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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-203419 DATE: December 31, 1981

MATTER OF: Biospherics, Inc.

DIGEST:

1. During evaluation of proposals in step one of two-step procurement, the agency may delete a requirement for information which was to be used in evaluating proposals where (1) the revised requirement appears to reflect the agency's actual needs and (2) there is no showing that the interests of offerors or potential offerors are unfairly prejudiced by the amendment.

2. Contention that the agency waived the solicitation's definitive responsibility criteria is without merit because the information requested (concerning prior experience and quality control programs) was general in nature and not sufficiently specific and objective to be described as definitive responsibility criteria.

Biospherics, Inc., protests the proposed award of a contract to Lapteff Associates (Lapteff) by the District of Columbia (D.C.) under solicitation No. 0149-AA-0-1-RJ, a two-step formally advertised procurement for laboratory services at the Blue Plains Wastewater Treatment Facility. Biospherics objects to D.C.'s determination to postpone evaluation of certain information concerning an offeror's ability to perform the required work until the second step, price competition, had been completed. Alternatively, Biospherics argues that the other offerors should be determined to be nonresponsible. D.C. explains that its intent from the start was not to evaluate capability to perform until after prices were submitted in the second step. We find that this protest is without merit.

On December 8, 1981, Biospherics filed suit in the Superior Court of the District of Columbia, raising the same material issues and requesting (1) a temporary

restraining order enjoining D.C. from making award until our Office renders the decision on its protest, (2) a declaratory judgment, and (3) a preliminary injunction. Biospherics, Inc. v. The District of Columbia, et al., Civil Action No. 17577-81. We understand that the court refused to issue a temporary restraining order, scheduled the hearing on the preliminary injunction for January 25, 1982, and expressed an interest in receiving our views on the matter. Accordingly, even though the material issues are pending before a court, we will provide our views on the matter. 4 C.F.R. § 21.10 (1981).

This procurement results, in part, from our decision in the matter of Lapteff Associates, et al., B-196914, August 20, 1980, 80-2 CPD 135, aff'd, 60 Comp. Gen. 28 (1980), 80-2 CPD 272. There, our Office determined that while information as to how bidders propose to comply with quality control requirements for services may be required under the prior solicitation (an invitation for bids) to determine a bidder's responsibility, the information could not be required for the purpose of making a responsiveness determination regardless of the solicitation's language to that effect. We suggested that the contract award for 1 year not be disturbed, but recommended that the options for additional years of performance not be exercised and the procurement be resolicited on a proper basis. Thus, D.C. could have evaluated information on how offerors would perform the required work by using a negotiated procurement or D.C. could have used formal advertising and considered such information in determining the bidder's responsibility.

In response to our decision, D.C. initiated this two-step formally advertised procurement. The first step involved the evaluation of proposals to determine the acceptability of the services offered. Step two involved the receipt of bid prices from offerors which submitted an acceptable proposal in step one. Proposals were submitted on January 16, 1981, by Martel Laboratories, Inc. (Martel), Lapteff, and Biospherics. Also on January 16, 1981, Martel protested here contending that the new solicitation contained language identical to that in the prior solicitation. Martel believed that D.C.'s evaluation plan was contrary to the holding in our Lapteff Associates, et al., decision. After D.C. notified GAO and the interested parties that information concerning the offeror's ability to perform would not be used to determine an

offeror's technical acceptability, Martel essentially withdrew its protest. However, D.C.'s action sparked Biospherics' protest.

On June 1, 1981, D.C. amended the solicitation, formally eliminating as evaluation factors under step one (1) previous related work and experience of personnel assigned to project, (2) previous related work and experience of the organization, (3) previous Environmental Protection Agency (EPA) contract experience, and (4) quality of the offeror's quality control program. The remainder of the solicitation's evaluation factors were unchanged. D.C. explained in the amendment that, in order to shorten the award process, this information regarding each offeror's capability would be used to evaluate responsibility under step two. D.C. advised that the purpose of the amendment was to clarify D.C.'s intent to use responsibility data only in the second step.

On the basis of the amended solicitation, D.C. determined that all three proposals were technically acceptable, and that all three offerors should be permitted to submit prices under step two. Lapteff submitted the low bid price. We have been advised by D.C. that it intends to award to Lapteff, which D.C. has determined to be responsible.

Biospherics argues that, based on the unamended solicitation, it was the only technically acceptable offeror under step one. Biospherics contends that D.C. restructured the procurement to avoid having to negotiate solely with Biospherics. In support, Biospherics relies on: (1) a memorandum dated April 13, 1981, signed by a technical evaluator, which indicates that the three proposals were reviewed in accordance with the original evaluation criteria and that Martel's and Lapteff's quality control programs were not acceptable and that Lapteff's previous EPA contract experience was not acceptable, and (2) a memorandum dated May 8, 1981, which indicates that the contracting officer determined that the responsibility determination should be made in the second step and that all proposals responded adequately to the requirements of the first step and should be allowed to submit bid prices under step two.

Biospherics contends that on the basis of the technical findings, Biospherics was the only offeror

eligible to proceed to step two. Biospherics states that, under such circumstances, where only one technically qualified offeror remains after step one, price negotiations properly should have been conducted solely with Biospherics. Biospherics asserts that the amendment was an improper attempt to circumvent this result.

Biospherics also contends that the amendment eliminated all evaluation factors which had necessitated the use of a two-step procurement instead of procurement by formal advertising.

Biospherics concludes that D.C.'s deletion of the requirement for information on the offeror's capability to perform prejudiced Biospherics by forcing it to expend effort unnecessarily in preparing its proposal for step one, prejudiced other potential offerors, which cannot enter the competition now, and prejudiced D.C.'s interest in protecting health and safety by reducing the solicitation's emphasis on high quality laboratory services. Alternatively, Biospherics contends that the amendment converted the technical evaluation criteria of step one to definitive responsibility criteria of step two and the other offerors are not eligible for award because they failed to satisfy the criteria.

In response, D.C. reports that the technical evaluation memorandum essentially represents the viewpoint of the one staff member who signed it and his views were not adopted by supervisory personnel or the contracting officer.

Our primary concern is whether it was legally proper for D.C. to amend the solicitation's evaluation criteria after proposals had been received and evaluated. We have considered protests against the propriety of issuing an amendment during the technical evaluation of the proposals. This Office previously has found no legal objection to changes in specifications by amendment made during the evaluation of technical proposals in step one of a two-step procurement where the changes appeared to reflect actual agency needs and provide for a broader competitive base, by relaxing requirements even where these changes were particularly advantageous to one offeror. Guardian Electric Manufacturing Company, 58 Comp. Gen. 119 (1978), 78-2 CPD 376. Similarly, in negotiated procurements we have stated that changes such as altering evaluation criteria or modifying requirements are ordinarily permitted during the

course of a negotiated procurement as long as all offerors are given the chance to respond to them. Systems Group Associates, Inc., B-198889, May 6, 1981, 81-1 CPD 349; Alton Iron Works, Inc., B-179212, May 6, 1974, 74-1 CPD 121. For example, in Systems Group Associates, Inc., we found no legal objection to changes by amendment concerning how the agency intended to weigh evaluation criteria.

Here, the amendment was issued to clarify the contracting officer's intention to consider the information concerning an offeror's experience and quality control only as a part of the responsibility determination; he did not intend to evaluate that information as a portion of each offeror's technical proposal. The amendment did not eliminate the requirement that each offeror submit, under step one, information on experience and quality control but the amendment did reduce the solicitation's emphasis on experience and capability by eliminating this element from the evaluation of technical proposals. While deemphasizing qualifications may have adversely affected Biospherics, which may view itself as the most qualified offeror, there is no showing that the solicitation as amended would not meet D.C.'s needs. Further, at least in the eyes of one technical evaluator, the amendment broadened competition in step two because Lapteff and Martel were technically acceptable based on the amended solicitation. Thus, we have no basis to object to the amendment to the solicitation's evaluation criteria even though proposals were received and evaluated at the time of the amendment.

Turning to Biospherics' specific contentions, first, in our view, potential offerors were not prejudiced because the amendment was not so substantial in nature and purpose that D.C. was required to cancel the original solicitation and issue a new solicitation. As noted, the amendment merely postponed consideration of experience and quality control until after prices were submitted in step two. Second, Biospherics was not unfairly prejudiced by D.C.'s actions because Biospherics had the same opportunity as the other competitors to submit its price based on the revised solicitation. Moreover, since all offerors had to submit information on experience and quality control in step one, Biospherics was not put to unnecessary expense. Third, Biospherics has failed to show that the amended solicitation would prejudice D.C. The determination of the needs of the Government and the methods of accommodating such

needs are primarily the responsibility of the contracting agencies of the Government. 38 Comp. Gen. 190 (1958); Fenwal, Inc., B-202283, December 18, 1981, 81-2 CPD ___. Here, under the amended solicitation, D.C. determined that Lapteff can perform the work as required. We have no basis to conclude that D.C.'s interest in protecting health and safety through high quality laboratory services was prejudiced. Since Biospherics has not shown that the amended solicitation does not reflect D.C.'s actual needs and because the change may have provided a broader competitive base, we have no basis to object to D.C.'s action. See Guardian Electric Manufacturing Company, supra.

Regarding Biospherics' contention that the amendment left nothing to evaluate in step one, we note that the amendment merely eliminated a portion of the evaluation factors. The amendment did not disturb the requirement for data and documentation on pages 10 through 15 of the solicitation to be submitted with the proposal. For example, on page 10, the solicitation required written procedures for (1) collecting, transferring, storing, analyzing, and destroying evidence samples; (2) calibrator maintenance and quality control checks on laboratory instruments and equipment; and (3) cleaning and storing glassware. Also on page 10 was a requirement for a detailed outline and narrative concerning compliance with the required quality control and quality assurance requirements. Thus, in our view, the amendment did not leave nothing to evaluate in step one.

Regarding Biospherics' alternate contention--that D.C. created definitive responsibility criteria and improperly concluded that Lapteff satisfied the criteria--in our view, the amendment did not establish definitive responsibility criteria. Definitive responsibility criteria involve specific and objective special standards of responsibility, compliance with which is a necessary prerequisite to award, that cannot be waived by the contracting officer. Bob McDorman Chevrolet, Inc., et al., B-200846, March 13, 1981, 81-1 CPD 194, aff'd sub nom., B-200847.3, August 28, 1981, 81-2 CPD 183. As noted, the amendment required offerors to submit information on (1) previous related work experience of personnel and the organization, (2) previous EPA contract experience and (3) quality control programs; clearly, the information requested was general in nature and not sufficiently specific and objective to be described

as definitive responsibility criteria. Further, in our view, the April technical memorandum has no bearing on the contracting officer's responsibility determination. The record indicates that Lapteff subsequently convinced the contracting officer that it possessed adequate experience and quality control to perform the work satisfactorily. In any event, our Office does not review affirmative determinations of responsibility absent a showing of fraud on the part of procuring officials or of the agency's failure to apply definitive responsibility criteria. Environmental Laboratory of Fayetteville, Inc., B-205593, December 7, 1981, 81-2 CPD ___. Neither exception is applicable here. Thus, we find that this aspect of the protest is without merit.

Protest denied.

Harry R. Van Cleve

For Comptroller General
of the United States