



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Essex Corporation

File: B-246536.3

Date: June 25, 1992

James H. Roberts III, Esq., and Victoria Toensing, Esq., Manatt, Phelps, Phillips & Kantor, for the protester. Richard J. Webber, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for Wackenhut Services, Inc., an interested party.

L. James Tillman and James A. Stout, Esq., Department of Energy, for the agency

Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Proposal that failed to provide letters of intent for key personnel required by the solicitation should have been rejected as unacceptable for failure to satisfy a material solicitation requirement.

2. Where agency properly received initial proposals, conducted meaningful discussions, and received final revised proposals, then awarded a contract to offeror whose proposal failed to satisfy material solicitation requirements, agency should reevaluate the extant final proposals and select an awardee on the basis of those proposals.

DECISION

Essex Corporation protests the award of a contract to Wackenhut Services, Inc. (WSI) under request for proposals (RFP) No. DE-RP04-91AL72307. The RFP was issued by the Department of Energy (DOE) for proposals to operate DOE's Transportation Safeguards Training Center in Albuquerque, New Mexico. Essex, the incumbent contractor, contends that WSI's final proposal was technically unacceptable for failing to comply with the solicitation requirements regarding key personnel.

We sustain the protest.

BACKGROUND

The RFP was issued on March 11, 1991, and, as amended, required submission of initial proposals by April 19. The solicitation contemplated award of a contract under which the contractor would provide all personnel, facilities, equipment, supplies, and services necessary to operate DOE's Transportation Safeguards Training Center, located in Albuquerque, New Mexico.

The solicitation established that, in evaluating technical proposals, the "managerial/operation" factor would be significantly more important than any other technical factor, and provided that "personnel" would be the second most important element within the "managerial/operation" factor. The solicitation listed several key positions, and provided that each offeror must submit letters of intent from the personnel it proposed to fill those key positions.¹ Specifically, RFP § L.03(b)(2)(ii) stated:

"Personnel. The Offeror shall substantiate the experience, formal and informal training, and demonstrated performance of the proposed Instructor and Key Management Personnel which will perform key functions by furnishing resumes In addition, provide Letters of Intent for those Instructor and Key Management Personnel who have provided written assurance that they would accept employment with the Offeror's firm if they are currently employed with another firm."

Four proposals, including those of Essex and WSI, were timely submitted by the April 19, 1991, closing date. All four were subsequently determined to be within the competitive range.

In its initial proposal, WSI stated that, except for the project manager and deputy project manager, it intended to perform the contract by hiring all of Essex's incumbent personnel; however, WSI submitted no letters of intent for

¹Section L identified the key positions as: project manager; deputy project manager; assistant manager for logistics operations; assistant manager for plans and administration; assistant manager for curriculum support; curriculum development specialist; accreditation specialist; contractor instructors; and environment, safety and health program manager.

any Essex personnel.² Consistent with WSI's inability to attract Essex personnel, WSI's initial proposal listed several "alternate candidates" for each of the key positions; however, WSI submitted no letters of intent for any of these "alternate candidates."³ WSI's proposal did include letters of intent for its proposed project manager and deputy project manager.

By letter dated June 5, the agency advised WSI that discussions would be conducted, and identified particular aspects of WSI's proposal which were weak or deficient. Among other things, this letter called WSI's attention to its failure to provide commitments from the key personnel it proposed, stating:

"What assurances can you provide that the personnel proposed in your proposal dated April 19, 1991, are still available and will be committed to working on the proposed contract. If any of these proposed personnel are no longer available to work on this contract, please provide the information requested in the RFP for those personnel you plan to substitute. Also, for any proposed personnel for which written assurances were not provided in your proposal, please provide letters of intent for such personnel." [Emphasis added.]

On June 14, the agency conducted oral discussions with WSI. During those discussions, the agency raised the issue of WSI's failure to submit letters of intent for its key personnel. In this respect, the record contains the contracting officer's handwritten notes concerning the oral discussions with WSI which state, "SEB stressed necessity

²WSI's initial proposal noted that although WSI had placed an advertisement seeking applicants, it had received no responses from any Essex personnel.

³Essex contends that WSI's proposal of alternate candidates violated RFP § L.36 which stated: "Alternate proposals are not solicited, are not desired, and shall not be evaluated." DOE responds that: "The SEB did not consider the WSI initial submission [of alternate candidates] as [an] alternate proposal as it . . . was not an entirely separate technical or business management proposal." In light of our conclusion that WSI's proposal was otherwise technically unacceptable, we need not resolve this issue.

for Letters of Intent," WSI responded by expressing its dissatisfaction with the RFP requirement in this regard. Video Transcript (VT) at 14:57.⁴

The record is clear that during discussions DOE specifically advised WSI that it was required to submit letters of intent for all key personnel proposed. Further, WSI acknowledges that DOE personnel made no statements purporting to curtail or rescind the RFP's letter of intent requirement, VT at 15:09-10. Finally, the RFP was not amended in any way following discussions. Nonetheless, WSI asserts that, after expressing its dissatisfaction with the letter of intent requirement during oral discussions, it believed it was not required to submit letters of intent for its key personnel.

Following discussions, each offeror was asked to submit a "final revised proposal"⁵ by June 24. WSI's final revised proposal contained no additional letters of intent, and stated:

"key personnel will execute day-to-day operations, so experience here is vital to program continuity. Consequently, we opted to retain incumbents wherever justified by job performance. We have taken the precaution, however, of recruiting a group of qualified, alternate candidates for all key positions. . . . [O]nce our staff selections are complete, [DOE] will benefit from a key personnel team synthesized from the best qualified incumbents and outside candidates."

In short, in its final revised proposal, WSI advised DOE that it would wait until after its proposal had been evaluated, and after it had been awarded a contract, to advise the agency which key personnel it intended to use on the contract.

Despite WSI's refusal to comply with either the solicitation requirement or the agency's direct request during discussions that letters of intent be submitted, DOE's source

⁴WSI specifically questioned the number of positions the solicitation designated as "key." WSI's president asserted that WSI is performing contracts with more than 1,000 employees in which no more than 2 employees are properly designated as "key personnel." VT at 14:57.

⁵Although such submissions are usually referred to as "best and final offers," here, DOE referred to them as "final revised proposals"; our decision uses DOE's nomenclature.

selection official (SSO) selected WSI for contract award on August 21, 1991. Essex was notified of the selection by letter dated August 26.

On September 9, Essex filed an agency-level protest. In that protest, Essex questioned whether WSI had proposed Essex key personnel without obtaining letters of intent for those individuals. On September 10, DOE's contracting officer contacted WSI and asked that WSI submit letters of intent for its "alternate candidates" and also asked WSI to provide a letter stating that it no longer intended to use former Essex employees as key personnel.⁶ VT at 11:36-37.

On September 13, WSI responded to DOE's request, submitting a letter stating that WSI no longer intended to use any Essex employees as key personnel.⁷ A DOE attorney providing legal support for this procurement edited WSI's letter; the contracting officer then telecopied the letter back to WSI and asked WSI to re-sign and resubmit the letter as edited. VT at 11:38. WSI resubmitted the letter and, under separate cover, also submitted letters of intent for 13 of the "alternate candidates" identified in its proposal.⁸ Each of these letters of intent carried dates of either September 12 or September 13.

By letter dated September 24, DOE responded to Essex's agency-level protest. In that response, DOE included a copy of the letter WSI submitted on September 13 which stated: "WSI no longer intends to employ [Essex's] personnel to staff key management and instructor positions." Based on this evidence, Essex withdrew its agency-level protest.

⁶The contracting officer testified that she advised WSI what DOE wanted in the letter. More specifically, she stated, "I talked to [the WSI president] and told him what we needed him to say." VT at 11:37.

⁷At the hearing, WSI's president acknowledged that WSI changed its intention with regard to key personnel as a result of Essex's agency-level protest. VT at 15:16.

⁸In its proposal, WSI had listed over 25 "alternate candidates," identifying multiple individuals for each key position. For example, WSI's proposal listed five "alternate candidates" for the position Assistant Manager, Logistics Operation; five "alternate candidates" for the position Assistant Manager, Plans and Administration; and three alternate candidates for the position Assistant Manager, Training.

On November 1, DOE awarded WSI a letter contract. On that same day, WSI's project manager issued a memorandum to 40 of Essex's 41 incumbent employees--including Essex's key personnel--stating "WSI intends to continue as many incumbent employees as possible. . . . I look forward to working with you for a successful future." WSI's project manager testified that, at that time, he "had not foreclosed the possibility" of hiring Essex key personnel because DOE personnel were concerned that the contract could not be properly performed without Essex's key personnel. VT at 16:08-16:14.

On November 5, Essex filed a protest with our Office alleging that WSI had engaged in "bait and switch" tactics, that is, that WSI had proposed a slate of individuals other than the incumbent personnel, with the intention of actually performing the contract with Essex personnel. By letter dated November 25, DOE wrote to counsel for Essex, requesting that Essex withdraw its new protest. Pursuant to a protective order issued by our Office, DOE sent Essex's counsel various documents including the letters of intent and accompanying cover letter WSI had submitted on September 13. However, the version of the cover letter which DOE provided to Essex's counsel carried a date of June 24 (the closing date for submission of final revised proposals), and the dates on the accompanying letters of intent had been removed. DOE expressly represented to Essex's counsel that WSI had submitted the letters of intent and the accompanying cover letter with its final revised proposal, and that WSI's proposal had subsequently been evaluated only on the basis of the non-Essex, "alternate candidates."

In short, DOE presented Essex's counsel with materially altered documents⁹ (which WSI had prepared in response to Essex's agency-level protest), misrepresented to Essex's counsel that these documents had been submitted by WSI with its proposal prior to the June 24 closing date, and asked Essex to withdraw its protest. Essex declined to do so, and subsequently amended its protest to question whether the letters of intent for the "alternate candidates" had been submitted prior to the closing date for submission of final

⁹Under the terms of the protective order, Essex's counsel was unable to discuss these documents with his client.

revised proposals. On November 26, the DOE SSO executed a written determination that performance of the contract should not be suspended notwithstanding Essex's protest.¹⁰

On December 18, DOE filed an administrative report with our Office. As part of that report, DOE submitted the altered documents along with a statement signed by the contracting officer and the DOE attorney supporting this procurement asserting, among other things, that: "WSI revised its final proposal by submission of a letter dated June 24, 1991, with Letters of Intent for each person."

On February 10, DOE advised our Office that it had "[recently] learned that the evaluation process . . . was flawed."

Our Office subsequently conducted a hearing during which we received testimony from various DOE officials as well as WSI and Essex personnel. At the hearing, DOE's contracting officer testified that she had altered the documents that WSI submitted on September 13. Specifically, the contracting officer testified that she had deleted the dates on the letters of intent and the accompanying cover letter, and retyped the date of June 24 on the cover letter to make it appear that the documents had been submitted with WSI's final revised proposal. VT at 11:41-11:42, 12:00-12:01.¹¹ The contracting officer also testified that, after altering the documents, she advised WSI's project manager and deputy project manager of her actions.¹²

¹⁰One of the reasons stated by the SSO for making this determination was that: "We are prepared to refute all allegations made by Essex Corporation. . . . [T]here is no likelihood that GAO will sustain the Essex protest."

¹¹The agency is in the process of investigating the matters that led to the alteration of documents.

¹²The contracting officer testified that she advised WSI personnel of her actions in late October, 1991. VT at 12:10-12:11; 12:37-12:38. WSI's project manager acknowledged that the contracting officer advised him and the deputy project manager of her actions, but asserted that the conversation took place "during the week of December 16." VT at 15:54. The record contains a letter dated November 20, 1991, over the project manager's signature, stating: "WSI has no objection to release of the Letters of Intent signed by our proposed Key Personnel and included in our proposal." The letters of intent released to Essex's counsel on November 25, in fact, were not included in WSI's proposal.

DISCUSSION

In negotiated procurements, a proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations. See, e.g., Stocker & Yale, Inc., 70 Comp. Gen. 490 (1991), 91-1 CPD ¶ 460; Eklund Infrared, 69 Comp. Gen. 354 (1990), 90-1 CPD ¶ 328. Generally, a requirement for letters of intent from key personnel constitutes a material solicitation requirement. See, e.g., Corporate Am. Research Assocs., Inc., B-228579, Feb. 17, 1988, 88-1 CPD ¶ 160. Here, the solicitation devoted two full pages to identifying and describing the key functional positions. Further, DOE specifically brought the requirement for letters of intent to WSI's attention prior to and during oral discussions. Finally, WSI's own final proposal demonstrated its understanding of the importance of key personnel, noting that "experience [of key personnel] is vital to program continuity." The requirement in this solicitation for submission of letters of intent for key personnel unquestionably constituted a material requirement.

Here, following submission of WSI's initial proposal, the agency provided WSI with a written discussion question specifically requesting submission of letters of intent and, during oral discussions, the agency "stressed the necessity for Letters of Intent." Although WSI acknowledges that, during discussions, the agency specifically alerted WSI to the fact that it had failed to submit the required letters of intent, VT at 15:07-15:08, WSI now takes the position that the language in the solicitation should be interpreted as requiring letters of intent only if such letters had, in fact, been provided to the offeror by the key personnel proposed. WSI's argument is without merit. Provisions requiring submission of letters of intent are included in RFPs in order to provide agencies with assurances that the key personnel proposed by offerors are, in fact, intending to work for the offeror proposing them. While this provision could have been more clearly worded, the agency consistently interpreted the provision during discussions in what we believe is the only reasonable manner, and this interpretation was conveyed to WSI. WSI's current interpretation would render the provision meaningless, since it would provide offerors complete discretion as to whether to provide the assurances sought.¹³

¹³To the extent WSI is now protesting the existence of the solicitation requirement, its protest is untimely. See 4 C.F.R. § 21.2(a)(1) (1992).

WSI's initial proposal failed to include letters of intent for all but two of the personnel it proposed to fill the key positions. Despite the agency's clear request during discussions that: "for any proposed personnel for which written assurances were not provided in your proposal, please provide letters of intent for such personnel," WSI elected not to comply with this requirement. Accordingly, WSI's final revised proposal should have been rejected for failing to comply with a material requirement of the solicitation. See Stocker & Yale, Inc., supra; Eklund Infrared, supra.

The protest is sustained.

RECOMMENDATION

DOE has acknowledged that its conduct of this procurement was flawed. Based on that fact, DOE proposes to reopen negotiations with all offerors, request submission of another round of revised proposals, and make a source selection on the basis of the revised proposals--while continuing contract performance with WSI. Essex objects to DOE's proposed action, noting that such action will merely permit WSI to do legally what it attempted to do improperly--that is, identify which personnel it intends to propose after receiving the contract award.¹⁴

We see no reason for soliciting yet another round of revised proposals. Based on the record before us, it appears that the agency properly obtained initial proposals, conducted meaningful discussions, and obtained final revised proposals on the basis of those discussions. The record does not evidence a flaw in the procurement up to that point. On the basis of the facts presented here, we believe it would be inappropriate for the agency to use another round of revised proposals to afford WSI the opportunity to provide information it was previously asked to submit. See Federal Acquisition Regulation § 15.610(d)(1); Advanced Data Concepts, Inc. v. Department of Energy, GSBCA No. 11707-P, 92-1 BCA ¶ ___ (1992).

Accordingly, we recommend that DOE reevaluate the previously submitted final revised proposals. In the event the information in those proposals needs to be updated due to the passage of time, revisions should be sought only from those offerors that previously submitted proposals which

¹⁴The record indicates that WSI is currently performing the contract with a significant number of key personnel that are neither former Essex employees nor the "alternate candidates" for whom WSI, belatedly, provided letters of intent.

complied with the material solicitation requirements. Following reevaluation of proposals, the agency should award a contract based on the proposal most advantageous to the government as measured by the evaluation criteria contained in the RFP.¹⁵ Essex is also entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d).

Milton J. Auster

Acting Comptroller General
of the United States

¹⁵The record also indicates that, on or about October 7, 1991, an Essex employee reviewed a portion of WSI's initial proposal. WSI asserts that Essex's unauthorized review of its proposal should form the basis for summarily dismissing Essex's protest or, alternatively, preclude Essex's further involvement in this procurement. We disagree. Essex did not view WSI's proposal until after all final revised proposals had been submitted, after the source selection had been made, and after Essex had been formally notified of the source selection. Thus, Essex's action provided it with no competitive advantage while the procurement was being conducted. Cf. Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd, B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435 (offeror was properly disqualified where it obtained a competitor's proprietary proposal information prior to closing date for submission of initial proposals, thereby obtaining a competitive advantage.) With regard to WSI's contention that Essex should be precluded from further participation in this procurement, we are unaware of any unfair advantage that will accrue to Essex during the reevaluation as a result of its review of WSI's proposal.