



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Medlin Construction Group

File: B-286166

Date: November 24, 2000

David F. Barton, Esq., The Gardner Law Firm, for the protester.
Wilson J. Campbell, Esq., Naval Facilities Engineering Command, for the agency.
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General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where request for proposals (RFP) for design and construction of physical fitness centers did not require offerors to submit with their proposals fully developed drawings demonstrating compliance with all RFP requirements, but provided for further development of successful offeror's design after award and required successful offeror to comply with all RFP requirements regardless of whether or not such compliance was shown in the drawings submitted with its proposal, agency was not required to reject proposal as technically unacceptable because its drawings failed to show every detail required.

DECISION

Medlin Construction Group protests the award of a contract to James N. Gray Company under request for proposals (RFP) No. N62474-99-R-6089, issued by the Department of the Navy for the design and construction of two physical fitness centers at the Naval Air Station, Lemoore, California. The protester contends that Gray's proposal did not comply with the terms of the RFP.

We deny the protest.

BACKGROUND

The RFP calls for the design and construction of two physical fitness centers (PFC), one of approximately 5,410 square meters in the station's Administrative area and the other of approximately 575 square meters in the station's Operations area. The

project also includes the rehabilitation of an existing outdoor swimming pool and the demolition of the existing PFC.

The solicitation, which used the two-phase design-build selection procedures outlined in Federal Acquisition Regulation Subpart 36.3, contemplated award of a fixed-price contract to the offeror whose offer was determined to be most advantageous to the government, considering price and technical evaluation factors. Phase One technical evaluation factors, which were to be used to select the five most highly qualified offerors to participate in Phase Two, were (1) past performance, (2) corporate and key personnel experience, and (3)(a) past commitment to small business (for large businesses only). Phase Two technical evaluation factors were (3)(b) proposed commitment to small businesses, (4) gymnasium design, (5) site design, and (6) building systems and materials. RFP, Document 00202, ¶ 1.2, 2. Several subfactors were listed under each of the three final factors.¹ The six technical evaluation factors carried approximately equal weight, and the technical evaluation factors, when combined, were approximately equal in weight to price. Id. ¶ 1.3.

The RFP requested prices for seven items: a base item, which represented the minimum project requirements, and six “desirable” items, which represented upgrades to the minimum requirements.² Offerors were advised that a budget of \$13,830,000 was available for the contract, and that the agency was interested in obtaining desirable items to the extent possible within the budgeted amount.

The solicitation included detailed design and construction requirements. Offerors were instructed to include in their Phase Two technical proposals a basis of design report, describing their design solutions and explaining their compliance with the project requirements outlined in the RFP. Id. ¶ 3.2.2.b. In addition, offerors were instructed to submit site and building plans and technical information, such as

¹ Subfactors to be considered under the building design factor were functional relationship of space layouts; ease and efficiency of interior circulation; function and aesthetics of internal spaces; sustainability and passive energy conservation of building design; quality and compatibility of exterior appearance; and orientation of buildings to related facilities and site features. Subfactors to be considered under the site design factor were aesthetics, maintainability and irrigation need of landscaping; ease of pedestrian and vehicular traffic; adequacy and ease of parking; ease of drainage; and suitability and maintainability of utility systems.

² The upgrades were the addition of work to (1) replace the pool pump, (2) provide a motorized fold up style curtain to separate the gyms, (3) provide additional landscaping, (4) provide an outside walled patio, (5) add exterior basketball and sand volleyball courts, and (6) provide a roof structure over the existing swimming pool.

catalog cuts and manufacturer's literature, describing items such as flooring, roofing, windows, and plumbing fixtures that they proposed to furnish. Id.

The Navy received the Phase One proposals on February 25, 2000 and, after evaluation, selected the five most highly qualified offerors to participate in Phase Two. Phase Two proposals were received on June 6. After evaluating the proposals, the Navy eliminated two offerors from the competitive range. On July 7, the agency opened discussions with the three remaining firms, Gray, Medlin, and Offeror A, by forwarding them questions regarding their offers via e-mail.

On July 12, Medlin notified the contracting officer that it had received another offeror's discussion questions in addition to its own. Upon review, the Navy discovered that it had inadvertently forwarded Offeror A's discussion questions to Medlin and Gray, as well as to Offeror A, and that it had furnished Medlin's discussion questions to Gray, as well as to Medlin. (Offeror A received only its own questions.)

The contracting officer determined that the Navy had violated procurement regulations by disclosing offerors' discussion questions to other offerors and conducted a conference call with representatives of the three firms to determine whether this impropriety could be resolved in a manner that would satisfy the parties and protect the integrity of the procurement process. The parties, none of whom wished to see the solicitation cancelled, agreed that an appropriate solution to the unauthorized disclosure would be award on the basis of initial proposals. The Navy subsequently determined, however, that award on the basis of initial proposals was not feasible because discussions had taken place and because all of the offers contained significant deficiencies. Accordingly, the contracting officer contacted the three firms again and advised them that the only acceptable course of action, other than cancellation of the solicitation, would be to release the discussion questions and initial total price of each offeror to the other two offerors. According to the agency, "[t]he offerors still did not want the Navy to cancel the solicitation, so they agreed to the release of the discussion questions and initial total price to each other." Agency Report, Sept. 28, 2000, at 6.

The above information was released to the offerors on July 19. Responses to the discussion questions were received on July 26, and final proposal revisions were received on July 28.

Taking into consideration both the Phase One and Phase Two evaluation factors, the evaluators assigned Gray's technical proposal an overall rating of "Good +" and Medlin's proposal an overall rating of "Good -." Id. at 7. Gray's final price was \$12,807,075, and Medlin's was \$11,800,000. The source selection authority determined that the technical superiority of Gray's proposal warranted its higher price and selected Gray's offer as the one most advantageous to the government. On July 31, the Navy awarded Gray a contract.

On August 18, Medlin submitted a Freedom of Information Act request for a copy of Gray's initial proposal. During an August 24 telephone conversation, Medlin clarified that the design drawings and renderings would be sufficient in lieu of the entire proposal. The Navy furnished a copy of the drawings and renderings initially proposed by Gray to Medlin on August 25. On August 28, Medlin filed its protest with our Office.

ANALYSIS

Medlin contends that Gray's proposal ought to have been considered unacceptable because Gray's design drawings fail to demonstrate compliance with a number of the solicitation's requirements. Medlin argues that Gray's drawings fail to show a paved fire fighting access ring road around the Administrative PFC, as required by the RFP;³ the type of double curtain shower stalls required by the RFP;⁴ and the required minimum number of lockers.⁵ The protester also argues that Gray's drawings do not show locker rooms located on the perimeter of the Administrative PFC, as required by the RFP.⁶

The Navy maintains that Gray was not required to demonstrate compliance with these requirements in the drawings that it submitted with its proposal because the drawings submitted with the proposal are conceptual designs only, with details to be added after award. The Navy contends that Gray's site plan showed adequate area for a fire fighting equipment access surface around the building's perimeter and that its building plans showed adequate area in the locker rooms for the required shower stalls and lockers, which was sufficient.

³ The Navy points out that, contrary to the protester's allegation, the RFP did not require a paved fire fighting access ring road; it required "a 25' (7620 mm.) wide, all weather, access surface suitable for fire fighting apparatus on all sides of the perimeter of the structure." RFP ¶ IIC.b.3(e). According to the Navy, there are acceptable all weather access surfaces other than pavement. Agency Report at 11.

⁴ The RFP indicated that one of the agency's "miscellaneous needs" with regard to the Administrative PFC locker rooms was for showers with "a double shower curtain system to create an undressing vestibule." RFP at IIA-17 and IIA-19.

⁵ The RFP, as revised by amendment No. 4, required the contractor to install 40 full size lockers, plus 30 sets of two stacked 'L' shaped lockers in the women's locker room in the Administrative PFC and 60 full size, plus 120 sets of two stacked 'L' shaped lockers in the men's locker room.

⁶ The RFP stated that both locker rooms were to be located "on the perimeter of the facility near swimming pool." RFP at IIA-16 and IIA-18.

We agree that Gray was not required to demonstrate detailed compliance with the above requirements in the drawings that it submitted with its proposal. There was no requirement in the RFP that offerors submit as part of their proposals fully developed drawings demonstrating compliance with each of the solicitation's requirements. To the contrary, the solicitation clearly contemplated that further development of the successful offeror's design would take place after award. For example, the RFP provided as follows at section 01331, ¶ 1.4:

After Award of contract the Contractor shall:

- a. Prepare design drawings and project specifications for construction of the facility;
- b. Prepare design analyses (basis of design and calculations) supporting the design shown;
- c. Coordinate all elements of the design to ensure there are no conflicts;
- d. Present progress information in 45% submittal. Present 100 percent complete design submittal in sufficient detail to permit a complete review by the Government.

Moreover, Gray--which took "no exception to any terms, conditions, and provisions included in [the] solicitation," Gray Final Proposal Revision, July 26, 2000--was required to furnish a 25' wide, all weather access surface suitable for fire fighting apparatus, double curtain shower stalls, the required minimum number of lockers, and locker rooms located on the facility's perimeter regardless of whether or not its preliminary drawings--or even its final drawings--showed such features. In this regard, the RFP provided that:

Final design submissions found to be not in compliance with the requirements of the RFP will be returned to the Contractor for correction and resubmission. The Contractor shall make such modifications as may be necessary to bring the design into compliance at no change in contract price and schedule. . . .

If design approval can not be granted due to non-compliance with technical elements of the design, the Government may exercise its option to terminate the contract for default . . .

RFP § 01111, ¶ 1.5.2; and that:

Design approval shall not be construed as a waiver from performing requirements contained in the RFP which may have been omitted from the Contractor prepared design documents.

RFP § 01331, ¶ 1.4.d. Given that the RFP did not require offerors to submit with their proposals fully developed drawings demonstrating compliance with all RFP

requirements, that the failure to demonstrate compliance with the above requirements did not relieve Gray of the responsibility of complying with them, and that the addition of these features would be consistent with Gray's design, as submitted, we see no reason that the evaluators could not regard Gray's design as acceptable. See F2M, Inc./SCI, B-257920, Nov. 22, 1994, 94-2 CPD ¶ 198 at 3-4 .

Regarding the protester's argument that there is not sufficient room in Gray's site design for installation of a 25' wide surface on all sides of the building, the Navy contends that there is sufficient space, and our review of Gray's drawings supports the agency's position. Further, regarding Medlin's assertion that Gray's fire fighting equipment access surface will necessarily extend beyond the project boundaries indicated on the RFP's site plans, the solicitation instructed that the fitness centers were to be developed within the indicated boundaries, RFP ¶ IIB.1(A), but did not require that the access surface for the fire fighting equipment also be located within these boundaries.

The protester also complains that Gray's design does not provide handicapped parking spaces adjacent to the main entrance of the Administrative PFC, as required by the RFP pursuant to the Americans with Disabilities Act (ADA) and the Uniform Federal Accessibility Standards (UFAS).⁷

Contrary to the protester's allegation, neither the ADA Accessibility Guidelines for Buildings and Facilities nor the UFAS require handicapped parking adjacent to a building's entrance; instead, both references require that the spaces with most direct access to the building entrance be designated for the disabled.⁸ Since the protester has not argued that Gray's drawings, which show handicapped parking in the area of the parking lot closest to the Administrative PFC's entrance, fail to comply with this requirement, this ground of its protest is without merit.

⁷ The RFP required that design and construction be in accordance with the latest adopted version of a number of codes, including the Uniform Federal Accessibility Standards, as well as the Americans with Disabilities Act. RFP at IIA-3.

⁸ The ADA Accessibility Guidelines for Buildings and Facilities provide at § 4.6.2 that:

Accessible parking spaces serving a particular building shall be located on the shortest accessible route of travel from adjacent parking to an accessible entrance.

The UFAS similarly provides at § 4.6.2 that:

Parking spaces for disabled people and accessible passenger loading zones that serve a particular building shall be the spaces or zones located closest to the nearest accessible entrance on an accessible route.

Medlin further contends that Gray's drawings do not show an exterior gathering space adjacent to the main entrance of the Administrative fitness center, as required by the RFP.⁹ The protester also argues that Gray's drawings do not show a service entry with appropriate vehicle access space and that the swimming pool sunroof proposed by Gray will not furnish adequate protection against glare as required by the solicitation.¹⁰

Regarding the protester's first complaint, Gray's drawing L-1 shows an open area partially surrounded by trees, shrubs, and groundcover on either side of the Administrative PFC's entrance canopy. The Navy opines that this will serve as an ideal gathering place, and we have no basis upon which to disagree. Similarly, with regard to the protester's second complaint, Gray's Drawing A1.01 shows a vehicle accessible entrance into the gymnasium, which, according to the agency, can serve as a service entry.¹¹ Regarding the protester's third argument, Medlin has furnished no evidence in support of its allegation that Gray will not furnish an appropriate sunroof, and thus we have no basis upon which to sustain this ground of its protest.

Next, Medlin argues that Gray did not propose to furnish the required minimum of 200 parking spaces for the Administrative PFC. The protester contends in this regard that 68 of the 220 spaces that Gray proposed to furnish serve a separate building, the Survival Training Center, and thus should not have been counted as parking for the new PFC.

⁹ Paragraph IIC.2.b.4(a) of the RFP provides in relevant part as follows (*italics in original*):

The main entry shall be developed with an outdoor gathering/waiting space, well lighted and landscaped with wind and weather protection.

¹⁰ Paragraph IIC.2.b.1(d) of the RFP provides in relevant part: "The [Administrative PFC] will have one controlled public entry and a service entry." Paragraph IIA.1.A.4 of the RFP, as revised by amendment No. 7, provides:

Roof structure for the existing swimming pool should provide cover against the low angle eastern and western sun. The center portion of the pool need not be covered. The intent is for the roof structure to protect swimmers against glare from the sun.

¹¹ Regarding the protester's complaint that this entry is not in fact vehicle accessible because the existing road/driveway does not extend all the way to it and Gray has not proposed to extend the existing paved surface in its drawings, we do not think that this is the sort of detail that Gray was required to address in the conceptual drawings that it submitted with its proposal.

The RFP, as revised by amendment No. 4, stated at ¶ IIB.1.A that the administrative PFC “requires a total of 200 parking spaces, including existing parking to remain.” The protester contends that the phrase “existing parking to remain” can only reasonably be interpreted as referring to “spaces which previously existed as assigned to the existing physical fitness center which is being demolished as part of this contract.” Protester’s Supplemental Comments, Nov. 6, 2000, at 2-3. The Navy disputes this interpretation, arguing that it intended that offerors be permitted to include existing parking serving other nearby buildings in their proposed number of parking spaces. Agency Response to GAO Questions, Nov. 2, 2000, at 1. The agency cites as support for its position ¶ IIC.2.b.1(d) of the RFP, which states in relevant part as follows:

There is existing parking at the corner of Hancock Avenue and Franklin Avenue. The designer may consider expanding, reconfiguring or relocating this parking to satisfy the building program and budget.

According to the agency, this is the parking lot containing the 68 spaces to which Medlin refers. The Navy maintains that “[n]o parking spaces in this existing parking lot were, or are meant to be, designated for the Survival Training Center or any other specific use.” Id.

We see no reason that the reference to “existing parking to remain” should be interpreted in the restrictive manner advocated by the protester. In our view, paragraph IIC.2.b.1(d), cited above, made clear that offerors could count spaces in the existing lot at the corner of Hancock and Franklin Avenues toward their required totals.

Medlin further argues that Gray’s proposal does not provide the minimum required fire separation between the new Administrative PFC and the existing Survival Training Center.

The Navy explains that the Uniform Building Code requires structures such as the Administrative PFC with an occupancy type of A-2.1 to have 1-hour non-combustible construction for exterior walls if located more than 10 feet from an assumed property line. According to the agency, this requirement applies to Gray’s design because the distance between the new PFC and adjacent buildings is 48 feet, which means that the assumed property line is 24 feet from the PFC. The agency further notes that Gray has proposed exterior walls for the Administrative PFC made of split Concrete Masonry Unit blocks of appropriate thickness, adequate to meet the 1-hour non-combustible requirement. Agency Report at 12.

In response, the protester generally challenges the agency's position on the ground that it assumes, first, that both the Administrative PFC and the adjacent building are of the same construction classification and, second, that the door and window openings in the PFC meet the requirements in the Uniform Building Code for fire rating or allowable area, which, Medlin maintains, is "doubtful." Protester's Comments, Oct. 16, 2000, at 9. With respect to the first point, the agency states that the Administrative PFC and the adjacent building, the Survival Training Center, are of the same construction classification, and we have no basis to question this assertion. With respect to the second point, as noted above, even assuming Gray's proposal does not indicate the fire rating or area of the door and window openings, any such lack of detail does not make its proposal unacceptable, as Medlin contends. As noted above, the RFP here did not require that proposals show detailed compliance with all the specifications and any such lack of detail in Gray's proposal did not relieve Gray of the obligation of complying with them. As long as use of compliant door and window openings would be consistent with Gray's design--and Medlin does not argue that it would not be--we see no reason why the evaluators could not regard Gray's design as acceptable.

Next, Medlin contends that it will be impossible for Gray to complete construction of the new Administrative PFC prior to demolishing the existing PFC, as required by the RFP, because the two buildings overlap.

As shown on Gray's drawing C-3, the only portion of the new PFC that overlaps the existing PFC is the entrance canopy; thus the only portion of the new facility that Gray will be unable to construct prior to demolition of the existing facility is the entrance canopy. Because the entrance canopy is a minor feature of the building not essential for its occupancy, we think it insignificant that Gray will not be able to complete work on it until after demolition of the existing PFC.

Finally, Medlin alleges that Gray did not revise its proposal to reflect the changes in requirements set forth in amendment No. 7, which was issued during discussions.

Amendment No. 7 deleted the requirement for food service space in the Operations PFC; deleted the requirement for an acoustical divider between the basketball courts in the Administrative PFC; relocated the Operations PFC from the northeast to the southeast corner of the site; and changed the requirement regarding a roof structure over the pool. Gray responded to these changes in its revised proposal of July 26 by providing a revised floor plan for the Operations PFC that deleted the food service space, proposing to furnish a non-acoustical partition between the basketball courts, offering to resite the Operations PFC to the southeast corner of the site during preliminary design at no additional cost, and revising their design for a sunscreen/sunroof. Accordingly, the protester's allegation that Gray's proposal

failed to address the changes in requirements made by amendment No. 7 is not supported by the record.

The protest is denied.¹²

Anthony H. Gamboa
Acting General Counsel

¹² To the extent that in its comments on the agency report the protester has raised additional grounds of protest—*i.e.*, that the government did not adequately consider the life-cycle cost savings associated with its proposal, that Gray’s proposal should have been rejected as nonresponsive because it included alternative offers for one of the desirable items, and that the ratings that the evaluators assigned Gray’s proposal under several of the evaluation factors were inconsistent with the ratings that they assigned the proposal under the subfactors comprising these factors—the arguments are untimely. Medlin was aware of these bases of protest, at the latest, upon its receipt of the agency report, yet did not assert these bases of protest within 10 calendar days after its receipt of the report, as required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2000). In this regard, Medlin’s comments were not filed within the normal 10-calendar-day period, *see* 4 C.F.R. § 21.3(i), due to our granting an extension request by the protester. Since a time extension for purposes of filing comments does not waive the timeliness rules with regard to new grounds of protest, we dismiss these bases of protest as untimely. SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 3-4 n. 3.