



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Southern Research

File: B-266360

Date: February 12, 1996

Karen G. Wood for the protester.

Nicholas P. Retson, Esq., and Michael J. O'Farrell, Jr., Esq., Department of the Army, for the agency.

Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Post-award protest challenging the requirements in solicitation for additional archeological services or staff as vague, indefinite, or unnecessary is untimely.
 2. Protest against award to offeror with a lower-priced, slightly lower-rated proposal is denied where agency reasonably determined that cost premium involved in awarding to higher-rated, higher-priced offeror was not justified.
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DECISION

Southern Research protests the award of a contract to Southeastern Archeological Services, under request for proposals (RFP) No. DABT10-95-R-0055, issued by the Department of the Army, for archeological services. Southern argues that the RFP is defective because the performance work statement (PWS) contains a requirement for additional services that were "unquantified, vague and indefinite"; that during discussions the agency effectively requested the protester to add more personnel than what was required by the solicitation which caused the protester to increase its overall price; and that the selection of Southeastern for award was inconsistent with the award criteria.

We deny the protest.

As amended, the RFP contemplated award of a firm, fixed-price contract for an archeological survey of approximately 4,406 acres located at Fort Benning. The PWS called for a contractor to provide personnel, facilities, equipment, and supplies to perform the required types of work, including background research, field survey, laboratory analysis, artifact conservation, documentation and reporting. Among other things, the PWS stated at section C.5.4.4 that:

"Additional services which may be required during the intensive survey include written recommendations for mitigation and alternatives; preparation of time and cost estimates for mitigation measures; completion of National Register of Historic Places forms; and preparation and production of special reports."

The solicitation established 12 labor categories, setting forth minimum educational and experience requirements. The RFP generally provided that award would be made to the offeror whose proposal can accomplish the necessary work in a manner most advantageous to the government. It expressly stated that technical experience and delivery were more important than price.

On August 16, prior to the time set for receipt of initial proposals, Southern submitted a written request to the contracting officer to clarify six technical areas in the RFP, including section C.5.4.4. In response, the Army issued amendment 0002 on August 25 which revised four of the six technical areas; however, section C.5.4.4 of the solicitation was not revised. In follow-up telephone conversations initiated by the protester with the contracting officer and the contract specialist, the firm was advised that the two areas not addressed by amendment 0002 would remain the same.

The agency received four offers, including offers from Southern and Southeastern, by the September 11 amended closing date. All four offers were included in the competitive range with the proposals submitted by Southern and Southeastern receiving the highest technical rating possible. Based on Southern's greater experience as a successful contractor for these type services at Fort Benning, its proposal was ranked first; Southeastern's proposal was ranked second. Oral discussions were held with the four offerors on September 15, and best and final offers (BAFO) were submitted on September 19. After BAFOs were evaluated, the technical ratings and rankings for Southern and Southeastern remained the same; Southeastern offered a BAFO price that was \$5,100 less than the price offered by Southern. The contracting officer determined that Southeastern's offer was the most advantageous to the government on the basis that Southeastern's price advantage outweighed the protester's slight advantage in experience. Award was made to Southeastern on September 22. This protest followed.

We dismiss as untimely the argument that Southern submitted a higher-priced offer than it otherwise would have because of the uncertainty created by the vague and indefinite additional services required by section C.5.4.4. Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Under these rules, protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that closing time. 4 C.F.R. § 21.2(a)(1) (1995).

Here, Southern clearly knew of the alleged deficiency in the solicitation prior to submitting its proposal. In fact, the protester asserts that it "added to our bid to cover clause C.5.4.4," after the contracting officer refused to change or otherwise revise section C.5.4.4. If the protester still believed that the solicitation contained vague and undefinable requirements for additional services, it should have protested on this basis before the September 11 amended closing date for receipt of initial proposals. Southern's failure to protest prior to that date precluded the possibility that corrective action could be taken, if warranted, before the expenditure of significant time and effort and the exposure of prices. Southern's post-award protest in this regard is untimely. See Capitol Paving of D.C., Inc., B-256896, July 5, 1994, 94-2 CPD ¶ 10.

Southern also complains that the agency acted improperly by imposing unnecessary and unrelated staffing requirements during discussions. The protester states that it knew at the time that the agency was acting improperly but that it nonetheless elected to simply include the cost for the additional personnel in its BAFO prices. We dismiss this issue as untimely also. We do not think a vendor can learn of what it clearly views as improper agency action, and continue to compete on that basis without objection, and then complain when it is not selected for award. Southern should have protested this matter prior to the closing date for BAFOs. 4 C.F.R. § 21.2(a)(1).

Finally, Southern argues that the award decision was flawed since the agency did not fully take into account Southern's evaluated superiority under the technical factor and cost became the deciding factor, contrary to the announced criteria in the RFP. Source selection officials in a negotiated procurement have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results; cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed by the test of rationality and consistency with the established evaluation factors. Family Realty, B-247772, July 6, 1992, 92-2 CPD ¶ 6. Even where cost or price is the least important evaluation factor, an agency may award to an offeror with a lower-cost, lower-scored proposal if it determines that the cost premium involved in awarding to a higher-rated, higher-priced offeror is not justified. Id.; Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321.

The tradeoff here was reasonable. As discussed above, the agency recognized that Southern's proposal was somewhat more advantageous under the technical factor, because of its record of successfully providing the required archeological services under its incumbent contracts at Fort Benning. The contracting officer determined, however, that since Southeastern had received the highest technical rating possible, Southern's advantage in experience did not warrant award at Southern's higher price. Consequently, in light of the overall high quality of Southeastern's proposal, we have no basis for questioning the agency's conclusion that Southern's advantage

under the experience factor was not as significant as Southeastern's price advantage. While price was the least important evaluation factor, the agency was not precluded (as Southern's argument suggests) from ultimately basing the award on the lowest price merely because the price factor was least important. See Dayton T. Brown, Inc., supra.

The protest is denied.

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