



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dworsky Associates

File: B-248216

Date: June 18, 1992

Daniel L. Dworsky for the protester.
Robert M. Truman, Esq., Department of Justice, for the agency.
Christina Sklarew, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency's decision to terminate negotiations with protester for architect/engineer services under Brooks Act was not arbitrary or unreasonable where the record shows that after 10 months of negotiations, agency and protester could not come to a mutually acceptable agreement.

DECISION

Dworsky Associates protests the decision by the Department of Justice, Federal Bureau of Prisons (FBOP), to terminate negotiations with the firm under solicitation No. 100-535-0 for architectural services for the design and construction of a federal correctional institution at a site near Taft, California. The solicitation was issued under the Brooks Act, 40 U.S.C. §§ 541-544 (1988), which prescribes procedures for acquiring architect/engineer (A/E) services.

We deny the protest.

Generally, under the solicitation procedures set forth in the Brooks Act which govern the procurement of A/E services, and in the implementing regulations in Federal Acquisition Regulation (FAR) subpart 36.6, the contracting agency must publicly announce requirements for A/E services. An A/E evaluation board set up by the agency evaluates the A/E performance data and statements of qualifications of firms already on file, as well as those submitted in response to the announcement of a particular project. The board must then conduct discussions with at least three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required service.

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40 U.S.C. § 543. The firms selected for discussions should include at least three of the most highly qualified firms. FAR § 36.602-3. Negotiations are held with the firm ranked first. If the agency is unable to agree with that firm as to a fair and reasonable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee. FAR § 36.606.

The FBOP's evaluation board reviewed the eligible architectural/engineering firms which had expressed an interest in this project, and prepared a ranked selection list based on the professional qualifications, specialized experience, past performance, and geographic location of each of the firms. A designated selection authority chose Dworsky as the most qualified firm, and FBOP issued the solicitation to this firm alone on May 28, 1991.

The solicitation was for architectural/engineering and related services for the design and construction of a medium-security prison and a prison camp. The Statement of Work advised that the design and construction documents for the facility were to be developed from existing documents that had been developed for a federal correctional institution project at Estill, South Carolina. The solicitation included the completed construction drawings and technical specifications from the Estill project.

On June 17, Dworsky submitted its first proposal. The agency considered Dworsky's proposed price to be excessive, and set up a conference call with Dworsky to discuss the scope of the required services. It became apparent that the agency and the protester had different views of the usefulness of the Estill project documents in the performance of this project. In FBOP's view, the requirement was, in essence, to build a facility in Taft, California, that would be like the one being constructed in Estill; the architect's job under the current RFP was to adapt the Estill documents to meet the peculiarities of the Taft site. Dworsky, on the other hand, believed that the changes that would be required would affect every aspect of the design, so that in fact it would be more efficient to use the Estill documents only as a guideline, regenerating the whole design. No agreement was reached on this fundamental point. During the discussions, FBOP also addressed certain conditions in Dworsky's proposal concerning the schedule (which the agency was not willing to extend) and environmental mitigation services that Dworsky had not priced.

During a second telephone conference conducted a few days later, Dworsky agreed to adapt the Estill documents to the Taft site and agreed to provide a new schedule that would be closer to the agency's schedule, providing justifications for any deviations.

Dworsky submitted its second proposal on July 28. The protester had based its revised proposal on a correct interpretation of the scope of the work and had reduced its price somewhat, but FBOP still considered it unacceptably high. Another telephone conference was held, in which the agency identified its concerns. The agency questioned such matters as the extensive use of senior personnel, certain consultants' fees, and the use of certain drafting methods. Dworsky was advised that its costs were considered too high and would have to be reduced significantly in its next proposal if it wished to continue to be considered.

When Dworsky submitted its third proposal on August 21, FBOP considered it to still be too high in price. In addition, the agency found that the proposal's cover letter placed a number of conditions on the fee proposal that appeared to be inconsistent with the services to be provided under the statement of work. The agency conducted another telephone conference with Dworsky, addressing these two basic areas of concern. In the course of the discussions, the agency also disclosed the government estimates for various portions of the work. The agency requested that Dworsky submit its best and final offer (BAFO) by September 10.

On September 10, Dworsky requested an additional meeting prior to submitting its BAFO to allow the firm's owner to participate in the final negotiations. The protester expressed its belief that a final agreement on price would be facilitated by meeting face-to-face. The agency declined to meet with the protester in person, stating that the failure of the parties to reach an agreement appeared to be based on a fundamental difference of opinion regarding the work that was required under the contract.

Dworsky submitted its BAFO on September 19. In October, while the agency was considering this submission, FBOP changed its standards for general housing cell size on all future projects from 90 square feet to 75-80 square feet. The contracting officer advised Dworsky of the revision and requested a revised proposal based on an assumption of the minimum impact on hours/cost from the change.

Dworsky submitted its fifth proposal in November, requiring an additional 7-week extension beyond the schedule for performance that Dworsky had previously proposed (and which had failed to meet the solicitation's schedule).

On December 4, Dworsky advised FBOP that its civil consultants had withdrawn from the project, and proposed a substitute firm (which was subsequently reviewed and approved by the agency). On December 20, Dworsky submitted its sixth proposal, which requested an additional 4-week extension to its already extended project schedule. The A/E

design hours listed in this proposal were considered extremely high. On January 24, FBOP conducted another telephone conference in which it addressed these concerns. When the agency requested that the schedule be extended only 2 weeks, Dworsky insisted that it could not perform in less time than the extended schedule it had proposed. Dworsky also refused to reduce the design hours it had proposed. Believing the parties to be at an impasse, the contracting officer requested a second BAFO.

Dworsky submitted its BAFO on January 29, along with a cover letter listing conditions, exclusions, limitations, and clarifications. In March, the agency contacted the protester and advised that its proposed conditions were unacceptable. The agency proposed to make certain changes to the statement of work, and requested an additional BAFO. On March 20, Dworsky submitted its final BAFO, which included seven pages of clarifications, exclusions, and limitations. FBOP decided that it could not reach an acceptable agreement with Dworsky and terminated negotiations with the firm. This protest followed.

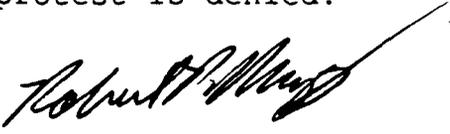
Dworsky complains that it twice requested in-person discussions and argues that such discussions would have facilitated reaching an agreement on the scope of work and the fee. Regarding the conditions it sought to impose with its offers, Dworsky maintains that each of them was justified, either as a reasonable confirmation of the statement of work or as a prudent and reasonable clarification necessary to cover the unknown scope of possible future demands on the contractor's services. The protester also asserts that its price should have been acceptable and that FBOP staff had led the firm to expect it would be accepted.

As noted above, the Brooks Act procedures specifically provide for the termination of negotiations where the agency and the offeror cannot come to a mutually acceptable agreement. Inca Eng'rs, Inc., B-236406, Oct. 23, 1989, 89-2 CPD ¶ 371. In our view, the fact that Dworsky continues to assert the reasonableness of its approach to the project and to defend its price as reasonable, while the agency is equally convinced that neither Dworsky's approach nor its price are acceptable, demonstrates the inability of the parties to reach an agreement at this point. The record shows that the protester and the agency continued, throughout the discussions that were held over the 10-month period, to view the project and the contract differently. During discussions that were held prior to the first BAFO submission, the contracting officer explained the agency's position as follows: Dworsky would be responsible under the statement of work to design a facility, essentially the same as the one in Estill, to be built in Taft. The design should meet the local construction practices and be adapted

to the site as required. The agency considered any suggestions proposed by the A/E for this design to be encompassed by the existing statement of work, and not compensable as a change. However, if the FBOP requested some change that was clearly not included in the statement of work, or if some unforeseen circumstance affected the design, then a change could be made to the contract.

Nonetheless, Dworsky continued to attempt to condition its proposals to anticipate any conditions that might arise and provide for their resolution in advance. Dworsky still required, for example, in its third BAFO, that any additional travel that might be required to perform the contract be reimbursed as additional services, whereas the statement of work had required that all travel by the A/E in connection with the services should be included in the contract price and not be presented as an additional expense to the government. Faced with the protester's ever-changing list of conditions, its unwillingness (or inability) to adhere to the required schedule or to reduce its proposed design hours and other costs, the agency reasonably concluded that further negotiations would be unlikely to produce a workable solution. In these circumstances, we see no basis for requiring the agency to continue negotiations.

The protest is denied.



James F. Hinchman
General Counsel