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Comptroller General
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Decision

Matter of: SWR, Inc.

File: B-284075; B-284075.2

Date: February 16, 2000

Benjamin M. Bowden, Esq., Albrittons, Clifton, Alverson & Moody, for the protester. A. Neil Stroud, Esq., and Julius Rothlein, Esq., U. S. Marine Corps, for the agency. Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the contracting agency awarded contract on the basis of a proposal that did not conform to several material solicitation requirements.

DECISION

SWR, Inc. protests the award of a contract to Stephenson's Appliance by the United States Marine Corps pursuant to request for proposals (RFP) No. M6700199R0004. The protester contends that the Corps should have rejected the proposal submitted by Stephenson's Appliance as unacceptable because the proposal did not meet a number of RFP requirements. The protester also contends that the agency's past performance evaluation was unreasonable and that the agency improperly held discussions solely with the awardee.

We sustain the protest.

Issued on May 20, 1999, the RFP solicited proposals for repair services to appliances (*i.e.*, refrigerators, stoves/ranges, and dishwashers) in family housing units at Camp Lejeune, North Carolina. The RFP contemplated that the services would be performed on a fixed-price per repair call basis for a basic period of 1 year with options for 4 additional years. RFP § B. The RFP stated that the contract would be awarded to the offeror whose proposal was determined to be most advantageous after evaluation of "past performance," "technical proposal," and "price" factors, and

that a risk assessment would be performed as part of the evaluation of each factor.¹ RFP § M. The awardee's technical proposal would become part of the contract specifications. RFP § L.6.3.1.

Four proposals were received by the June 29 closing date. The agency reports that no discussions were held with any offeror but that it twice contacted Stephenson's Appliance by telephone, once for clarification of a portion of its technical proposal and once to address a clerical error in its prices. Supplemental Agency Report at 1-2. After evaluation, each proposal was given an overall adjectival rating for "past performance," "technical," and "risk assessment"; and the total price of each proposal for the basic contract and all four option periods was noted. The two highest rated proposals were submitted by SWR and Stephenson's Appliance; the agency's best value analysis summarized their evaluations as follows:

Offeror	Past Performance Evaluation	Technical Evaluation	Risk Assessment	Total Price
SWR	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Stephenson's Appliance	[Deleted]	[Deleted]	[Deleted]	[Deleted]

Based upon this information, the agency determined that, while there was very little difference in the technical capability of these two offerors, Stephenson's Appliance's superior past performance was worth the additional cost of \$116,490. Agency Report, Tab F, Evaluation Summary, at 1. Therefore, the contract was awarded to Stephenson's Appliance on October 26. After a debriefing, SWR filed this protest.

SWR primarily protests that Stephenson's Appliance's proposal did not meet a number of RFP requirements and therefore the Corps should have rejected it and awarded SWR the contract. Protest at 2-3; Supplemental Protest at 4-5. SWR asserts that, under the guise of obtaining clarification from Stephenson's Appliance about its proposal, the agency conducted discussions, informed the awardee about some of its proposal's shortcomings, and allowed Stephenson's Appliance to supplement its original proposal. Supplemental Protest at 2-3; Protester's Supplemental Comments at 1-2. The protester argues that such discussions gave the awardee a competitive advantage and that, since no discussions were held with SWR, SWR was deprived of an opportunity to address certain adverse information that the Corps considered in the evaluation of SWR on the past performance factor. Protest at 3-4.

¹ The agency states that it conducted this negotiated acquisition under Federal Acquisition Regulation (FAR) part 15. Contracting Officer's Statement at 1. The RFP stated the agency's intent to award a contract without discussions. RFP § L.2(g).

In a negotiated procurement, all offerors must be provided a common basis for preparation and submission of proposals. CNA Indus. Eng'g, Inc., B-271034, June 7, 1996, 96-1 CPD ¶ 279 at 4. Any proposal that does not conform to material terms and conditions of the RFP should be considered unacceptable and may not form the basis for an award. Integrated Sys. Group, B-272336, B-272336.2, Sept. 27, 1996, 96-2 CPD ¶ 144 at 6. When an agency relaxes its requirements, either before or after receipt of proposals, it must issue a written amendment to notify all offerors of the changed requirements. CNA Indus. Eng'g, Inc., *supra*, at 4. We will sustain a protest where an agency, without issuing a written amendment, relaxes an RFP specification to the protester's possible prejudice (e.g., where the protester might have altered its proposal to its competitive advantage had it been allowed to respond to the relaxed requirements). *Id.*

Based upon our review of the protest record, including the record of a hearing conducted by our Office, we are sustaining the protest because we find that the proposal submitted by Stephenson's Appliance was technically unacceptable because it did not conform to three of the RFP's material provisions and, therefore, the agency relaxed the RFP requirements in favor of Stephenson's Appliance.² We will discuss each instance of noncompliance to a material requirement below.³

The first instance of noncompliance concerns the requirement for a quality control plan. The RFP instructed offerors to:

Provide your quality control plan which shall specifically address all requirements in Section C. The Quality Control Plan must include specific provisions for positive validation of services. The plan should also affirmatively state the level of training of employees. The plan shall be provided in sufficient detail to ensure the Government of your understanding and commitment to quality control.

² The hearing was conducted by telephone conference and included testimony from the awardee's owner and the contracting officer.

³ While we reviewed the entire record in light of all of the allegations and arguments presented by the protester and the agency, we will discuss only the most significant issues in this decision. In particular, we compared Stephenson's Appliance's proposal with each RFP requirement that was cited by the protester as not being met, but will not discuss instances where we found the allegations to have no merit or where, in our opinion, the RFP requirement was not material and noncompliance would not affect price or quality of the services to be provided. For example, the pages of Stephenson's Appliance's proposal were not numbered and dated as required by the RFP, but this minor deviation provides no basis for overturning the award decision.

RFP § L.6.5.1 (emphasis added). The RFP's statement of work listed the required elements of an acceptable quality control plan and gave a brief description of each element. Among other things, the RFP required the quality control plan to include: (1) an inspection plan covering all required services, specifying the areas to be inspected, and stating how often inspections would be conducted; (2) the methods for identifying and preventing deficiencies; (3) on-site records of all inspections; (4) a work ticket register; and (5) a records system. RFP § C1.10. Moreover, the RFP stated that "quality control" would be one of five subfactors to be evaluated as part of the "technical proposal" evaluation and, as noted above, that the technical proposal would become part of the contract specifications. RFP §§ M.2.2.5, L.6.3.1.

The proposal submitted by Stephenson's Appliance did not include a quality control plan or any of the required elements of a quality control plan. In fact, the only reference to quality control in the proposal was the following statement:

[Stephenson's Appliance's owner] will be in charge of Quality Control, he will make sure technicians and delivery person is doing a good job. If a problem comes up he will do everything possible to fix it.

Agency Report, Tab E, Stephenson's Appliance's Technical Proposal, at 5.

The owner of Stephenson's Appliance testified at the hearing conducted by our Office that he did not include a quality control plan in the proposal because he had been told by the contracting office before he submitted the proposal that this was something that he could "implement" if and when he was awarded the contract. When asked if the awardee's proposal included a quality control plan, the contracting officer confirmed: "He did not submit one." Despite submitting two separate protest reports, as well as comments on the hearing, the agency's only response to this allegation is that its evaluation was reasonable because the evaluators only gave Stephenson's Appliance's proposal ratings ranging from "fair" to "good" on this subfactor. Agency Report at 2.

We cannot see how the agency evaluators reasonably could have evaluated a plan that did not exist in order to ensure that Stephenson's Appliance understood and was committed to providing the required level of quality control. Indeed, because the proposal did not include a quality control plan at all, the Corps could not reasonably have concluded that the proposal demonstrated compliance with the RFP's quality control plan requirements. Further, there was no quality control plan for incorporation into the contract as contemplated by RFP § L.6.3.1. Thus, the Corps essentially waived this requirement and improperly accepted a materially

nonconforming proposal for award. Beckman Coulter, B-281030, B-281030.2, Dec. 21, 1998, 99-1 CPD ¶ 9 at 6-7; Pacific Consol. Indus., B-260650.2, Oct. 25, 1995, 95-2 CPD ¶ 247 at 3-4.

The second instance of noncompliance concerns the RFP's repair time requirement. The RFP generally required that repairs to refrigerators and stove/ranges be completed within 8 work hours of the appointed time, but stated:

In the event parts have to be ordered and the 8 work hour time frame cannot be met, the Contractor shall remove the appliance and install a replacement appliance within 2 hours after removal.

RFP § C5.5 (emphasis added). The RFP specifically stated that a proposal's response to the repair time requirement would be considered in the evaluation of the "contracts requirements" subfactor in the "technical proposal" evaluation. RFP § M.2.2.1.

Stephenson's Appliance's proposal responded to this requirement as follows:

If the part is ordered by 4pm we usually get it the next day, if for some reason the part is a factory order we will change out the appliance that day if before 4pm. If after 4pm we will change it out the next morning if the resident is home.

Agency Report, Tab E, Stephenson's Appliance's Technical Proposal, at 3. At the hearing, the owner of Stephenson's Appliance conceded that his proposal did not meet the 2-hour replacement time and stated that he was not aware of this "oversight" until it was pointed out to him by the hearing examiner. The contracting officer admitted that Stephenson's proposal was not consistent with the RFP's 2-hour replacement requirement and added that it might cost more to have a contractor meet the 2-hour time requirement if it was after 4 p.m. because of the need to pay compensation to overtime workers.

Again, the Corps could not reasonably have determined that the awardee's proposal complied with the RFP's specific replacement time requirement. Accordingly, the Corps improperly accepted Stephenson's Appliance's materially nonconforming proposal.

The third instance of noncompliance concerns the RFP's warranty requirement for service calls. The RFP stated:

If any malfunctions occur on a piece of equipment within 15 working days after the service call, the Contractor shall commence reservicing the equipment according to the allowable repair time at no additional cost to the Government.

RFP § C5.1 [emphasis added].⁴ The RFP specifically stated that a proposal's response to the service call warranty requirement would be considered in the evaluation of the "contracts requirements" subfactor in the "technical proposal" evaluation. RFP § M.2.2.1.

Stephenson's Appliance's proposal responded to this requirement as follows:

If a recall should occur within the 15 workday period, promptness to correct the problem will be established. If the failure is diagnosed to be the replaced part, then the repair will be at no cost to the government. Should another part fail during the 15 workday period, then part(s) and labor will be charged minus service fee.

Agency Report, Tab E, Stephenson's Appliance's Technical Proposal, at 1. At the hearing, the contracting officer testified that Stephenson's Appliance's proposal was not consistent with the RFP warranty provision and therefore a contract specialist telephoned the awardee to obtain "clarification." According to the contracting officer, the agency ascertained that, if a new part failed during the warranty period, Stephenson's Appliance would only charge the government for the new part but would not charge the government for additional labor or a service fee. Id. The contract specialist's notes, however, show that the owner of Stephenson's Appliance stated that the labor charge for repairing a new part within the warranty period "would never exceed the service fee, which is the same as price per call charge." These notes also state that "[Stephenson's Appliance's owner] said normally there will not be an additional charge." Agency Response to Hearing Request, Jan. 20, 2000, attach. 1, at 1.

The RFP required the initial service call to be performed for a fixed price and for any subsequent service call within the warranty period to be made for no additional charge (i.e., the fixed price charge would cover all services calls within the warranty period). RFP §§ B, C5.1. Stephenson's Appliance's proposed pricing scheme deviated from the fixed price scheme required by the RFP because it would allow the firm to charge an unspecified amount for labor when called upon to service an appliance again because of the failure of a different part within the warranty period. See Beckman Coulter, supra, at 6; Harris Corp., B-274566, B-274566.2, Nov. 27, 1996,

⁴ When called to repair an appliance, the contractor is required to evaluate the problem reported and any other problems or necessary repairs. RFP § C5.3.1.

96-2 CPD ¶ 205 at 5-6. During the telephone call, the awardee was allowed to explain its written proposal in an attempt to remove the exception.

We do not see how the oral “clarification” had any legal effect on Stephenson’s Appliance’s written proposal that took exception to the RFP warranty terms since Stephenson’s Appliance never revised its written proposal in this regard.⁵ See Universal Bldg. Maintenance, Inc., B-282456, July 15, 1999, 99-2 CPD ¶ 32 at 7 n.2. Thus, from the express language of Stephenson’s Appliance’s proposal it is clear that the Corps improperly accepted a nonconforming proposal.

In sum, we find that the Corps improperly relaxed material terms of the RFP when it awarded the contract to Stephenson’s Appliance based upon a proposal that did not comply with the RFP’s quality control plan, appliance replacement time, and service call warranty requirements.

We recommend that the Corps: (1) amend the RFP to represent its actual needs concerning a quality control plan, appliance replacement, and service call warranty requirements; (2) accept and evaluate revised proposals consistent with the amended RFP; and (3) conduct discussions and obtain final revised proposals, if deemed appropriate, and make a new best value determination.⁶ If, after evaluating revised proposals, the agency determines that the contract should be awarded to an

⁵ From a reading of the contract specialist’s notes, it is still not clear that Stephenson’s Appliance was proposing to perform reservicing within the warranty period “at no additional cost” since Stephenson’s Appliance’s owner apparently stated that “normally there will not be an additional charge” and did not indicate what he meant by “normally” or how much the firm would charge in other than “normal” situations.

⁶ Since we are recommending that the Corps amend the RFP and evaluate revised proposals, we need not resolve SWR’s contention that the agency held discussions with the awardee alone or its challenges to the past performance evaluation and cost/technical tradeoff. However, after reviewing the evaluation record, we have two concerns. First, Stephenson’s Appliance did not provide all of the information that the agency specifically requested on the Commercial Contract Reference Forms provided to offerors and there is nothing in the record to show that the Corps focused on or gave any weight to “size and complexity” of prior contracts in the past performance evaluation as required by the RFP. Agency Report, Tab E, Stephenson’s Appliance’s Past Performance Data, at 3-5; RFP §§ L.6.2.9, M.2.1. Second, the cost/technical tradeoff was apparently based upon SWR’s having been given a “moderate” rating on risk assessment, when, in fact, the evaluators rated the proposal “low” risk. Agency Report, Tab F, Evaluation Summary, at 1-2. Despite this error having been raised in the supplemental protest and again at the hearing, the agency has not responded to or explained the discrepancy.

offeror other than Stephenson's Appliance, then the contract with Stephenson's Appliance should be terminated for the convenience of the government and the contract awarded to the offeror selected. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). The protester should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States