



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: FMB Laundry, Inc.

File: B-261837.2; B-261837.3

Date: December 19, 1995

Richard A. Monfred, Esq., and Cynthia L. Leppert, Esq., Neuberger, Quinn, Gielen, Rubin & Gibber, P.A., for the protester.

L. James Gardner, Esq., and Eric Lile, Esq., Department of the Navy, for the agency. Robert Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against solicitation provision requiring that offerors provide new laundry equipment is denied where record establishes that the agency had a reasonable basis for excluding used equipment.
2. Protest that solicitation did not adequately identify technical factors used to determine product acceptability is denied where technical acceptability requirements on a "go/no-go" basis were explicitly included in the solicitation's statement of work.
3. Protest that solicitation did not adequately detail the "base closure status" of a facility to be serviced under laundry contract is denied where closure date was added by amendment and was after the end of the contract term, including options.

DECISION

FMB Laundry, Inc. protests the conduct of a procurement under request for proposals (RFP) No. N68836-95-R-0126, issued for the fixed price rental of laundry equipment (washers and dryers) at the Orlando Naval Training Center, from date of award through September 1996, with 1-year options through September 1988. FMB challenges the terms of the RFP.

We deny the protest.

BACKGROUND

The RFP was issued on June 1, 1995, with a closing time of 2 p.m. on Monday, July 3. Award was to be made to the low-priced technically acceptable offeror. Technical acceptability was to be determined on a "go/no-go" basis by examination of descriptive literature submitted by an offeror regarding the washers and dryers to be installed and maintained under the contract to see if they met the minimum technical requirements set forth in the statement of work. All equipment under the contract was required to be new.

On June 23, FMB--the incumbent contractor at Orlando--sent the contracting officer a request for clarification of 28 items which the protester maintains were necessary to make an "accurate bid in response to [the] solicitation." On June 27, FMB filed its first of three protests with our Office¹ alleging that: (1) the RFP should be amended to permit the use of used equipment; (2) the RFP failed to set forth technical evaluation factors and their relative weights in relation to price; and (3) the RFP failed to adequately detail what effect the status of the planned base closure at Orlando would have on the contract.

On Thursday, June 29, the contracting officer received FMB's June 23 request and, on Friday, June 30, responded by issuing amendment No. 0001 which addressed the 28 items of concern to the protester. The amendment did not extend the 2 p.m. closing time on July 3. Prior to the time set for closing, FMB filed an agency-level protest alleging that amendment No. 0001 did not fully address its concerns and requesting additional time to prepare an offer. The agency proceeded with closing as scheduled.

Five proposals were received. FMB's offer was the highest priced by a substantial margin and submitted "under protest" because, in its view, the technical concerns raised on June 23 had not been adequately addressed. The cover letter to the proposal stated

"The prices submitted in our proposal may not truly reflect the costs involved in performing . . . depending on the answers to the questions we had submitted."

The agency found FMB's proposal to be acceptable with respect to the technical requirements in the RFP but overall unacceptable because it failed to submit firm fixed prices.

¹The June 27 protest did not mention FMB's request for clarification on 28 items.

On August 10, FMB filed a second protest with our Office challenging the determination that its proposal was unacceptable, alleging that the agency's failure to respond to its inquiries and its agency-level protest requesting additional time to prepare an offer precluded the firm from submitting an accurate price proposal. Parallel arguments were set forth in FMB's comments to the agency report filed on the same date.

The agency subsequently changed its position with respect to the acceptability of FMB's proposal and, by amendment No. 0002 dated September 25, invited all offerors to engage in negotiations and submit revised proposals by 2 p.m. on September 27. On September 26, FMB's counsel submitted a letter to the contracting officer stating its position that negotiations should be postponed until its protests before our Office were resolved and posing nine questions which, in FMB's view, required resolution before the firm could submit a revised proposal.

The nine questions were discussed in oral negotiations on September 26. FMB submitted a revised proposal on September 27 and a best and final offer (BAFO)--in response to amendment No. 0003 on September 28. FMB then filed its third protest with our Office on September 29 alleging that the negotiations had been improperly conducted, principally because the agency had not responded to the September 26 letter from FMB's counsel and because the time allotted for proposal revision was insufficient.

PRELIMINARY MATTERS

As indicated above, FMB first protested the agency's decision to proceed with the July 3 closing to our Office on August 10. In that protest, FMB complained that its agency-level protest requesting an extension to prepare an offer had not been answered because the 28 questions it submitted on June 23 had not been adequately addressed and because the agency had not afforded offerors a sufficient proposal preparation period.

These allegations are untimely.² Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1995), a protest to our Office must be filed within 10 working days after actual or constructive notice of initial adverse agency action on a protest filed initially with the contracting agency. Generally, where a protest concerning an alleged solicitation impropriety has been filed with the contracting agency and the

²To the extent that the August 10 protest objects to the initial agency decision to eliminate FMB's proposal from the competitive range because it did not contain firm fixed prices, the protest is academic in light of the subsequent inclusion of the proposal.

agency proceeds to receive proposals without taking corrective action requested in the agency-level protest, closing constitutes initial adverse agency action on the protest. Zapata Gulf Marine Corp., B-235249, July 27, 1989, 89-2 CPD ¶ 85. Since FMB's protest was filed in our Office on August 10, more than a month after the July 3 closing date, it is clearly untimely.

FMB's allegations concerning the failure of the agency to delay negotiations and the submission of BAFOs, which were filed on September 29, are also untimely. The timetables for negotiations and the submission of BAFOs were established in amendment Nos. 0002 and 0003, respectively. By the terms of amendment No. 0002, post-negotiation revised proposals were due on September 27. By the terms of amendment No. 0003, BAFOs were due on September 28. Under our Bid Protest Regulations, alleged solicitation improprieties which are apparent on their face and added by amendment must be protested by the closing time established by the amendment. 4 C.F.R. § 21.2(a)(1). Since FMB waited until both closing times had passed to file its last protest, it is untimely.

PROTEST AND ANALYSIS

The issues for resolution by this Office on their merits are those raised in the initial protest, *i.e.*, (1) whether the requirement for new equipment is overly restrictive; (2) whether the RFP failed to set forth technical evaluation factors with weights relative to price; and (3) whether the RFP adequately informed offerors of the effect of a planned base closure at Orlando on the contract to be awarded.

The protester asserts that the useful life of the machines it possesses at Orlando is between 7 and 10 years and that all of those machines are less than 2-1/2-years old. Based on this assertion, FMB argues that the specification requirement for new equipment is wasteful and restrictive of competition by excluding vendors with used equipment.

In response, the agency notes that during a 6-year period where used machines were permitted at Orlando a significant and deleterious amount of downtime was experienced. In addition to reviewing this contract administration history, the agency contacted the manufacturer of the 2-1/2-year old machines presently at Orlando and was informed that, while their normal useful lifespan was, as FMB states, 7 to 10 years, in an environment where 3,800 people were using the machines the lifespan would likely decrease to 3 to 4 years "with no guarantees." The agency also argues that permitting FMB's use of the machines it now possesses at Orlando would be tantamount to restricting the competition to the protester.

Because contracting officials are most familiar with their minimum needs and the conditions under which they can be met, our Office will not disturb a contracting agency's decision regarding how to best fulfill those needs absent a clear showing

that the decision was unreasonable and a protester's mere disagreement with the agency's judgment does not establish that it was unreasonable. Robertson and Penn, Inc., B-226992, June 9, 1987, 87-1 CPD ¶ 582.

While the protester criticizes the agency's determination that new machines will decrease downtime and disrupt operations at Orlando, the record shows that this position is reasonably based on the agency's experience with used machines over a 6-year period. The record shows that the agency reasonably relied on the manufacturer's advice that the average lifespan of laundry equipment will significantly decrease from the 7 to 10 years claimed by FMB when the equipment is subject to heavy use by 3,800 people in the Orlando environment. At best, FMB has expressed its disagreement with the agency's technical judgment; such a disagreement, without more, provides us with no basis upon which to sustain the protest. Id.

FMB also asserts that the RFP is deficient because it fails to specify what technical factors will be used to determine acceptability and what weight will be accorded to these factors in relation to price in making the award determination.

Contrary to this assertion, section M stated

"Award will be made to that . . . offeror submitting the lowest priced, acceptable proposal. An acceptable proposal is one that conforms to . . . the proposal submittal requirements of Section L. . . ."

Section L, in turn, required the submission of descriptive literature to enable the agency to determine that the products offered conformed to requirements specified elsewhere in the RFP; these requirements were set forth in section C which contained minimum design and performance specifications. Thus, the technical requirements for acceptability were detailed in the RFP. As for FMB's concern that the relative weight of acceptability versus price was not spelled out, the solicitation did not contemplate gradations in acceptability rankings--it was essentially a "go/no-go" determination--and in the context of such a procurement "weight" in relation to price is meaningless. Moreover, there is nothing legally inappropriate with limiting the determining award factor to price in a negotiated procurement. Blane Corp., B-234887, Apr. 24, 1989, 89-1 CPD ¶ 403.

Finally, the protester notes that Orlando is scheduled for base closure and argues that the RFP lacked detail of the "status" of the closure which precluded offerors from submitting accurate prices because they could not determine the impact of the closure on how many machines the government would actually need.

In amendment No. 0001, the agency stated that the base would close on October 31, 1988. Since the RFP was for a contract with options through September 30, 1988,

and there is nothing in the record to indicate that the estimated quantities set forth in the schedule of items for washers and dryers are inaccurate, we fail to see what additional information the agency could supply offerors regarding base closure that could affect pricing strategies.

The protest is denied.

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