



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: North Country Associates II

File: B-231643, B-231643.2

Date: October 6, 1988

DIGEST

1. Protest alleging awardee's noncompliance with minimum mandatory solicitation requirements is denied where the awardee's proposal substantially complied with the requirements in question and the agency properly evaluated the proposal.

2. Since procuring officials enjoy a reasonable degree of discretion in evaluating proposals, the General Accounting Office will not disturb an evaluation where the record supports the conclusions reached and the evaluation is consistent with the criteria found in the solicitation.

DECISION

North Country Associates II protests the award of a contract to D.O.F. Development Corporation under request for proposals (RFP) No. DACA65-9-87-0004, issued by the Army Corps of Engineers. The procurement is for the construction and lease of off-post military family housing in the Fort Drum, New York area.

North Country has filed two protests under the RFP. In the first protest, North Country contends that DOF's proposal should have been found technically unacceptable for a number of specific reasons. North Country also argues that it was improper for the agency to award the contract more than 30 days after DOF's proposal guarantee expired. In its second protest, North Country contends that the agency improperly increased DOF's score after best and final offers (BAFOs) were received.

We deny both protests.

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BACKGROUND

The solicitation requires the contractor to provide a properly zoned and serviced building site, design and build 300 units of family housing, and then lease the property and resulting improvements back to the government at a fixed annual rent for a period of 20 years. The RFP stated that award would be made to the responsible offeror whose proposal conformed to the RFP and was the most advantageous to the government, price and other factors considered. The RFP provided for a technical evaluation which included a review of the offeror's (1) housing construction/experience resume, (2) site and dwelling unit design and engineering, and (3) annual rent to the government. The offerors were to be ranked by means of a price/quality ratio which was derived by dividing each offeror's proposed annual rent by its technical point score, with the resulting dollar figure representing each offeror's cost per quality point.

Four of the six proposals received on the closing date for initial proposals were determined to be within the competitive range. As between DOF and North Country,^{1/} the results of the initial evaluations were as follows:

| <u>Offeror</u> | <u>Rent</u> | <u>Points</u> | <u>Cost per point</u> |
|----------------|-------------|---------------|-----------------------|
| 1. NCA | \$2,400,000 | 989 | \$2,426.69 |
| 2. DOF | \$2,439,000 | 977 | \$2,496.41 |

Following discussions and BAFOs, the relative standing of the offeror's reversed, with DOF offering the lower cost per point:

| <u>Offeror</u> | <u>Rent</u> | <u>Points</u> | <u>Cost per point</u> |
|----------------|-------------|---------------|-----------------------|
| 1. DOF | \$2,439,000 | 1007 | \$2,422.04 |
| 2. NCA | \$2,430,000 | 989 | \$2,457.02 |

The question raised by North Country is whether the requirements for selection and award of the contract were complied with in the procurement.

THE FIRST PROTEST

North Country's first protest is grounded on three RFP requirements. First, the RFP required that proposed

^{1/} Since only the awardee and the protester remained in the competition after discussions and BAFOs, the two other offers will not be considered further.

construction sites "be currently zoned for applicable land usage and considered to be a legal building site." Second, the RFP barred the use of sites subject to specific encumbrances (for example, sites located within 1,000 feet of a sanitary land fill, sites lacking utility service, sites located in wetlands without a permit, etc.). Third, offerors had to submit a minimum level of technical information, including:

"Listing of applicable codes, zoning permits and evidence of site ownership, or access to ownership through held options; certification that utilities or utility connections are available or will be available at the proposed site from public utility organizations or a detailed description of how utilities are to be provided if not through the appropriate public utility organizations; and all data requested in paragraph I.B.2. [environmental information such as site conditions (streams, wetlands); identity of local comprehensive plan; and source/availability of utility services]."

North Country makes the following specific allegations in support of its position that DOF's proposal should have been rejected or penalized for failing to meet the above requirements: (1) DOF misrepresented both the size of its overall development and the size of the project site; (2) DOF failed to provide proof of ownership and control of the entire site; (3) DOF did not establish the legality of the site's zoning; (4) DOF submitted improper and alternative utility arrangements; and (5) DOF improperly positioned an access road within 1,000 feet of the town dump. Finally, North Country argues that (6) the agency should not have awarded the contract more than 30 days after DOF's proposal guarantee expired.

Size of Development/project site

North Country argues that DOF claimed possession of a 152-acre development site when local tax maps show that it only has a 129.1-acre site. Similarly, North Country calculates that DOF misrepresented the project site acreage by 15 percent when DOF stated that it would provide a 70-acre project site within the development area while the actual site is only 61.9 acres.

We will not object to the award on this basis. The agency admits that the 152- and 70-acre figures are not precise, but reports that the evaluators were aware of the exact figures from documents that accompanied the proposal. The noted documents include a tax map that shows a 151.9-acre

development, and while DOF's proposal states that the project site consists of "approximately 70 acres" it is accompanied by a drawing showing an exact acreage of 61.9. The record thus is clear that DOF's alleged "misrepresentation" did not mislead the agency, and did not competitively prejudice the protester in the evaluation and selection decision.

Site Control

As stated above, the RFP required "evidence of site ownership, or access to ownership." North Country contends that DOF failed to provide proof of ownership and control of the entire project site. DOF's proposed site can only be reached by two access roads, a northern road and a southern one. North Country's contention is limited to the northern road, which crosses an adjacent site. It appears that in order to obtain possession of the northern road it is first necessary that an affiliate of DOF, the C.D. LeRay Realty Corporation, exercise the option under a contract it has with a third party. North Country asserts that because DOF did not submit documentation evidencing its ability to require LeRay Realty to exercise the necessary option, DOF has failed to show the required site control.

The agency reports that it draws a distinction between site work (i.e., work on the housing site) and off-site work (i.e., work on access roads and utilities). In the agency's view, the RFP requirement only applies to the housing site. The agency points out that the solicitation's schedule of completion does not require evidence of ownership of off-site work until 15 days before lease execution, so that the lack of such evidence in an initial proposal is no basis for either rejecting the proposal or downgrading it during evaluation.

We cannot conclude on this record that the agency's position is unreasonable since the RFP does not define the word "site." In this regard, we note that the RFP's executive summary states that "[p]roposers will offer the housing units on sites acquired by the proposer," and that RFP § I.B (Proposer Selected Sites) states that "[t]he work will be located upon land provided by the proposer." We think this is consistent with the agency position. Moreover, the executive summary states that Section IV sets out the rules applicable after notification of award, and Section IV's Exhibit C (Schedule) clearly makes all matters of proof pertaining to land ownership, final zoning, site plan approvals, and the existence of necessary permits and approvals matters of contract administration, which our Office does not review. In these circumstances, we deny

North Country's protest that the evidence of site control in DOF's proposal was inadequate with respect to the norther road so that the offer should have been penalized.

Site Zoning

North Country contends that, despite DOF's assertion in its proposal that it had obtained both comprehensive plan approval and zoning for the site and the only remaining barrier to starting construction was a site plan review by the town board, DOF did not establish that the site is appropriately zoned.

We have held that, except where a solicitation requires specific zoning, so that the requirement is itself an aspect of the contract work, zoning requirements concern the offeror's responsibility, or capability to perform the work. See Fort Wainwright Developers, et al., B-231374.4, et al., supra. An otherwise successful offeror therefore has until award to establish that it can comply with such requirements. TRS Design & Consulting Services, B-218668, Aug. 14, 1985, 85-2 CPD ¶ 168. Consequently, the current status of DOF's zoning approvals would not in itself be a ground for rejecting or downgrading DOF's proposal. In any event, the agency reports that the fact that DOF obtained "Planned Development" zoning is sufficient to meet the requirement since such zoning includes commercial, single family homes, townhomes, and multi-family housing usage which encompasses all aspects of the solicitation's "applicable land usage" requirement.

Utility Arrangements

North Country initially presented numerous objections to the propriety of DOF's utility arrangements and certifications. In its report the agency responded to each objection, and North Country has not disputed or refuted the substance of the agency response. Where an agency specifically addresses issues raised by the protester in its initial protest and the protester fails to rebut the agency response in its comments, we consider the issues to have been abandoned by the protester. Front Desk Enterprises, Inc., B-230732, June 23, 1988, 88-1 CPD ¶ 603.

North Country has, however, replied with a new allegation: that the agency improperly allowed DOF to submit two different sewer service plans. We find no merit in this contention. The record shows that while DOF initially proposed a sewer service approach (a tie-in to the Fort Drum sewage pump station) that later was prohibited by Amendment No. 5, DOF subsequently proposed an alternative approach (a

tie-in to the local authority's "force main") which complied with the requirements of the amended solicitation. We see nothing improper in permitting the offer of the acceptable alternative.

Access Road Near Town Dump

North Country contends that DOF improperly positioned the northern access road within 1,000 feet of the town dump. The agency replies that the RFP's prohibition of sites within 1,000 feet of active or inactive sanitary land fills only applies to the housing site and not to off-site access roads. Consequently, the agency asserts that the proximity of the access road to the town dump is irrelevant. Since we cannot conclude that the agency's distinction between site requirements and off-site requirements is unreasonable, we deny this ground of protest.

Award After Expiration of Proposal Guarantee

North Country contends that the award to DOF was improper because it was not effected until more than 30 days after DOF's proposal guarantee expired. The proposal guarantee reimburses the agency in the event that the successful offeror refuses either to execute the contract documents or to provide the lease bond within 15 days of the government's acceptance of its offer. See Federal Acquisition Regulation (FAR) § 28.001 (FAC 84-12). A proper proposal guarantee thus would expire no sooner than 15 days after the last day of the acceptance period. Here, based on the RFP's 180-day acceptance period, the proposal guarantees should have run until June 24. The record shows that DOF's proposal guarantee expired on April 15, but the award was not made until May 27.

The agency responds that it was unaware of the expiration of DOF's proposal guarantee, but that if it had been it simply would have held discussions to afford DOF the opportunity to resubmit the bond. The agency further observes that it is arguable that the deficiency can be waived under FAR § 28.101-4(b) (FAC 84-32), which applies to insufficient (not expired) guarantees and which allows waiver when the amount of a proposal guarantee is less than required but equal to or greater than the difference between the bid price and the next higher acceptable bid. The agency points out that the protester's price is \$9,000 less per year than the awardee's price, and the agency thus would not lose anything if forced by the default of the awardee to accept the protester's next in line, lower-priced proposal.

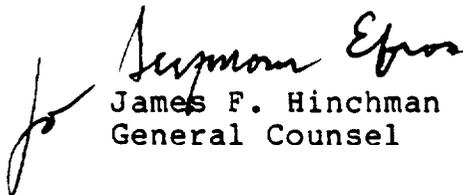
We agree with the agency that the expiration of DOF's bond does not warrant any action at this time with respect to the awarded contract. The agency is correct that it would have been proper to permit DOF, through discussions, to have the bond revived. See Consolidated Engineering, Inc., B-228142.2, Jan. 13, 1988, 88-1 CPD ¶ 24. Further, as the agency notes, if DOF defaulted the \$9,000 per year saved by awarding to North Country would have offset any attendant costs (assuming negotiations were not conducted to correct the problem), so that the government interest the bond is aimed at protecting in fact was protected by the particular circumstances of the procurement. Finally, DOF did not default in that regard, so that we see no rational basis to object at this time to continued performance by the firm.

THE SECOND PROTEST

In its second protest, North Country contends that the agency improperly gave DOF an additional 30 technical evaluation points following its BAFO submission, and that without the unwarranted points North Country's lower price proposal would have won. The argument is premised upon the assumption that the only changes to DOF's proposal were in the areas outlined in a January 14, 1988, letter from the agency to DOF. Since the matters covered in the letter concern mandatory minimum requirements of a pass/fail nature and not items that would be point-scored, the protester urges that there is no basis for a 30 point increase in DOF's score.

At a bid protest conference held in our Office it became apparent that DOF had received a second letter from the agency the contents of which were not disclosed to the protester. The second letter addresses deficiencies in DOF's initial proposal and was the basis for DOF's BAFO. The agency reports that DOF's 26 specific responses to the deficiencies identified in the agency letter were responsible for the 30 point improvement in its score. We have reviewed the documents, and we conclude that the award of the additional points was not unreasonable in light of DOF's detailed response.

The protests are denied.


James F. Hinchman
General Counsel