The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Turner International, Inc.

File: B-232049

Date: November 3, 1988

DIGEST

1. Protest that request for best and final offers (BAFOs) after disclosure of offerors' initial prices constituted an auction is untimely where filed after the closing date for the receipt of BAFOs.

2. Protest that evaluation was not conducted under the terms set out in the RFP is denied where, in accordance with solicitation, proposals were evaluated on a pass/fail basis under criteria listed in the solicitation and award was made to the lowest-priced technically acceptable proposal.

3. Although award on the basis of an initial proposal that does not meet specific solicitation requirements is improper, a contracting agency can include in the competitive range proposals which are unacceptable as submitted but susceptible of being made acceptable through discussions.

DECISION

Turner International, Inc. protests the award of a contract to ENCORP under request for proposals (RFP) No. 391-0488-128, issued by the Agency for International Development (AID) for construction of the North-West Frontier Province Agricultural University at Peshawar, Pakistan. Turner contends that AID improperly requested best and final offers (BAFOs) after offerors' prices were disclosed, resulting in an impermissible auction and that the agency's evaluation of proposals was flawed. We dismiss the protest in part and deny it in part.

On April 4, 1988, six offerors submitted initial proposals; of those, three were not included in the competitive range for reasons unrelated to the protest. The remaining three proposals, of Turner, ENCORP and Taylor Woodrow, Inc., were evaluated by AID's Pakistan Office of Engineering and a

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private architect and engineering firm. Based on this review, the contracting officer concluded that the three proposals to be included within the competitive range were unacceptable as submitted but were capable of being made acceptable. The proposals were considered unacceptable because they each included conditions and assumptions which were contrary to the RFP solicitation requirements.

At that time, since Turner was the apparent low offeror, AID held oral discussions with that firm on May 20 and 31 in order to remove the unacceptable conditions from Turner's proposal. Based on those discussions, by letter of June 1, Turner increased its initial price. After the oral discussions, on June 6, AID issued amendment No. 005 to the solicitation which clarified the RFP requirements in view of the exceptions taken in the initial proposals and required the submission of BAFOs by June 30.

On May 20, before the request for BAFOs, the Middle East Economic Digest, a construction trade magazine, published an article about the procurement. The article revealed that the prices of the three competitive range offerors were $17.8 million for Turner, $18.6 million for ENCORP and $20.3 for Taylor, which closely approximated the offerors' actual initial prices.1/ According to AID, the contracting officer was aware of the publication when he decided to request BAFOs.

All three offerors submitted BAFOs on or before the June 30 due date. Turner maintained its previous price as increased by the June 1 letter, while the other two offerors decreased their prices. The BAFO prices were as follows:

ENCORP	$17,600,000
Turner	18,425,871
Taylor	20,329,074

Contracting officials reevaluated ENCORP's proposal, including its June 30 submission and determined that the portions of its initial proposal which took exception to the terms of the solicitation had been removed. Since ENCORP's proposal was technically acceptable and the lowest-priced of the three, a contract was awarded to ENCORP on July 13.

1/ AID states that the agency's Inspector General has been notified of the price disclosure and is investigating the incident.

Turner argues that because of the exposure of the offerors' initial prices, AID should not have requested BAFOs from the offerors but instead should have made award to Turner based on its initial low-priced proposal. According to Turner, the request for BAFOs after the prices were disclosed and the award to ENCORP under those circumstances amounted to an auction in violation of Federal Acquisition Regulation (FAR) § 15.610(d)(3).

AID argues that Turner's contention that the agency conducted an auction is untimely. We agree. Our Bid Protest Regulations require that alleged apparent improprieties which did not exist in the original solicitation but subsequently are incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1988). After the prices were disclosed and the contracting officer issued the request for BAFOs, Turner did not protest that the request constituted an auction before the closing date, but waited until after the contract had been awarded to ENCORP. Since the defect complained of was the request for BAFOs, the protester was required to raise its objection prior to the closing date for receipt of those offers. It is not fair to the other offerors to permit Turner to submit its BAFO along with the others and then after it is not selected for award to complain that BAFOs should not have been called for at all. Research Analysis and Management Corp., B-218567.2, Nov. 5, 1985, 85-2 CPD ¶ 524.

In any event, we think that under the circumstances the agency acted reasonably in permitting the offerors to submit BAFOs despite the disclosure. It would not have been proper, as the protester argues, for the agency to have made award to it as the low offeror on the basis of initial proposals since the agency determined that all those proposals including the protester's were unacceptable as submitted.2/

2/ The protester questions the agency's determination in this regard. We have reviewed the evaluation record and conclude that the agency's judgment concerning the acceptability of the initial proposals was reasonably based. For example, Turner's proposal listed subcontractors for civil, mechanical electrical and plumbing tasks, however the proportion of the work to be subcontracted was uncertain, the background information for several of the firms made it impossible to evaluate their qualifications, and some firms were listed as "associates" which left their relationship to Turner unclear. Furthermore, Turner's technical proposal

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Universal Shipping Co., Inc., B-223905.2, Apr. 20, 1987, 87-1 CPD ¶ 424. At this point, the agency's choices were essentially either to conduct discussions with those offerors in the competitive range and permit them to submit BAFO's or, as the protester suggests, to cancel the RFP and resolicit the requirement. Since prices had been exposed and the RFP requirements would not change, we do not think that the evils of an auction would have been avoided by canceling the RFP and resoliciting the requirement. While it might have been preferable for AID to have placed some restriction on the BAFOs such that price changes be linked to the specific technical proposal changes, we do not believe its action constituted an improper auction such that we should disturb the award. See Sperry Corp., 65 Comp. Gen. 715 (1986), 86-2 CPD ¶ 48.

Turner also argues that the evaluation was not conducted in accordance with the criteria set out in the solicitation. In this respect, Turner contends that the contracting officer did not properly weigh the price and nonprice criteria set out in the solicitation. There is no merit to this contention.

The solicitation included a list of evaluation factors such as specialized experience; technical and financial capacity; past performance; key personnel and equipment. It required that each proposal be determined acceptable under each factor in order to be considered for award. Thus, the RFP clearly indicated that the evaluation was to be on a pass/fail basis with award made on the basis of the lowest-priced acceptable offer. Based on our review of the record, we conclude that the evaluators followed the RFP evaluation scheme.

Finally, Turner argues that since the three competitive range proposals did not conform to the solicitation requirements, AID was required to reject all three proposals. We disagree. Although as indicated above award on the basis of a proposal that does not meet specific solicitation requirements is improper, the contracting agency can include in the competitive range and hold discussions concerning proposals which are unacceptable as submitted but susceptible of being made acceptable through discussions. Universal Shipping Co., Inc., B-223905.2, supra. That is what occurred here. As a result of the discussions ENCORP, as well as the protester, was able to

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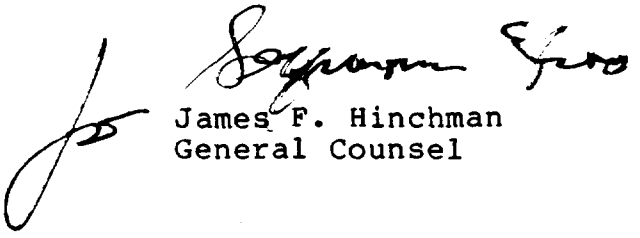
varied from certain contract requirements or was unclear on other points.

make its proposal acceptable and award was made to ENCORP based on its revised proposal which met the terms of the solicitation.

The protest is dismissed in part and denied in part.



James F. Hinchman
General Counsel