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Comptroller General
of the United States

436117

Washington, D.C. 20548

Decision

Matter of: Maritime Management, Inc.

File: B-260311.2; B-260311.3

Date: July 11, 1995

Richard O. Duvall, Esq., Richard L. Moorhouse, Esq., and Dorn C. McGrath III, Esq., Holland & Knight, for the protester.

J. Scott Hommer III, Esq., Wm. Craig Dubishar, Esq., and Paul N. Wengert, Esq., Venable, Baetjer and Howard, LLP, for Keystone Ship Berthing, Inc., an interested party.

Alan W. Mendelsohn, Esq. and Owen C. Wilson, Esq., Department of the Navy, Military Sealift Command, for the agency.

Susan K. McAuliffe, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency determination that proposal which provided 20-foot wide paved roadway met solicitation 20-foot roadway width requirement was reasonable notwithstanding preliminary drawing in proposal that provided for 10-inch curb resting on the 20-foot wide roadway since proposal promised in other places to provide 20-foot wide roadway, curb was in addition to RFP's minimum requirements, and it could easily be removed from the drawing prior to construction; accordingly, the agency reasonably determined that proposal met 20-foot wide paved roadway requirement.

2. Agency reasonably found awardee's proposal of parking area approximately two blocks from pier's layberth site acceptable where solicitation's requirement for parking area adjacent to layberth did not require parking contiguous to the layberth site.

3. Agency reasonably determined that transit shed did not pose an unacceptable fire hazard where shed is to be used only for the storage of nonhazardous materials, including paper and lumber.

4. Protest that agency's communication with successful offeror prior to award constituted improper post-best and final offer discussions is denied where the protester has not shown the requisite prejudice to sustain the protest.

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DECISION

Maritime Management, Inc. (MMI) protests the award of a contract to Keystone Ship Berthing, Inc. under request for proposals (RFP) No. N62387-94-R-4006, issued by the Department of the Navy, Military Sealift Command, for layberth services for two Fast Sealift Ships (FSS).¹ MMI contends that the agency improperly evaluated the awardee's proposal and improperly conducted discussions with Keystone after the submission of best and final offers (BAFO).

We deny the protest. Concerning the protester's specific contentions regarding the agency's actions, we conclude that the agency either did not miscalculate the awardee's proposal, or that the protester was not prejudiced by the agency's actions.

The RFP, which contemplated the award of a firm, fixed-price contract, with minor cost reimbursable elements, for a 2-year base period with three 1-year options, provided for performance to start on May 10, 1995. The proposals were to be evaluated for technical acceptability of the required services; offerors were to demonstrate the proposal of a technically adequate, safe berth, and were to include a facility improvement plan addressing those improvements necessary to meet all requirements, and a plan of action and milestones (POA&M) of each key event in the facility improvement process. Award was to be made to the lowest priced, technically acceptable offeror.

Initial proposals were received by October 25, 1994, discussions were conducted on December 12 and 13, and BAFOs were submitted by December 29. Keystone proposed a total price of \$2,736,540 for the base and option periods for evaluation compared to MMI's offer of \$3,604,481.²

¹The FSS are activated to transport equipment to support an Army division or other units. As necessary, the equipment is loaded aboard these ships for rapid, point-to-point sealift from the United States to support worldwide operations. When not activated, the FSS are placed in reduced operating status at layberth sites. The layberth services specified in the RFP include the provision, operation and maintenance of a technically adequate, safe berthing facility at a port which is navigable 24 hours a day.

²MMI contends that Keystone's proposal should be rejected as mathematically unbalanced (for overstating the base year prices) and materially unbalanced (because the proposal
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Keystone was awarded a contract under the RFP on January 24, 1995, on the basis of its lowest priced, technically acceptable proposal. MMI, which offered the ships' current layberth site, filed its initial protest of the agency's evaluation of the awardee's proposal with our Office on February 3; the protester filed related supplemental protests of the award on March 3 and March 28.³

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becomes low only in the first option year.) MMI argues that if performance problems occur due to the technical inferiority of Keystone's proposal, the agency may not exercise the options. This speculation does not establish that the awardee's offer is unbalanced. The record shows that Keystone's base price includes the cost for significant site improvements the value of which will not pass to the contractor after completion of the contract, that the agency has historically exercised options for these services and plans to do so here, and the protester has not provided any credible evidence to show otherwise. Under the circumstances, we do not think that Keystone's offer was mathematically or materially unbalanced. See M&M Servs., Inc., B-228717, Oct. 21, 1987, 87-2 CPD ¶ 382.

³MMI's March 28 protest, for the first time, challenged the award on the basis that Keystone's proposal was conditional since the lease for the pier it offered was not finalized until after the submission of BAFOs; the supplemental protest also stated that the terms of Keystone's dredging permit are inadequate to meet the RFP's requirements. We dismiss these allegations as untimely filed. First, regarding the lease, the record shows that the protester had a copy of the lease, dated after the submission of BAFOs, several weeks earlier than the date it first raised the protest issue; to be timely, the matter had to have been filed within 10 working days of MMI's obtaining the copy of the lease since the basis of protest should have been known at that time. 4 C.F.R. § 21.2(a)(2) (1995). Second, regarding the dredging permit, the protester failed to expeditiously or diligently pursue the information on which this allegation is based; although the permit was publicly available from the U.S. Army Corps of Engineers, the protester failed to seek the document until several weeks after the protest was filed, and further, failed to timely act upon it when it was received from the Corps. See Horizon Trading Co., Inc.; Drexel Heritage Furnishings, Inc., B-231177; B-231177.2, July 26, 1988, 88-2 CPD ¶ 86. Our Bid Protest Regulations do not allow this type of piecemeal presentation of protest issues. Id.

MMI contends that the agency misevaluated the Keystone proposal and improperly determined it to be technically acceptable since, according to MMI, Keystone's proposal fails to meet certain technical requirements. In reviewing an agency's technical evaluation, we will not reevaluate the proposals; instead, we will examine the record to ensure that the evaluation was reasonable and consistent with the RFP evaluation criteria. Management Technical Servs., B-250834, Feb. 22, 1993, 93-1 CPD ¶ 304.

MMI first contends that because a drawing in Keystone's proposal shows a 10-inch timber curb upon a 20-foot wide roadway, the awardee's proposal failed to meet the RFP requirement that the width of the access roadway be "20 feet (not including suitable shoulders)." At several places in the proposal, Keystone stated that it will provide the required 20-foot wide roadway. Furthermore, the curb is in excess of the RFP's minimum requirement of a 20-foot paved roadway (which Keystone's proposal otherwise provided), and the challenged curb could easily be removed from the firm's preliminary drawing prior to construction. Under the circumstances, we cannot find the agency acted unreasonably in finding that the proposal met the RFP's 20-foot roadway width requirement.

MMI next challenges the agency's determination of the technical acceptability of Keystone's proposed parking area. The RFP required a parking area "adjacent to the layberth." Keystone's proposed parking area is approximately two blocks from the pier's layberth site. MMI contends that the awardee's parking area does not meet the RFP's adjacency requirement which it interpreted as requiring offerors to propose a parking area adjoining or contiguous to the layberth site. The agency states that Keystone's parking area met the RFP's adjacency requirement because the RFP's use of the term "adjacent" means that the parking area can be near or not distant from the layberth and that the RFP does not require that the parking area be contiguous to the layberth.

The meaning of the term "adjacent" in the RFP is not entirely clear. A common definition of "adjacent" includes both the protester's interpretation of the RFP term (i.e., adjoining) and the agency's interpretation (i.e., not distant or nearby). See Webster's Ninth New Collegiate Dictionary (1983). Since the RFP does not specifically require contiguity of the parking area to the layberth, the RFP's adjacency requirement is susceptible to more than one reasonable interpretation. The agency's interpretation--that adjacent can mean near or close to the layberth, as proposed by Keystone--is the less restrictive one and is not inconsistent with the RFP when read as a whole. We thus find that the agency acted reasonably in deciding that the

proposal of a parking area two blocks from the layberth met the adjacency requirement. See Aero Realty Co., B-250985, Mar. 2, 1993, 93-1 CPD ¶ 191. Further, there is no showing in the record that any offeror was misled by the RFP requirement as more broadly interpreted by the agency.

MMI also contends that Keystone's proposal is technically unacceptable because its parking area will not be visible from the guard shack, as required by the RFP. The agency states that the RFP's general requirement that the offeror's guard shack (required by the RFP to be staffed by at least one guard) have sufficient windows for full visibility of the layberth facility must be read in conjunction with the RFP's emphasis on the agency's concerns for safety and security within the layberth facility and not merely for the provision of visibility of the parking area. The agency states that regardless of whether the parking area is considered part of the layberth facility or whether Keystone's parking area is visible from the proposed guard shack, the proposed parking area provides adequate security to meet the RFP's security requirements since Keystone's proposal affirmed that the parking area will be lighted and secured by a fence and automatic card key-access security system, and that safe access exists between the parking area and the pier; Keystone stated that on-street parking at the pier was also available.

We do not believe that the agency's determination of technical acceptability in this area represents, as MMI contends, a significant deviation from the RFP requirements that materially affects the award determination. The RFP, as the agency points out, specifically identified the agency's overall security concerns and we believe the awardee's proposal provided adequate information to support a determination of the acceptability of the security of its parking area and access to that area. Although acceptance of the proposal constitutes a relaxation of the RFP's guard shack visibility requirement, we agree with the agency that the deviation of the visibility requirement was not material. The RFP reflects that the agency's greater interest was in having adequate security for the parking area. Clearly, the awardee's proposed plan for the parking lot provides for significant security and safety features which the agency reasonably found met its needs. The protester has not demonstrated how it has been prejudiced by the agency's evaluation since MMI has not shown that it would have changed its proposal in any way had it known beforehand that the visibility provision would be waived.

MMI also challenges the acceptability of Keystone's proposal because a Maryland Port Authority transit shed, which holds lumber and paper, is located near Keystone's proposed layberth site. The RFP requires that no nearby structure

provide an unreasonable fire hazard. MMI argues that since lumber and paper are flammable materials, and since Keystone will not have access to the shed, the shed presents an unacceptable fire hazard.

The RFP required that no nearby structures contain hazardous/explosive material and that the layberth and associated structures shall not present an unacceptable fire hazard to the ships. Although Keystone does not have access to the shed, the firm provided to the agency a statement from the Maryland Port Authority confirming its policy of not storing hazardous materials in the structure. Based on this information, we believe the agency could reasonably conclude that Keystone's proposal satisfied the RFP's requirements regarding the safety of nearby structures. We also believe that the agency could reasonably conclude that the shed's lumber and paper contents did not pose an unacceptable fire hazard as contemplated by the RFP prohibition. We think the agency's determination was within the agency's reasonable discretion. Accordingly, this protest basis is denied.⁴

MMI next protests that the agency conducted improper post-BAFO discussions with Keystone by allowing Keystone the opportunity to make its unacceptable proposal compliant with the required performance schedule.⁵ The record shows that

⁴MMI also contends that the agency failed to conduct an adequate cost realism analysis of Keystone's proposal and that in light of Keystone's low price, the agency will be faced with contractor claims for additional funds after award. The RFP stated only generally that "the elements of the per diem price will be reviewed for cost realism." The agency here compared the offerors' per diem rates or fixed price elements (e.g., Keystone's substantially low lease payments account for a difference in the offerors' prices) and reviewed Keystone's pricing data sheet to confirm that an item-by-item cost breakdown of the work to be performed paralleled the proposed price. There was no requirement for additional supporting cost or pricing data or any additional analysis of the data submitted; the protester has not provided any information to persuasively contest the reasonableness of the agency's analysis. See Family Realty, B-247772, July 6, 1992, 92-2 CPD ¶ 6.

⁵MMI also contends that improper post-BAFO discussions were conducted with Keystone to allow the firm's technically unacceptable proposal to be made acceptable by allowing a copy of omitted documents (a lease and a dredging permit) to be considered by the agency after the submission of BAFOs. The RFP, however, did not require rejection of a proposal as
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the POA&M in Keystone's proposal provided for 140 days after award for completion of the necessary improvements, but because of delays by the agency in awarding the contract, less than 140 days remained until the May 10 required start of performance. The agency states that it sent the following communication to Keystone before the agency could make an affirmative determination of the firm's responsibility:

"As a result of the time taken in awarding a contract . . . inconsistencies exist between the delivery dates required by the solicitation and the [POA&M] in your proposal. Will you verify (in writing) that, if awarded a contract by 25 January 1995 that you will meet the delivery dates prescribed in the RFP (10 May 1995) at your proposed price."

The agency states that the challenged communication did not constitute discussions because it did not involve the technical acceptability of Keystone's proposal, but only the offeror's ability to meet the required performance delivery date.

Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of its proposal. Federal Acquisition Regulation (FAR) § 15.601; Paramax Sys. Corp.; CAE-Link Corp., B-253098.4; B-253098.5, Oct. 27, 1993, 93-2 CPD ¶ 282; HFS, Inc., B-248204.2, Sept. 18, 1992, 92-2 CPD ¶ 188. Here, even if the communication constituted post-BAFO discussions, the protester has not shown that similar discussions with it would have possibly affected its

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technically unacceptable for omitting these documents and the record shows that the agency obtained the documents during its pre-award survey from sources other than Keystone.

standing for award. MMI offered the incumbent layberth facility and was found technically acceptable. The firm does not state--nor does the record suggest, in light of the firm's opportunity to do so during the prior discussions held with the firm--that it would have lowered its substantially higher price to such an extent (i.e., by at least approximately 28 percent), to have reasonably put the firm in line for award had the protester been included in another round of discussions. Accordingly, MMI has not shown the requisite prejudice to sustain the protest issue. See IT Corp., B-258636 et al., Feb. 10, 1995, 95-1 CPD ¶ 78.

The protest is denied.

for *Robert P. Murphy*
Robert P. Murphy
General Counsel