



Comptroller General
of the United States
Washington, D.C. 20548

1119287

Decision

Matter of: Plum Run
File No.: B-256869
Date: July 21, 1994

Curtis W. Stewart for the protester.
Timothy L. Felker, Jr., Esq., Department of the Army, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Although solicitation contained latent defects which misled protester into preparing its price proposal based on more labor hours and a higher wage rate than intended by the agency and used by the incumbent contractor, protest against award is denied where record shows that agency still would select awardee's proposal as the most advantageous offer.

DECISION

Plum Run protests the award of a contract to W-P Construction Services, Inc. under request for proposals (RFP) No. DACW69-93-R-0029, issued by the Army Corps of Engineers for maintenance services at the John W. Flannagan Dam located in Haysi, Virginia. Plum Run contends that the agency improperly misled the protester into competing on an unequal basis with W-P Construction, the incumbent contractor for these services.

We deny the protest.

The RFP was issued on October 15, 1993, as a total small business set-aside and required offerors to perform a variety of tasks including: grass mowing and landscape maintenance; cleaning recreational areas and government equipment; building and facilities maintenance; mechanical, electrical, water and sewer systems maintenance; and--of relevance to this protest--park attendant services.

The RFP required offerors to submit both price and technical proposals. For their price proposals, offerors were directed to complete and submit the solicitation's 44-page "PRICES/COSTS" schedule which required fixed prices for each

solicited service over a 1-year base period and four 1-year option periods. In their technical proposals, offerors were to demonstrate full compliance with each of the mandatory requirements set forth in the solicitation's statement of work. With respect to contract award, the solicitation provided that award would be made to the firm "whose proposal conforms to the solicitation and is within a [t]echnical/[p]rice competitive range as determined by the [c]ontracting [o]fficer and has been evaluated as most advantageous to the [g]overnment."

On November 3, the agency issued amendment No. 0001 to the RFP which incorporated Department of Labor (DOL) hourly wage rates for each required service; of significance here, the amendment set forth a \$7.70 "PARK AID" hourly wage rate, with the corresponding position description:

"PARK AID - Maintain surveillance at a campground 24 hours each day and man the entrance station for a specific period during the days specified. Hand out informational pamphlets, Federal Regulation campground maps and other information provided by the Government to all campers as they enter the park. Advise campers and visitors of Title 36 regulations, campground rules and other applicable rules. Collect fees, fill out user permits, fill out visitor permits and maintain register of campers and visitors. Provide personal cash to make change for campers while collecting fees. Prepare draft Remittance Register for User Permits. Inspect the area during times specified. Maintain quiet hours as specified. Report all disturbances to the Resource Manager, Rangers or Project Office or as a last resort, the local law enforcement officers. Cooperate with all Corps of Engineers employees and contractors. Keep a record of all complaints and criticisms of park facilities. Report maintenance items to the Resource Manager."

No separate "park attendant" wage rate was listed in the amendment or original RFP.

By the December 6 closing date, the Army received five proposals. After evaluating these offers, by letter dated December 22, the agency conducted written discussions with each offeror. On January 24, 1994, each offeror submitted a best and final offer (BAFO); the agency evaluated them as follows:

<u>Firm</u>	<u>Technical Score</u>	<u>Total Cost</u>
W-P Construction	76	\$2,840,586
Plum Run	60	\$2,883,013
GCR, Inc.	56	\$3,004,102
Tracer Commercial, Inc.	56	\$2,604,118
Tim Wheeler Enterprises	52	\$2,473,688

After this initial ranking, the contracting officer determined that a score of 60 points would be the minimum technically acceptable score; this resulted in a preliminary competitive range of two firms: W-P Construction and Plum Run. Because W-P Construction's proposal received a higher technical score and was lower priced, on March 21, the agency awarded the contract to W-P Construction. On March 30, Plum Run filed this protest.

PROTESTER'S CONTENTIONS

Plum Run contends that the agency utilized RFP specifications which misled the protester into overpricing its offer, and which prevented the protester from competing on an equal basis with the awardee. First, the protester maintains that the RFP's park attendant labor hours specifications were ambiguous, and misled the protester into basing the price attendant portion of its price proposal on an improperly high labor hour figure. Additionally, the protester maintains that the solicitation misled the protester into using the \$7.70 "PARK AID" wage rate for its park attendant services price calculation. But for these specification deficiencies, Plum Run asserts, it would have submitted a lower-priced offer than W-P Construction and probably would have received contract award as the most advantageous offer.

ANALYSIS

Park Attendant Labor Hours Ambiguity

With respect to park attendant services, the solicitation required three levels of service as follows:

"Level 1 - Level 1 Park Attendant services consist of providing 24 hour surveillance at the campground, including staffing the entrance station from 8:00 a.m. to 12:00 midnight. During the hours of 8:00 p.m. to 12:00 midnight, a minimum of two attendants shall man the entrance station.

"Level 2 - Level 2 Park Attendant services consist of providing surveillance at the campground from 12:01 a.m. to 8:00 a.m. and from 4:00 p.m. to 12:00 midnight, including staffing the entrance

station from 4:00 p.m. to 12:00 midnight. During the hours from 8:00 p.m. to 12:00 midnight a minimum of 2 attendants shall man the entrance station. Random patrols are required during this time period to collect fees from, and distribute required material to unregistered campers and visitors that may have entered the area prior to the scheduled attendant hours.

"Level 3 - Level 3 Park Attendant services consist of providing surveillance during the hours from 4:00 p.m. to 8:00 p.m. . . . "

The record shows that Plum Run and the awardee interpreted the Level 1 and Level 2 park attendant service level specifications to require different numbers of service hours. According to Plum Run, 44 hours are required for Level 1 and 28 hours are required for Level 2. In contrast, the agency and awardee assert that the Level 1 specification requires only 28 hours--instead of 44--and the Level 2 specification requires 20 hours of services--instead of 28.

It is a basic principle of procurement law that specifications must be sufficiently definite and free from ambiguity so as to permit competition on a common basis. Essex Electro Eng'rs. Inc., B-252288.2, July 23, 1993, 93-2 CPD ¶ 47. When a dispute exists as to the actual meaning of a solicitation requirement, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Sea-Land Serv., Inc., B-246784.2, Aug. 24, 1992, 92-2 CPD ¶ 122, aff'd, B-246784.4, Feb. 17, 1993, 93-1 CPD ¶ 147. A solicitation ambiguity exists where two or more reasonable interpretations of a specification are possible. Id. In this regard, a party's particular interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation provision is reasonable and susceptible of the understanding it reached. Reflect-A-Life, Inc., B-232108.2, Sept. 29, 1989, 89-2 CPD ¶ 295.

The crux of the parties' disagreement about the interpretation of the specifications here lies in whether or not the entrance station services are to be performed by the same attendant charged with the 24-hour park attendant surveillance. The protester concluded that separate individuals were required for each of these tasks, while the agency and awardee contend that one individual is to perform both surveillance and entrance station duties simultaneously. Given the language and structure of the provisions describing the required services and the absence of a labor hour total, we think the parties' interpretations are equally reasonable, and we conclude that the ambiguity

rendered the solicitation defective.¹ Sea-Land Serv., Inc., supra.

The Park Attendant Wage Rate

As noted above, Plum Run contends that the agency withheld the proper wage rate for the park attendant position from all competitors on this requirement, enabling the incumbent, W-P Construction, to retain an unfair competitive advantage. In this regard, the record shows that although Plum Run utilized the listed \$7.70 "PARK AID" wage rate for this calculation, the agency and awardee maintain that in fact a \$4.41 wage rate--which was not set forth in the solicitation--is the correct rate. Both the agency and the awardee report that the \$4.41 park attendant wage determination is not listed in the DOL Wage Determinations publication; instead, this rate was individually "conformed" or prepared by DOL for W-P Construction during the incumbent's prior performance of this requirement.²

Where an incumbent is a prospective competitor on a successor procurement, the government is not required to compensate for every competitive advantage inherently gleaned by the incumbent as a result of its prior performance of a particular requirement--for example, the incumbent's acquired technical expertise or firsthand knowledge of the costs related to a requirement's complexity. See Versar, Inc., B-254464.3, Feb. 16, 1994, 94-1 CPD ¶ 230. However, consistent with the government's obligation to promote full and open competition, where, as here, the incumbent and government possess material

¹We do not agree with the agency that the ambiguity was patent, so as to have required the protester to raise this issue prior to the RFP's closing date. Where, as here, a protester is reasonably unaware of any interpretation other than its own, it cannot be charged with knowledge of an ambiguity that had to be protested before the closing date. Reflect-A-Life, Inc., supra.

²The Service Contract Act, 41 U.S.C. §§ 351-358 (1988), requires federal contractors to pay minimum wages and fringe benefits as determined by the Secretary of the Labor to employees under service contracts exceeding \$2,500. When the Act applies to a particular contract, that contract must contain certain provisions specifying the minimum level of wages to be paid, 41 U.S.C. § 351(a)(1), and the minimum level of fringe benefits to be provided. 41 U.S.C. § 351(a)(2). Regulations implementing the Act require that agencies notify DOL of their intent to enter into such contracts and to list the classes of workers they expect to employ. See 29 C.F.R. Part 4.

information--such as a specialized wage rate--which has not been disclosed to the public, the agency must equalize the competitive arena by providing other potential offerors with access to this data. Hero, Inc., 63 Comp. Gen. 117 (1983), 83-2 CPD ¶ 687; Pacific Consolidated Indus., B-250136.5, Mar. 22, 1994, 94-1 CPD ¶ 206.

As noted above, the solicitation did not set forth the \$4.41 park attendant wage rate determination, and only the incumbent knew of the existence of this figure. Moreover, the RFP listed a "PARK AID" wage rate with a description which closely matched the Park Attendant services description in the solicitation's statement of work. Since the RFP did not request a corresponding "PARK AID" price, we think Plum Run reasonably concluded that the term "park attendant" was synonymous with the term "PARK AID" and, therefore, the \$7.70 PARK AID wage rate was to be applied to the Park Attendant position. Because the agency knew that the appropriate wage rate for the park attendant position was \$4.41, and because only the incumbent had access to this price figure, the agency should have disclosed this information to all offerors. See MSI, A Div. of the Bionetics Corp., B-243974 et al., Sept. 17, 1991, 91-2 CPD ¶ 254.

Prejudice

Prejudice is an essential element of a viable protest, and we will not recommend disturbing an agency's procurement absent the existence of possible prejudice. Florida Professional Review Org., Inc.--Advisory Opinion, B-253908.2, Jan. 10, 1994, 94-1 CPD ¶ 17. This standard comports with the courts' standard of review. Id.

Here, while we agree that the solicitation was defective, we find that no prejudice resulted to the protester's competitive position. In response to questions for the record issued by this Office, Plum Run prepared a revised price proposal based on the \$4.41 wage rate, the 28-labor hour estimate for Level 1, and the 20-hour estimate for Level 2. Under this pricing scheme, Plum Run's revised price is approximately \$31,000 lower than W-P Construction's price.

Notwithstanding this lower price, the record shows that the Army would still select W-P Construction for award. After reviewing Plum Run's revised pricing, the Army reports that it would still select W-P Construction--which received 76 points--and pay a \$31,000 price premium for that firm's 16-point technical superiority. Given the solicitation's evaluation scheme--which clearly contemplated that technical considerations were more important than price--we find the Army's conclusion here consistent with the RFP's emphasis on

technical considerations and therefore reasonable. Consequently, we find no prejudice inured to the protester as a result of these solicitation defects, and therefore deny the protest. See Calspan Corp., B-255268, Feb. 22, 1994, 94-1 CPD ¶ 136.

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel

³In future procurements like this one, however, we urge the agency to include in the solicitation an actual labor hours number--instead of just a time schedule--and the most current wage rate determinations in its possession.