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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Payne Construction

File: B-291629

Date: February 4, 2003

Alan Payne for the protester.

L. Benjamin Young, Jr., Esq., Department of Agriculture, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency should have considered protester's quotation where it was received prior to agency's commencement of quotation evaluation and other vendors would not have been prejudiced.

DECISION

Payne Construction protests the failure of the Forest Service to consider its quotation and the agency's issuance of a purchase order to Ridgley Engineering under request for quotations (RFQ) No. RFQ-17-02-120, for excavator piling site preparation in Tahoe National Forest, California.

We sustain the protest.

The RFQ, which was issued on June 17, 2002 using Federal Acquisition Regulation Part 13 simplified acquisition procedures, requested prices on 13 line subitems (numbered 1A-1F and 2A-2G), representing estimated acreages at 13 different work sites. The solicitation contemplated the issuance of an order to the vendor whose quotation represented the best value to the government. Factors to be considered in the determination of best value included price, experience, delivery, quality, and past performance. The RFQ invited interested firms to "[p]lease furnish quotations to the issuing office in block 5a on or before close of business July 16, 2002."

Neither Ridgley nor Payne furnished a quotation by the July 16 due date. Two other vendors did provide quotations, but the agency determined that one was unrealistically low in price and that the other was from a vendor who had experienced difficulties in completing work on time. Contracting Officer's Statement

¶ 2. At the time the quotations were received, funding constraints prevented the agency from issuing a purchase order; accordingly, the contracting officer determined that he would “take the opportunity to try to broaden the competition by reopening the solicitation.” Id. ¶ 3.

On August 1, the Forest Service issued, and posted on the FedBizOpps website, amendment No. 1 to the RFQ, which extended the quotation due date to August 14.¹ Ridgley and three other vendors submitted quotations by the new due date; Payne did not submit a quotation. There is no evidence in the record that the quotations received were evaluated at any point between August 14 and October 7.

Funding constraints still prevented the agency from issuing a purchase order. The contracting officer decided that since the agency would not be able to issue a purchase order until after the start of the new fiscal year, he would issue a second amendment to the RFQ reformatting the schedule of items to request separate totals for items 1 and 2 and emphasizing that the two items might be awarded to different contractors. Id. ¶ 4. On September 20, the contracting officer issued amendment No. 2, which extended the quotation due date to October 7, to the four vendors who had submitted quotations in response to amendment No. 1.² Because he did not intend to reopen the competition to vendors other than those four, he did not post the amendment on the FedBizOpps website.

Subsequent to the contracting officer’s issuance of amendment No. 2, Payne Construction learned of the RFQ from a Forest Service Internet site. A Payne representative contacted the contracting office, which furnished Payne a copy of the solicitation. On October 7, the Payne representative visited the contracting office, where a Forest Service employee furnished it detailed information regarding the job. Later the same day, Payne hand-delivered its quotation to the contracting office. Protest at 1.

The Forest Service received quotations from Payne and Ridgley and from two of the three other vendors to whom it had distributed amendment No. 2. Of the quotations received, Payne’s was lowest, and Ridgley’s was next lowest. The contracting officer did not consider Payne’s quotation because he believed that Payne was ineligible to participate in the competition, having failed to submit a quotation prior to the due

¹ Specifically, amendment No. 1 stated: “The above solicitation RFQ-IBET-17-02-120, Excavator Piling Site Preparation on the Nevada City Ranger District, quotation due date has been extended to August 14, 2002. The original solicitation can be seen on the electronic posting system, <http://www.fedbizopps.gov>.”

² Amendment No. 2 provided in relevant part: “Quotation due date has been extended to October 7, 2002.”

date set by amendment No. 1. Contracting Officer's Statement ¶ 6. On October 11, the contracting officer issued a purchase order to Ridgley Engineering.

Payne received a letter notifying it of the selection of Ridgley on October 15. On October 16, a Payne representative contacted the contracting office regarding the matter and was told by a member of the office staff other than the contracting officer that the RFQ had not been open to his company. Later the same afternoon, the same Forest Service employee told a second Payne representative who called to inquire about the matter that "there appear[ed] to be a serious problem" with the solicitation, which the Payne representative would need to discuss with the contracting officer, who would be out of the office until October 21. Protest at 2. On October 21, the Payne representative reached the contracting officer, who reiterated that the RFQ had not been open to the protester, but promised to investigate the matter and furnish Payne with a written explanation as to why its quotation was not considered.

In his follow-up letter dated October 25, the contracting officer explained that he had not considered Payne's quotation because it had been submitted after the due date established by amendment No. 1. The contracting officer noted that amendment No. 2 had been issued only to those vendors who had furnished quotations by the due date set by amendment No. 1 and that, in contrast to the original RFQ and amendment No. 1, it had not been posted on the FedBizOpps website. The contracting officer further explained that he had not considered the protester's quotation because he felt it would be unfair "both to those who had already responded to the solicitation and to others who were not in a position to offer a price in August when the competition closed, but [who] might have been interested in October." Contracting Officer's Letter to the Protester, Oct. 25, 2002.

On October 30, Payne protested the agency's failure to consider its quotation to our Office. By letter dated November 26, the Forest Service notified our Office that it was taking corrective action in response to the protest. Specifically, the Forest Service informed us that it was terminating Ridgley's order with regard to those items on which performance had not been initiated and that it would resolicit the terminated items the following spring. The Forest Service requested that we dismiss Payne's protest on the grounds that corrective action had been taken. The protester objected to the agency's request for dismissal, contending that partial termination followed by resolicitation was neither appropriate nor what it had requested. We declined to dismiss because we were not persuaded that the proposed corrective action was the appropriate remedy for the alleged impropriety.³ Accordingly, we requested that the agency furnish us with a report on the merits.

³ We reasoned that if we were to determine that the agency had acted improperly in excluding Payne's quotation from consideration and sustain the protest, we would recommend as corrective action not that the agency resolicit the terminated items, (continued...)

Timeliness

As a preliminary matter, the Forest Service argues that Payne's protest should be dismissed as untimely because it was filed more than 10 days after the protester learned of its basis for protest.⁴ In this connection, the agency notes that the protester was notified of the selection of Ridgley on October 15, and of the agency determination that the RFQ was not open to it on October 16, but did not protest to our Office until October 30.

We do not agree that Payne's protest is untimely. The protester is objecting to the agency's failure to consider its quotation; accordingly, we think that Payne's period for filing a protest did not begin to run until the contracting officer notified it that he had not considered the quotation. The notification that the protester received on October 15 did not start the 10-day period running because, while it informed the protester of the selection of Ridgley, it did not advise the protester that its quotation had not been considered; thus, it did not furnish the protester with the information providing the basis for its protest. Further, we do not think that the conversation between the Payne representative and a contracting office employee on October 16 constituted notice sufficient to start the 10-day period running because while the employee initially informed the protester that its quotation had not been considered because the RFQ was not open to it, she then backtracked, stating that there appeared to be serious problems with the solicitation and that the protester would need to speak with the contracting officer. Under the circumstances of this case, we do not think that the protester can be said to have learned of its basis for protest until October 21 at the earliest, when a representative of the company spoke with the contracting officer and was told that its quotation had not been considered. Accordingly, we consider its protest filed on October 30 to be timely.

Analysis

The agency argues that the contracting officer reasonably excluded Payne's quotation from consideration because it was submitted after the due date set forth in amendment No. 1, which the contracting officer intended as the final closing date for purposes of defining the competitive field. The Forest Service explains that in issuing amendment No. 2, the contracting officer did not intend to reopen the

(...continued)

but that the contracting officer consider Payne's quotation, and, in the event that he determined it to represent the best value to the government, that he issue a purchase order for the remaining items under the RFQ to Payne.

⁴ Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2002), require that protests other than those based on alleged improprieties in a solicitation be filed not later than 10 days after the basis of protest is, or should have been, known.

competition to additional vendors; rather, he intended merely to permit those vendors who had already submitted quotations to revise them.

When agencies use simplified acquisition procedures, as the Forest Service did here, they are not required to meet the standard of full and open competition; they are, however, required to obtain competition to the maximum extent practicable.

41 U.S.C. § 427(c) (2000). Accordingly, if the Forest Service viewed Payne's submission as an unsolicited quotation, that fact alone provided no basis to decline to consider it. While we recognize that there may be circumstances where it would not be reasonable to require an agency to consider an unsolicited quotation, we see no basis for reaching that conclusion here.

Alternatively, the agency may have viewed Payne's quotation as late and rejected it on that basis. That basis, as well, is, in our view, legally unsupported. We have long held that the requirement to obtain competition to the maximum extent practicable, whether in the context of simplified acquisition procedures or the predecessor small purchase procedures, means that language requesting quotations by a certain date cannot be construed as establishing a firm closing date for the receipt of quotations absent a provision—which was not present here—expressly providing that quotations must be received by that date to be considered. Instruments & Controls Serv. Co., B-222122, June 30, 1986, 86-2 CPD ¶ 16 at 3. Instead, agencies should consider any quotations received prior to source selection if no substantial activity has transpired in evaluating quotations and other vendors would not be prejudiced. Id. See also KPMG Consulting LLP, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 at 11; G.E.G. Sugar Blues & Noe's Colors, B-284117, Feb. 22, 2000, 2000 CPD ¶ 29 at 3.

In effect, this is what the agency did with respect to vendors, such as Ridgley, who had failed to respond to the initial RFQ: quotations they submitted in response to amendment No. 1 were considered, and properly so. We see no legal basis for the agency to then refuse to consider a quotation from a vendor, such as Payne, who had not responded to amendment No. 1, but timely submitted a quotation in response to amendment No. 2, which contained language regarding extension of the quotation due date virtually identical to the language in amendment No. 1.⁵ The fact that the contracting officer decided not to post the second amendment to the FedBizOpps website does not justify the failure to consider Payne's quotation.

Here, the agency had not begun to evaluate the quotations received in response to amendment No. 2 (indeed, it had apparently not undertaken substantial, if any, activity in evaluating the quotations received in response to amendment No. 1) prior

⁵ In our view, this inconsistency in the Forest Service's position raises concern about whether the agency fulfilled its fundamental duty to treat vendors fairly. See Vereinigte Gebäudereinigungsgesellschaft, B-280805, Nov. 23, 1998, 98-2 CPD ¶ 117 at 5.

to receipt of Payne's quotation. Moreover, consideration of Payne's quotation would not have prejudiced vendors who had previously submitted quotations since they, like Payne, were given the opportunity to revise their quotations after the due date set by amendment No. 1. Further, while the agency conjectures that there may have been vendors who were not in a position to offer a price in August, but who would have been interested in October, there is no evidence in the record that such potential vendors existed; certainly, no other vendors submitted quotations in the period before the agency began evaluating the October 7 quotations.

We conclude that the contracting officer should have considered Payne's quotation. Accordingly, we recommend that he now do so, and, in the event that he determines that, consistent with the evaluation scheme set forth in the RFQ, Payne's quotation represents the best value to the government, he award the remaining items under the RFQ to Payne. We also recommend that the protester be reimbursed for the costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). In accordance with our regulations, Payne's certified claims for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel