GAO
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Novex Enterprises

File: B-297660; B-297660.2

Date: March 6, 2006

Vahe Penbe for the protester.
Michael L. Walters, Esq., and Edward C. Hintz, Esq., Defense Logistics Agency, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency unreasonably selected higher-priced proposal based on the fact that its initial delivery was somewhat earlier than the protester's, where the awardee's overall delivery schedule was noncompliant with the delivery schedule established in the solicitation and significantly less advantageous than the protester's compliant delivery schedule, and the agency apparently did not consider this in making the award selection.

DECISION

Novex Enterprises protests the award of a contract to Badger Truck Center, Inc. under request for proposals (RFP) No. SP0750-06-R-3979, issued by the Defense Logistics Agency (DLA), Defense Supply Center, Columbus, Ohio, for steel side rings. Novex objects to the award on the basis that Badger's proposal was at a higher price and offered a less favorable delivery schedule than Novex's.

We sustain the protest.

This RFP, issued on September 23, 2005, solicited fixed-price proposals to satisfy an "urgent" DLA requirement for 15,887 military, steel, side rings National Stock Number (NSN) 2530-00-738-9061. The RFP included the following note:

> This is an urgent requirement. Please quote your best possible price and delivery. Phased delivery is acceptable if delivery can be improved. There are backorders on this NSN and earlier shipments of smaller quantities, phased out longer may be accepted without

> discussions. The required delivery . . . is for the FAT [first article test] test part in 45 days, up to 3000 each in 165 days and 3000 every 30 days thereafter until complete with FAT required. If FAT is waived, the required delivery is up to 3000 each in 90 days and 3000 every 30 days thereafter until complete. An improved delivery will be appreciated even if it is for smaller shipments.

RFP at 2. The RFP also stated that the 45 days for FAT as well as the initial delivery of 165 days were both measured from date of award. RFP at 11.

The RFP provided for award on a best-value basis based on a comparative assessment of the following evaluation factors, listed in descending order of importance: price, proposed delivery, past performance, socioeconomic support, and Javits-Wagner-O'Day Act (JWOD) Program. Regarding proposed delivery, the RFP explained that the "[o]fferors will be evaluated based on their offered delivery as compared to the government's required delivery" and that "[p]reference may be given for offered deliveries that are shorter than the required delivery." Regarding past performance, the evaluation included considering the offeror's "automated best value system" (ABVS) score,[1] and any other information related to the offeror's past performance. RFP at 20d.

Six offerors, including Novex and Badger, responded to the RFP by the October 14 closing date. Novex proposed a unit price of $38.50, for a total price of $611,649.50, and alternative delivery schedules: one for the required delivery schedule identified in the RFP where there was no waiver of FAT, and the other, if there was waiver of FAT, for 3,000 units in 120 days and 3,000 units every 30 days until contract completion. Badger based its price solely on waiver of FAT with a unit price of $39.11 for a total price of $621,340.57, with delivery of the initial 3,000 units in 150 days and delivery of the remainder at a rate of 1,800 units every 30 days until contract completion.

The agency's evaluation of the proposals is documented solely in a "Prenegotiation and Price Memorandum," which includes a comparative assessment of the proposals based on the price, delivery, and past performance evaluation factors. This document indicated that Badger's past performance was superior to the other offerors based on its higher ABVS score; no other past performance discriminators were identified.[2] The document focuses on the facts that "delivery time is critical"

---

[1] The ABVS score is a function of the individual offeror's past performance history on prior procurements with DLA and is based on delivery delinquencies and quality complaints.

[2] Notwithstanding the agency's post hoc arguments made in response to the protest that the awardee had a significant advantage over the protester under past performance, this is not stated in the contemporaneous evaluation documentation
(continued...)

because there was very little stock on hand and that Badger was the only offeror for which FAT was waived, so that the initial delivery will be made in 150 days (instead of the required 165 days). This document states that for those offerors, such as Novex, where FAT was not waived, "all required FAT approval . . . adds a minimum of 75 days (45 days for FAT submission plus 30 days for government approval) before the production quantity would begin." The source selection official determined that "[b]ecause of the urgent need for this material, the waived FAT source was selected as awardee."[3] Agency Report, Tab 5, Prenegotiation and Price Memorandum.

Award was made to Badger on November 18, 2005. This protest followed. On December 16, DLA determined that urgent and compelling circumstances required continuing with contract performance notwithstanding the protest, for a quantity of 7,353 units to cover current and anticipated backorders.[4] Agency Report, Tab 8, Authorization To Continue Performance, at 3.

Novex challenges the award on the basis that Novex "submitted a bid of $38.50 each against 15,887 pieces of the solicited Ring . . . to be delivered at the required scheduled [delivery] dates" specified in the RFP, while award was made to Badger at "$39.11 per Ring, with a delivery schedule of 3,000 pieces due in 150 days and 1,800 pieces due every 30 days until completion." Protest at 1.

In reviewing protests of an agency's evaluation and source selection decision, our Office will not reevaluate proposals; rather, we review the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria, and applicable procurement laws and regulations. Keeton Corrections, Inc., B-293348, Mar. 4, 2004, 2005 CPD ¶ 44 at 6.

Based on our review, the source selection official could not reasonably accept Badger's proposed delivery schedule as the basis for award. As indicated above, the "required" delivery schedule, as specified by the RFP if FAT was waived, was delivery of 3,000 units in 90 days (not the 150 days proposed by Badger) with deliveries at 3,000 units per month until completion (not the 1,800 units per month

---

(...continued)
and in fact the protester's ABVS score is not significantly lower than the awardee's. In any case, the contemporaneous record does not evidence that this superiority was the primary reason for the award selection.

[3] FAT was not waived for Novex.

[4] DLA also concluded that it was "modifying this contract to reduce the urgent requirement from 15,887 units to a quantity of 7,353 units." Agency Report, Tab 8, Authorization To Continue Performance, at 3.

proposed by Badger). While, as noted above, the RFP indicated that "earlier shipments of smaller quantities, phased out longer may be accepted," RFP at 2, this provision had no applicability to Badger's noncompliant delivery proposal, which did not offer "earlier shipments."

Indeed, while Badger's proposed initial delivery of 3,000 units in 150 days was somewhat better than the RFP-required delivery of 165 days if FAT was not waived--which was the delivery proposed by Novex--Badger's 1,800-unit monthly rate of delivery for the rest of the contract was significantly less advantageous than the RFP-required 3,000-unit monthly rate, which was proposed by Novex. This means that, except for the initial quantity, Novex's proposed delivery schedule, which would be completed in 315 days (initial delivery in 165 days and five deliveries at 3,000-unit rate every 30 days), was significantly better than Badger's, which would not be completed until 390 days (initial delivery in 150 days and eight deliveries at 1,800-unit rate every 30 days). There is no evidence in the award selection documentation that the agency recognized Novex's superiority with regard to delivery of the bulk of the units, and the source selection official did not reasonably explain why gaining earlier delivery of only 15 days for the initial delivery was worth the additional cost, considering that the rest of Badger's proposed delivery was significantly less advantageous than Novex's. <u>Cf.</u> <u>American Material Handling</u>, B-297536, Jan. 30, 2006, 2006 CPD ¶ __ at 4 (agency reasonably focused on early initial delivery as award discriminator where the delivery evaluation factor in the solicitation expressly stated that such credit would be given).

While the award selection documentation indicates that up to 75 days would be needed to obtain and approve FAT before production could begin, Novex's proposal committed to supply the total initial quantity in 165 days from date of award, including FAT, which is only 15 days longer than the 150 days proposed for delivery by Badger. The agency did not indicate that Novex's proposed delivery schedule was unrealistic. Instead, in a supplemental agency submission made after the attorney from our Office, in response to an agency request for alternate dispute resolution, advised the agency of the reasons (set forth in this decision) that our Office believed the award selection was unreasonable, the agency for the first time argued that the source selection official was actually considering the risk that Novex might fail its FAT in determining that Badger offered superior delivery because FAT had been waived for it and therefore its offer represented the best value. However, the contemporaneous documentation does not mention that any such risk was considered. We give little weight to this argument because it was made in the heat of litigation. <u>See</u> <u>Boeing Sikorsky Aircraft Support</u>, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

In view of the agency's urgent requirement, we do not recommend disturbing the initial quantity to be delivered by Badger. However, given Badger's slower delivery schedule, and the agency's determination that it no longer has an urgent requirement for the entire quantity of steel side rings, we recommend that DLA consider terminating the remainder of Badger's contract and resoliciting the requirement. We also recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2005). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1). In the event the agency elects not to terminate Badger's contract, we recommend that Novex be reimbursed its proposal preparation costs. If the agency does not terminate Badger's contract, then the protester should submit its certified claim for these costs directly with the agency within 60 days of receiving notice from the agency that it has elected not to terminate Badger's contract. Id.

The protest is sustained.

Anthony H. Gamboa
General Counsel