. Better

Service thus could not have been awarded a contract for these models.

In view of these deficiencies, GSA reasonably determined that Better Service would have to submit virtually a new proposal in order to have a reasonable chance of receiving award. Since an agency may properly eliminate a proposal from the competitive range in these circumstances, we have no basis to object to GSA's actions here.

Finally, we note that the record provides no support for the protester's broad allegation that GSA exhibited bias against minority-owned small businesses. Protesters alleging bias on the part of government officials must submit proof that the agency acted with a specific intent to injure the protester. Wayne D. Josephson, B-256243, May 12, 1994, 94-1 CPD ¶ 307. Better Service has submitted no evidence in support of its allegation and, as noted, the record shows instead that GSA had numerous adequate reasons for eliminating the protester's proposal from consideration.

The protest is denied in part and dismissed in part.


Robert P. Murphy
General Counsel