Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Matrix General, Inc.

File: B-282192

Date: June 10, 1999

Terry Cowart for the protester.
Justin P. Patterson, Esq., and Sherry K. Kaswell, Esq., Department of the Interior, for the agency.
Linda C. Glass, Esq., Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Exclusion of protester's proposal from competitive range is unobjectionable where agency reasonably concluded that, based on its evaluation of the offerors' capability and price ratings, the proposal was not among the most highly-rated.

2. Protest of agency's failure to allow adequate time for offerors to respond to solicitation amendment is untimely where allegation initially was raised in agency-level protest and subsequent protest to General Accounting Office was not filed within 10 days after closing date for receipt of proposals, which constituted initial adverse agency action on the protest.

DECISION

Matrix General, Inc. protests the exclusion of its proposal from the competitive range and the subsequent award of a contract to Rockford Corporation, under request for proposals (RFP) No. 1443RP991099902, issued by the Department of the Interior, National Park Service (NPS) for the design, furnishing, and installation of a complete underground fuel storage and distribution system at Glacier Bay National Park, Alaska.

We deny the protest.

The RFP was issued on December 23, 1998, and, as amended, contemplated award of a fixed-price contract to design, furnish and install a complete underground fuel storage and distribution system to replace the existing fuel system. RFP attach. I, at 1. The requirement also included the removal of the existing fuel storage and distribution system and preparation of Spill Prevention Control and Countermeasure (SPCC) and Facility Response Plans for the new system. Id.

The RFP stated that award would be made to the offeror whose offer represents the best value to the government on the basis of (1) the merits of the offer and (2) the offeror's capability. RFP § M.1. The RFP stated that the agency would determine the acceptability of each offer on a pass/fail basis and that an offer is acceptable when it manifests the offeror's assent, without exception, to the terms and conditions of the RFP. RFP § M.2.a. Under capability of the offeror, the RFP provided that the government would assess the capability of each offeror on the basis of (1) its organizational experience, (2) its organizational past performance, (3) qualifications and experience of key personnel, and (4) its demonstrated ability to comply with instructions. RFP § M.3. The RFP also stated that the agency would not assess capability on a pass/fail basis, but would use its assessments of capability as a basis for comparing offerors to determine best value. Id. The RFP provided that an offeror's capability assessment was significantly more important than its price. RFP § M.4.1. The RFP further stated that in order to select the winning offeror, the government would rank the offers from best to worst by making a series of paired comparisons among them, trading off the marginal differences in capability and price between the members of each pair. RFP § M.5.

The original closing date for receipt of proposals was January 25, 1999. All vendors on the agency mailing list were notified by telephone during the week of January 18, 1999, that an amendment would be issued extending the proposal due date and clarifying information contained in the RFP. Contracting Officer Statement at 1. Amendment No. 0001 was issued on January 26 which provided responses to clarification requests and changed the closing date to February 2.

Ten proposals were received by the February 2 closing time. The technical proposals were evaluated by the technical evaluation panel (TEP) and a competitive range of three proposals was established. Discussions were held with the competitive range offerors and final proposal revisions were received and evaluated. After final proposal evaluation, the Rockford Corporation's proposal was determined to be the best value based upon a minimal difference in technical capability but a substantial cost savings compared to the other two competitive range offerors. On February 23, 1999, award was made to Rockford in the amount of $141,000 for the design and response plan preparation phases of the contract. Once the design and response plans have been approved by the NPS and the State of Alaska, the construction and demolition phases will be added to the contract by modification in the amount of $1,650,000. Legal Memorandum at 1. After requesting and receiving a debriefing on February 25, Matrix filed this protest with our Office on March 4, 1999.

First, Matrix states that it interpreted the "bid documents to state that the award would be given to the low responsible bidder who had the technical qualifications to provide an end product and who had a competitive price." Protest at 2. Matrix argues that based on this standard it was technically qualified and was denied further consideration without a reasonable basis. Matrix also contends that it was unfairly and arbitrarily denied price consideration. Contrary to Matrix's assumption, the RFP

did not provide for award on the basis of the low, technically acceptable offer; rather, as explained above, the RFP specifically stated that award would be made to the offeror whose offer represents the best value to the government on the basis of (1) the merits of the offer and (2) the offeror's capability. While the RFP provided for an assessment of acceptability on a pass/fail basis, it provided for an assessment of capability as a basis for comparing offerors to determine best value. The RFP also provided that an offeror's capability was significantly more important than its price. Since the RFP specifically indicated that technical considerations were more important than price considerations, technical superiority properly could be considered in the agency's selection decision. Dynamics Research Corp., B-240809, Dec. 10, 1990, 90-2 CPD ¶ 471 at 2. Here, while Matrix's proposal was considered acceptable, it was ranked fifth in capability and, thus, could not be considered to be in line for award simply on the basis of price.

Matrix essentially objects to its exclusion from the competitive range and to the agency's establishment of a competitive range of only three proposals. The determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency, and in reviewing an agency's evaluation of proposals and subsequent competitive range determination we will not evaluate the proposals anew in order to make our own determination as to their acceptability or relative merits; rather, we will examine the record to determine whether the documented evaluation was fair and reasonable and consistent with the evaluation criteria. Ervin & Assocs., Inc., B-280993, Dec. 17, 1998, 98-2 CPD ¶ 151 at 3. A protester's mere disagreement with an agency's evaluation does not, without more, establish that the evaluation was unreasonable. Beneco Enters., Inc., B-278591, Feb. 17, 1998, 98-1 CPD ¶ 91 at 3.

Solicitations issued after January 1, 1998, such as this one, are governed by the Federal Acquisition Regulation (FAR) as amended by Federal Acquisition Circular No. 97-02, which includes the Part 15 rewrite. The current language concerning the composition of the competitive range states that "[b]ased on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency . . . ." FAR § 15.306 (c)(1). We do not read the revised language to require agencies to retain in the competitive range a proposal that is not among the most highly-rated ones or that the agency otherwise reasonably concludes has no realistic prospect of award. SDS Petroleum Prods., Inc. B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5. Here, the record shows that, while Matrix submitted an acceptable proposal, it was not included in the competitive range because the Matrix proposal did not address the capability criteria as well as the three competitive range offerors and, as a result, was not among the most highly-rated proposals.

In this regard, the RFP required offerors to prepare an experience, past performance, references form and include a reference for relevant projects. RFP § L.2.b.2. Under relevant experience, offerors were to address the following specific areas considered most important to this project: ability to design, furnish, install and start up, for a turnkey operation, a complete underground fuel storage and distribution facility consisting of double walled underground tanks; ability to successfully remove underground tank installations of this size and type; ability to prepare and have approved SPCC, facility response plans, and related documents; and ability to mobilize sufficient resources to meet the demands of an accelerated project in an extremely remote location. Id. Contrary to these instructions, Matrix's proposal contained significant deficiencies and issues requiring clarification. For example, its proposal failed to mention names of key construction personnel licensed for underground tank removal in Alaska; failed to provide a schedule to indicate how the fuel system installation portion of the project was to be completed within the required 180 calendar days; failed to address the requirement for post-construction operation and maintenance support; and failed to provide references for the material suppliers/fabricators of the fuel system equipment. Contracting Officer's Statement at 9. Additionally, Matrix failed to address how it would provide operational and maintenance support. Id. In contrast, the three competitive range offerors addressed all these matters completely in their proposals.

Overall, Matrix was ranked fifth in capability of the ten offerors and submitted the third lowest price. The three competitive range proposals received scores of 15.5, 14.25 and 14, while Matrix received a score of 12. The RFP specifically provided that the government would "consider an offeror's noncompliance with [proposal] instructions to be indicative of the type of conduct that it may expect from the offeror during contract performance." RFP § L.1. Primarily because Matrix failed to provide sufficient capability information, the agency determined that Matrix was less qualified than four other offerors including the three offerors in the competitive range, and that Matrix's price was not so significantly low as to warrant the inclusion of Matrix in the competitive range. Under these circumstances, we have no basis to conclude that the agency was unreasonable in determining that Matrix's was not among the most highly rated proposals and the proposal was properly excluded from the competitive range.[1]

---

[1]To the extent that the agency report suggests that Matrix's proposal could have been excluded from what otherwise might have been a competitive range of the five most highly rated proposals on the basis that three proposals constituted an appropriate competitive range limitation for purposes of efficient competition, the solicitation did not contain the requisite notice. While FAR § 15.306(c)(2) provides that a contracting officer may limit the number of proposals to be included in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals, it requires that the underlying solicitation contain the notice at FAR § 52.215-1(f)(4), which advises that this limitation may be imposed if the contracting officer determines that the number of proposals that would otherwise be included in

(continued…)

Matrix does not actually challenge the evaluation of its technical proposal, but rather contends that the RFP was disorganized and that the agency's failure to adequately respond to its clarification requests resulted in its failure to provide a complete proposal. In this regard, Matrix states that it submitted 33 requests for clarifications and the agency responded to only 12. Matrix's protest that the solicitation was disorganized and incomplete or that the contracting officer failed to adequately respond to its clarification requests concerns alleged solicitation improprieties. Our Bid Protest Regulations require that protests based upon improprieties apparent from the face of a solicitation be filed prior to the time set for receipt of offers. 4 C.F.R. § 21.2(a)(1) (1998). Likewise, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. Id. If Matrix believed that amendment No. 0001 did not adequately address some of its concerns, it was required to protest on this ground prior to the next closing date, February 2. As Matrix did not do so, its protest on this basis is untimely and will not be considered on the merits.

Lastly, Matrix contends that the agency did not give sufficient time to respond to the clarifications provided in Amendment No. 0001. The record shows that by letter dated January 28, Matrix informed the agency that it had not timely received the amendment and needed adequate time to respond to the clarifications. Matrix specifically requested that the closing date be postponed. However, the agency did not extend the February 2 due date for receipt of proposals and Matrix subsequently filed this protest with our Office on March 4. While Matrix timely protested to the contracting officer prior to the revised closing dated for receipt of proposals, it did not subsequently protest to us within 10 days of "initial adverse agency action." Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3), where a protest is filed initially with the agency, any subsequent protest to our Office must be filed no later than 10 days after initial adverse agency action. The term "adverse agency action" includes the agency's proceeding with the receipt of proposals in the face of a protest

---

(continued…)
the competitive range exceeds the number at which an efficient competition can be conducted. Here, as explained above, the record, which also included a telephone hearing addressing the mechanics of the competitive range selection process, reflects that the Matrix proposal properly was never included in the competitive range because it was reasonably evaluated as not one of the most highly rated proposals.

alleging solicitation improprieties. 4 C.F.R. § 21.0(f). Here, proposals were received as scheduled on February 2 without any action being taken on the protest. Thus, since Matrix's protest was filed with our Office more than 10 days after February 2, its protest on this basis is also untimely.

The protest is denied.

Comptroller General
of the United States