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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Marshall-Putnam Soil and Water Conservation District

File: B-289949; B-289949.2

Date: May 29, 2002

Jill Ketter for the protester.
Alan D. Groesbeck, Esq., Department of Agriculture, for the agency.
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DIGEST

Under solicitation for offers for leased office space, proposal that failed to conform to material solicitation requirements for architectural elevation and landscape plans could not form the basis for award.

DECISION

The Marshall-Putnam (MP) Soil and Water Conservation District protests the award of a lease to Henry Developers, Inc. under a solicitation for offers (SFO) issued by the Farm Service Agency (FSA), United States Department of Agriculture (USDA), for 3,600 square feet of office space. The office space is to serve as the new USDA Service Center in Henry, Illinois, and will serve Marshall and Putnam counties. The protester primarily maintains that USDA should have rejected Henry's proposal as technically unacceptable.

We sustain the protest.

BACKGROUND

FSA issued this SFO on December 12, 2001, contemplating an initial 5-year lease at a fixed annual price, with one 5-year option period. SFO ¶ 1.3, at 5. The SFO sought offers for approximately 3,600 square feet of office space in a new or existing

building in Henry, Illinois.[1] At the same time that FSA issued the SFO, it provided offerors with what appears to be a rough floor plan indicating the agency's "preferred" layout of the required space. The SFO listed the following technical evaluation factors in descending order of importance: accessibility/location; quality/physical characteristics; layout compatibility; parking; safety; first floor space; fixed rate, fully serviced lease; proximity of eating facilities; energy conservation; and price. The SFO provided instructions on the type of information and architectural details offerors were required to include with their offers. As for price, offerors were instructed to submit an annual rental rate per square foot for the initial 5-year term of the lease, and for the option period. Technical factors and price were of equal importance. Award was to be made to the offeror whose proposal earned the highest combined score of both price and technical factors.

Four firms, including the protester and the awardee, responded to the SFO by the January 11, 2002 closing date. The acting County Executive Director (CED), who was responsible for conducting this acquisition, excluded one offer from further consideration, leaving the protester's, Henry's and a third offeror's proposals in the competition. Both Henry and MP offered new construction. The third offeror proposed space in what the record refers to as a "historical" building. Upon his initial review of offers, the CED noted that with its offer, Henry attached a copy of the rough layout that FSA had provided, but did not provide any architectural drawings, elevations or other details about the offered building. Before proceeding to evaluate offers, the CED sought advice from the FSA State Administrative Officer (AO) regarding the sufficiency of Henry's plan. According to the CED, the AO advised him that the rough floor plan Henry attached to its offer would meet the government's needs.

The CED and an NRCS representative evaluated technical offers by assigning numerical ratings under each factor and a total score, for a maximum of 50 points in the technical area. Price was evaluated by assigning the maximum possible score

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[1] FSA conducted this acquisition on behalf of itself and another USDA agency, the Natural Resources and Conservation Service (NRCS). The agency explains that NRCS offices often share space with the local Soil and Water Conservation Districts. Since 1937, various states, territories and Native American tribal governments have enacted legislation creating local conservation districts. There are approximately 3,000 local districts nationwide responsible for developing soil and water conservation programs, and for assisting land owners and operators plan and maintain sound conservation programs. Each district is considered a unit of county government, not part of USDA, and operates independently pursuant to state law, using local and state funding. See Agency Report (AR) exh. I, USDA Departmental Regulation No. 1340-1, July 7, 1983. In this case, the protester, MP, is the local district.

(50 points) to the lowest price, and proportionately lower scores to higher prices. The table below shows the results of the technical and price evaluation for the proposals submitted by the protester and the awardee (prices reflect upward adjustments FSA made to reflect certain required services):

Offeror	Price/ Sq. Ft.	Price Score	Tech. Score	Total Score
Henry	$13.55	50	46	96
MP	14.04	48	46	94

AR exh. L, Cost and Technical Analysis.

In a letter dated January 29, FSA notified the protester that it had selected another firm for the lease. This protest followed.

MP primarily contends that FSA should have rejected Henry's offer as technically unacceptable because that firm did not include with its offer elevation or landscape plans allegedly required by the SFO.[2]

Timeliness

USDA requests that we dismiss the protest as untimely. The agency argues that MP learned that Henry had not included elevation plans with its offer on February 4, 2002. Relying on 4 C.F.R. § 21.2(a)(2) (2002), USDA maintains that since MP did not file its protest with our Office until February 19, more than 10 days later, the protest is untimely. USDA also argues that MP unduly delayed seeking further details about the award to Henry. We disagree on both counts.

MP explains that it received FSA's award notification letter on February 1. On February 4, MP telephoned a contractor that assisted MP in preparing its offer, to inform the contractor that MP had not been selected. According to the protester, MP learned during that conversation that Henry had contacted the contractor to inquire whether that firm would be interested in constructing the new building Henry proposed, and to request that it prepare the building plans. In response, the contractor apparently suggested that Henry contact the protester to ask whether MP would be willing to sell existing plans that it had already prepared for MP in connection with the SFO. By letter on that same day, MP asked FSA to provide more specific information concerning the award including the award date, rental rate, the

[2] Alternatively, MP argues that it was unreasonable for FSA to award nearly the maximum number of technical points to the awardee's offer, while awarding identical high scores under all technical evaluation factors to MP's proposal. Since we sustain the protest and recommend that FSA reevaluate revised offers, we need not address this contention.

identity of the firm selected, location of the proposed building, and a copy of the floor and landscape plans the awardee submitted with its offer. By letter dated February 11, FSA responded to that request by providing MP with a copy of Henry's complete proposal. MP subsequently filed the instant protest on February 19.

While the information MP learned during the conversation with the contractor may have led MP to deduce that FSA had selected Henry, and that the firm's offer probably did not include architectural or elevation plans, that suspicion alone was not adequate to trigger the running of the 10-day period for filing a protest. Even assuming that MP correctly assumed that FSA had awarded Henry the lease, MP could not have discerned from the conversation with the contractor what information Henry had included with its offer, the form of that information, or the level of detail describing the proposed new building for the agency to evaluate (e.g., architectural drawings, sketches, schematic plans, landscape, or elevation plans). It was not until after MP received FSA's February 11 response to its request for additional information that the protester confirmed that FSA had selected Henry, and that Henry's offer did not include elevation or landscape plans.

Moreover, contrary to FSA's suggestion, this is not a case where the protester unreasonably delayed requesting additional information. See, e.g., Pentec Envtl., Inc., B-276874.2, June 2, 1997, 97-1 CPD ¶ 199 (protest dismissed where protester delayed debriefing for more than 1 month so that it could first obtain and evaluate information received under the Freedom of Information Act and so that its president could attend an unrelated business conference and take a vacation); Professional Rehab. Consultants, Inc., B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 (protest dismissed as untimely where protester failed to request debriefing until 2 months after it was informed that it had not received award). Rather, within 3 days of learning that FSA had selected another firm, MP asked FSA to provide details concerning the award. In our view, MP acted diligently in seeking information that formed the basis for its protest. Accordingly, MP's protest, filed on February 19, within 10 days after MP received FSA's reply to its request for information regarding the award, is timely. 4 C.F.R. § 21.2(a)(2).

Analysis

MP contends that FSA should have rejected Henry's offer as noncompliant with material SFO requirements for elevation and landscape plans.

As a preliminary matter, we note that throughout the record, the agency uses the terms "bid" and "nonresponsiveness" to refer to the offers. Similarly, the protester alleges that the agency should have rejected the awardee's "bid" as "nonresponsive." The agency concedes, however, that the SFO is essentially a request for proposals. Agency Memorandum of Law at 3. The record also shows that the agency contemplated treating offers as in a negotiated procurement--e.g., the SFO provided for detailed evaluations, and contemplated negotiations prior to award. See SFO § 1.0, ¶¶ C-J, and § 2.0, ¶¶ 2.1, 2.2, and 2.3. The references to "bids" and

"nonresponsiveness" are, therefore, inappropriate, since these concepts are not applicable to negotiated procurements. See Merrick Eng'g, Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130 at 2 n. 2. We interpret MP's protest as contending that Henry's proposal should have been rejected as technically unacceptable because the firm's offer allegedly did not comply with the SFO requirements. Accordingly, we analyze the protester's contentions by the standards applicable to negotiated procurements.[3]

In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation should be considered technically unacceptable and may not form the basis for an award. See 41 U.S.C. § 253b(a) (1994); Rel-Tek Sys. & Design, Inc., B-280463.3, Nov. 25, 1998, 99-1 CPD ¶ 2 at 3; Eigen, B-249860, Dec. 21, 1992, 92-2 CPD ¶ 426 at 4. As relevant here, the SFO contained specific instructions on the type and level of detail of information offerors were required to submit with their proposals.

As explained in greater detail below, we conclude that Henry's proposal failed to satisfy the SFO's material requirements.

The SFO contained the following provision:

> Required attachment to all offers:
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> A. One copy of a schematic floor plan, preferably drawn to a scale of 1/8 or 1/4 inch to the foot, indicating the space offered and showing the location of all existing windows, structural features, and mechanical equipment. Alterations or other work planned for the purpose of meeting solicitation specification must be clearly shown on the plans and/or explained in an attached narrative statement.
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> B. When new construction is proposed, one copy of a plan drawn to scale and an elevation drawing(s), showing all existing or proposed improvements and landscaping.

AR, exh. G, SFO ¶ 1.7, at 5.

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[3] FSA maintains the Federal Acquisition Regulation does not apply to the procurement here because FSA is conducting it pursuant to the independent leasing authority of the Commodity Credit Corporation (CCC). See 15 U.S.C. § 714b (2000). (FSA is the agency within USDA charged with carrying out CCC programs. Agency Memorandum of Law at 1; USDA Memorandum, July 8, 1986, at 3.) Nevertheless, FSA concedes that the procurement is subject to the Competition in Contracting Act of 1984. Supplemental Agency Report, Apr. 4, 2002, at 3.

Consistent with those instructions, the SFO required offerors to submit the following with their proposals:

> 4 complete sets of one-eighth inch (preferred) or larger scale plans that clearly illustrate the space being offered. All architectural features of the space must be accurately shown in the form of elevations and wall sections which define the relationships of all required spaces and construction systems and finish materials. IF CONVERSION OR RENOVATION OF THE BUILDING IS PLANNED, ALTERATIONS TO MEET THIS SOLICITATION MUST BE INDICATED. If requested, more informative plans, specifications, or other information must be provided within 5 working days. Site plan showing placement of building on site, proposed parking required, and landscape plan is required.

Id. ¶ A(3) at 6.

There is no question that if an offeror proposed new construction, the SFO required as an attachment to the offer an architectural plan drawn to scale, including elevation drawings. There is also no question that the SFO required that those architectural plans clearly illustrate the space being offered, and that "all architectural features of the space must be accurately shown in the form of elevations and wall sections which define the relationships of all required spaces and construction systems and finish materials." SFO ¶ A(3) at 6. As the agency recognizes, "[t]he purpose of submitting the drawings in the case of new space is to ensure compliance with the Government's requirements." AR exh. A, Memorandum of Law, at 11. Clearly, without these required drawings, the agency simply could not have known any details of the space it was leasing, the building construction and design, or materials to be used.

Further, absent detailed architectural plans, drawn to scale, there was no basis for evaluators to assess several aspects of a proposed new building. For instance, as relevant to our analysis here, the evaluation factors included an assessment of the proposed building's "Quality/Physical Characteristics." Under that area, evaluators were to assess the suitability of the proposed space considering the quality of the building design, among other characteristics. Another factor assessed layout compatibility (i.e., whether the proposed space would provide a quality layout for furniture, equipment, and employees). Similarly, the proposed building was to be evaluated for safety characteristics, particularly the structural safety of the proposed building.[4] We fail to see, and the agency does not explain, how these material

[4] In fact, the record shows that the evaluators considered this to be an important feature of the proposed building, and downgraded the third offeror's proposal primarily due to concerns with the proposed building's structural safety. AR exh. C, Acting CED Statement, Mar. 25, 2002, at 2.

characteristics of a building that did not exist at the time of the evaluation--worth 50 percent of the technical evaluation--could reasonably be evaluated without the type and level of detailed information that elevation plans are intended to provide. In our view, the SFO requirement that offerors submit with their proposals elevation and landscape plans, drawn to scale, clearly relates to elements of the offered building that are material to the needs of the government.

The agency does not dispute, and the record shows, that Henry failed to provide the required elevation and landscape plans. Instead, Henry attached to its offer one copy of the rough floor plan FSA had provided with the SFO, showing the agency's "preferred" layout of the required space. That rough sketch, however, is not drawn to scale, does not show elevations, and does not include landscape plans, as the SFO required.

The record also shows that during FSA's initial review to determine completeness and acceptability of offers, and again during the evaluation, FSA questioned whether Henry's proposal satisfied the SFO's requirements for floor plans and elevation drawings. AR exh. C, Acting CED Statement, Mar. 25, 2002, at 1-2. The evaluators apparently determined that any failure of Henry's proposal to satisfy the SFO's requirements in this regard could be treated as a "minor" informational deficiency that could be corrected after the lease was awarded. Id. at 2. While the SFO did provide that "[i]f requested, more informative plans, specifications, or other information must be provided within 5 working days," the fact that the awardee may, after award, agree to be bound to a solicitation's material requirements does not render the proposal acceptable or the award proper. Universal Yacht Servs., Inc., B-287071, B-287071.2, Apr. 4, 2001, 2001 CPD ¶ 74 at 5 n.7; Tri-State Gov't Servs., Inc., B-277315.2, Oct. 15, 1997, 97-2 CPD ¶ 143 at 4. In sum, since Henry's proposal did not satisfy the SFO's material requirements for elevation and landscape plans, the agency's acceptance of the firm's proposal was improper.

USDA argues that MP was not prejudiced by any errors here because, even if discussions are held, and revised proposals are received and reviewed, the award decision will not change. The premise of USDA's argument is that Henry will provide the details missing from its proposal and that its technical score will not change. The agency's argument ignores the fundamental problem with the evaluation here: the agency improperly made assumptions about the building that Henry proposed—and concluded that it not only satisfied the government's needs, but warranted a nearly perfect technical score—with no evidence before it of the actual features of the building being proposed. Since the additional information Henry may submit with a revised proposal is unknown at this point, there simply is no basis to conclude that the technical evaluation scores will remain the same after submission and evaluation of revised proposals. USDA also maintains that opening discussions at this point to cure errors in the procurement would essentially create an improper auction because prices have been revealed. We view the risk of an auction as secondary to the importance of correcting an improper award and preserving the integrity of the competitive procurement system through appropriate

corrective action. Spectrofuge Corp. of North Carolina, Inc.--Recon., B-281030.3, Apr. 9, 1999, 99-1 CPD ¶ 65 at 2-3.

Finally, regarding the price evaluation, FSA has essentially conceded that it did not use the most current information available to adjust offerors' prices. In this connection, USDA has presented two explanations of how FSA calculated price adjustments, and offered a third calculation during a telephone conference that our Office conducted with the parties. While MP's rate remains higher than Henry's under any version of these calculations, it appears that the difference between Henry's and MP's rates becomes smaller with each subsequent calculation. Despite our repeated requests for the agency to provide documentation supporting its revised calculations, the agency has failed to do so.

In order to address the issues of Henry's nonconforming proposal and the appropriate price adjustments, we recommend that the agency hold discussions, request revised proposals from Henry and MP,[5] reevaluate those proposals, and document the evaluations.[6] Regarding price adjustments, we recommend that the agency use the most current data available to determine appropriate price adjustments, if necessary. We further recommend that the agency make a new source selection decision based on the results of the technical and price evaluations, and terminate the awarded lease if Henry is not selected for award. We also recommend that MP be reimbursed the reasonable costs of filing and pursuing its

[5] We recognize that in response to the protest, one evaluator expressed concern that MP's floor plan deviated from FSA's "preferred" layout. However, the evaluation record does not contain any narrative explanation of the evaluators' concerns, and there is nothing in the record to indicate how MP's floor plan deviated from the agency's preferred layout. In the absence of such contemporaneous evaluation documentation, we cannot determine whether those concerns are reasonably based. Nevertheless, implementation of our recommendation will allow the agency and MP to address such concerns with MP's proposed building.

[6] For our Office to perform a meaningful review of an agency's selection determination, the agency is required to have adequate documentation to support its evaluation of proposals and its selection decision. OSI Collection Servs., Inc., B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18 at 8, 12; Biospherics, Inc., B-278508.4, et al., Oct. 6, 1998, 98-2 CPD ¶ 96 at 4. Here, we note that except for assigning numerical scores to the proposals under each of the evaluation factors, the record is devoid of any contemporaneous documentation supporting or explaining the evaluations.

protest. 4 C.F.R. § 21.8(d)(1). MP's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days after receiving this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel