



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: E. Frye Enterprises, Inc.

File: B--258699; B-258699.2

Date: February 13, 1995

James P. Rome, Esq., for the protester,
John R. Osing, Jr., Esq., Naval Medical Logistics Command,
for the agency,
C. Douglas McArthur, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Where record shows that challenged agency contacts with offerors resulted in only minor changes to the proposals-- correction of certifications, acknowledgment of nonmaterial amendments to the solicitation, and correction of extended prices--such contacts constituted clarifications, not discussions, and protest contending that such contacts were improper is denied.
2. Record does not support protester's allegation of bias where agency made award to offerors who submitted the lowest prices, as provided for in the solicitation.
3. Allegation that awardees submitted false certificates of independent price determination concerns a matter of responsibility, which the General Accounting Office does not review.

DECISION

E. Frye Enterprises, Inc. protests the award of contracts under request for proposals (RFP) No. N62645-94-R-0029, issued by the Department of the Navy, Naval Medical Logistics Command, for dental services. Frye raises several specific issues that are either untimely or concern matters that our Office does not review, and generally objects to the Navy's conduct of the procurement.

We deny the protest in part and dismiss it in part.

On June 29, 1994, the agency issued the solicitation as a total small business set-aside, for award of firm fixed-price personal services contracts to provide comprehensive dental hygienist services at the Great Lakes, Illinois Dental Center and its branch office in Kansas City,

Missouri. The solicitation provided for award of multiple contracts for a base year, with four 1-year options, for 16 positions--15 full-time hygienists at Great Lakes and 1 part-time position in Kansas City. Each award was to be made to the responsible offeror submitting the lowest-priced, technically acceptable offer; evaluation of price was to include option prices and the administrative costs of multiple awards.

The agency received 14 offers, from 4 corporations and 10 individuals, on July 29. Six of the seven low offers contained various errors either in extended pricing or in filling out the forms that came with the solicitation. Because these errors appeared minor and the offers were otherwise acceptable, the contracting officer contacted the offerors and allowed them to submit corrected certifications, acknowledgments, and pricing. The contracting officer awarded contracts for seven positions on September 14 and opened negotiations with the offerors for the remaining nine positions.¹ This protest followed.

Frye objects generally to any effort at communications with offerors prior to award and contends that it was improper to allow the "nonresponsive bidders" to make changes to their offers after they were submitted. In short, much of Frye's argument confuses the rules for submission of sealed bids--which do not permit post-bid opening discussions--with the rules for procurements using negotiated procedures, which do allow for discussions.² See FAR §§ 14.101(d); 15.610. In any event, the agency contends, correctly in our opinion, that in allowing the offerors to correct obvious mistakes and minor clerical errors in their proposals, it was not engaging in discussions--which are material communications related to an offeror's proposal--but in clarifications, contacts which merely allow an offeror to eliminate minor uncertainties or irregularities in its proposal. See FAR § 15.601; 4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc., B-251936; B-251936.2, May 13, 1993, 93-1 CPD ¶ 420.

The record shows that the low offeror's extended pricing contained a \$26 mathematical error. The third low offeror's extended pricing was off by 4 cents. The sixth and seventh

¹Each of the seven low offerors proposed one position; of the remaining seven offerors, four submitted offers for more than one position.

²Even in sealed bidding, agencies are permitted to allow bidders to correct minor informalities or irregularities and certain mistakes in their bids. See Federal Acquisition Regulation (FAR) §§ 14.405 and 14.406.

low offerors' extended pricing was off by 15 cents, in both cases. An agency may allow an offeror to correct apparent clerical mistakes through clarifications where, as here, the existence of the mistake and the proposal actually intended can be clearly established from the proposal, and the interests of other offerors are not prejudiced. See Stacor Corp., B-231095, July 5, 1988, 88-2 CPD ¶ 9. We find no basis to object to the agency's decision to allow the offerors to correct these minor errors, which had no effect on the relative standing of offerors.

The second and fourth low offerors failed to acknowledge two amendments to the solicitation; Frye does not allege that these amendments were material, and the record is clear that they were not. Amendment No. 0001 added omitted contract line item No. (CLIN) 0011 to the solicitation; in the RFP as issued, CLIN 0010 was followed by CLIN 0012 (CLINs 0001-0015, for the full-time positions at Great Lakes, are identical). The awards to the second and fourth low offerors were based on different line items--CLINs 0002 and 0004; we fail to see how amendment No. 0001 had a material effect on either offer.

Amendment No. 0002 added the clause at FAR § 52.219-14, Limitations on Subcontracting, to the solicitation; the two offerors submitted proposals in their own name and did not propose to subcontract. The solicitation as issued, paragraph H.3, contained a Substitution of Personnel clause that required a contractor to obtain the express consent of the contracting officer for any personnel substitutions; the agency could therefore control the extent of any subcontracting, regardless of whether the offeror acknowledged the amendment, so long as the face of the proposal indicated, as the proposals did here, that performance would essentially comply with the Limitations on Subcontracting clause: The failure to acknowledge an amendment does not preclude award where, as here, the offeror is otherwise obligated to perform in accordance with the terms of the solicitation. MRS/AME, An MSC Joint Venture, B-250313.2, Mar. 19, 1993, 93-1 CPD ¶ 245.

In addition, several of the offerors were women but, apparently confused by the term "concerns," indicated in section K of their offers that they were not women-owned business concerns. The offers were acceptable, whether or not the offerors were women-owned; the errors in completing section K were minor informalities that the offerors properly were allowed to correct. See Extinguisher Serv., Inc., B-214354, June 14, 1984, 84-1 CPD ¶ 629.

In sum, despite Frye's general argument that it is unfair to allow its competitors to cure their "nonresponsive" proposals, Frye has failed to point out--and we see no

evidence of--even one instance where the agency's contacts with the offerors resulted in a material change to an offer.

Frye also generally alleges that the agency was biased against it. The record shows, however, that the agency made the first seven awards based on proposals that offered lower prices than did the protester's; the awards therefore were in accordance with the solicitation, which provided for award to technically acceptable offerors on the basis of price. The remaining proposals were also lower in price; the agency conducted competitive range discussions with the offerors of those proposals as well as with Frye. On this record, and in the absence of any evidence that supports Frye's assertion, we cannot conclude that the agency's actions were motivated by bias toward Frye.³

Our Bid Protest Regulations, 4 C.F.R. §§ 21.0 et seq. (1994), provide for the dismissal of the remainder of Frye's allegations.

First, Frye contends that the other offerors submitted proposals in violation of FAR § 52.293-2, the certificate of independent price determination. Such an issue is not for resolution by our Office, but is a matter for the contracting officer to consider in determining the offeror's responsibility. See 4 C.F.R. § 21.3(m)(5); U-Liners Contracting Co., Inc., B-245179.2, Oct. 24, 1991, 91-2 CPD ¶ 370.

Frye also argues that it was unfair to require Frye to compete against its former employees, none of whom has Frye's overhead, administrative, or general operating expenses. The solicitation, however, clearly allowed such individuals to compete and made no provision for equalizing competition by assessing overhead and other indirect expenses, for the purpose of evaluating prices offered by individuals. It would therefore have been improper for the agency to consider such factors in its evaluation, and to the extent that Frye objects to the solicitation's failure to include such a factor, its protest is untimely. See

³Frye's only specific charge of bias relates to the evaluation. Frye and another offeror proposed the same hygienist for one position; unlike Frye, the other offeror supplied information required by the solicitation, regarding the individual's satisfaction of continuing education requirements. Even if the agency had gone back and evaluated Frye's proposal as acceptable, based on the information contained in the other proposal, the other offeror, who proposed a lower price, would still have received the award, since the solicitation provided for award based on price.

4 C.F.R. § 21.2(a)(1); U.S. Defense Sys., Inc., B-245006.2,
Dec. 13, 1991, 91-2 CPD ¶ 541.

Frye further contends that the agency acted improperly under its existing contract by refusing to allow the protester access to agency facilities and records prior to the procurement. Frye contends that this action was an attempt to create a basis for terminating Frye for default. Our Office, however, does not consider issues relating to disputes arising from the administration of an existing contract. 4 C.F.R. § 21.3(m)(1).

The protest is denied in part and dismissed in part.

Robert P. Murphy

Robert P. Murphy
General Counsel