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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: National Shower Express, Inc.; Rickaby Fire Support

File: B-293970; B-293970.2

Date: July 15, 2004

R. Wade Curtis, Esq., Belnap & Curtis, for National Shower Express, Inc., and Stan Rickaby for Rickaby Fire Support, the protesters.

Donna Wysocki for Bishop Companies, Inc., an intervenor.

Daniel N. Hylton, Esq., Department of Agriculture, for the agency.

Henry J. Gorczycki, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably eliminated proposal from consideration for award where the proposal contained general statements of compliance with the technical requirements, but failed to clearly demonstrate how its proposed equipment would comply with the requirements.

2. Agency may properly reopen discussions in order to correct a procurement defect—improper post-closing discussions only with the awardee—even though an award had been made and the award price announced to all offerors.

DECISION

National Shower Express, Inc. protests an award to Bishop Companies, Inc., and Rickaby Fire Support protests the reopening of discussions, under request for proposals (RFP) No. 49-03-06, issued by the Department of Agriculture, Forest Service, National Interagency Fire Center, for mobile shower facilities at various locations.

We deny the protests.

BACKGROUND

The RFP provided for award of multiple fixed-price requirements contracts, for a base year with 4 option years, for mobile shower facilities to be located near 30 cities in 12 western states, including Alaska, which were identified as “designated dispatch

points.” The RFP required that the proposed shower facilities, including equipment and personnel, be located within 20 miles of the dispatch point and ready for deployment throughout a specified availability period. One award would be made for each dispatch point. Offerors could propose shower facilities to be considered for award at any number of dispatch points.

Award was to be made on a “best value” basis to the offeror whose proposal met the minimum requirements of the solicitation and was most advantageous to the government considering price and the following technical evaluation factors (in descending order of importance): (1) proposed equipment, (2) past performance, (3) experience, and (4) technical approach. These technical factors, when combined, were approximately equal to price.

Of relevance to this protest was the most important technical factor, proposed equipment. In this regard, the RFP provided as follows:

The Government will evaluate the proposed shower unit of each acceptable offer to determine to what extent the unit will meet or exceed the stated performance requirements. Minimum requirements will be evaluated on a pass/fail basis. In addition, shower equipment will be evaluated based on condition, durability, privacy, design, capacity and flexibility of gender usage.

RFP § M.3.A.1. Further, in the RFP’s instructions for preparation of the technical proposal, offerors were specifically cautioned as follows:

The technical proposal will be used to make an evaluation and arrive at a determination as to whether the proposal will meet the requirements of the Government. Therefore, the technical proposal must present sufficient information to reflect a thorough understanding of the requirements and a detailed description of the techniques, procedures and program for achieving the objectives of the specifications/statement of work. Proposals which merely paraphrase the requirements of the Government’s specifications/statement of work, or use phrases as “will comply” or “standard techniques will be employed” will be considered unacceptable and will not be considered further.

RFP § L.5(b).

Price proposals were to be evaluated for reasonableness and for demonstrated understanding of the level of effort needed to successfully perform these services. RFP § M.3.B. In this regard, the RFP required each offeror to complete not only the solicitation schedule of prices, but also to submit a detailed breakdown of individual cost elements, including overhead and profit. RFP §§ M.3.B, L.5(c)((1)(b).

The Forest Service received initial proposals from 42 offerors for 64 mobile shower facilities by the closing time. The agency conducted discussions with the 38 offerors whose proposals were determined to be in the competitive range, including National Shower, Bishop and Rickaby. The discussion letters reminded offerors that the stated “minimum requirements will be evaluated on a pass/fail basis,” and included an equipment evaluation checklist which the letters indicated would be “used to determine to what extent the units will meet or exceed the stated performance requirements.” Contracting Officer’s Statement at 4; see Discussion Letters to National Shower, Bishop and Rickaby. The letters requested offerors to complete and return the checklist as follows:

Use this form to identify which page of your proposal addresses each requirement [for each unit]. Submit the form with your final proposal revision.

In addition, the discussion letters also addressed specific weaknesses or deficiencies identified by the agency’s evaluation of proposals.

The agency received revised proposals from 37 offerors. However, after receipt of proposal revisions, the contracting officer realized that, due to a misunderstanding of Rickaby’s proposal, the agency had incorrectly advised Rickaby that its pricing was low. Since Rickaby had responded by significantly increasing its price in its revised proposal, the contracting officer subsequently afforded Rickaby, after the closing time for receipt of revised proposals, the opportunity to revise its price.

The Forest Service evaluated Bishop’s and Rickaby’s revised proposals as acceptable or higher under every technical factor. In contrast, National Shower’s proposal was determined to be only marginal under two of the factors (proposed equipment and experience) and acceptable under the remaining two factors (past performance and technical approach). Under the proposed equipment factor, the agency’s technical evaluation board (TEB) determined that National Shower’s proposal did not provide sufficient information to show compliance with stated minimum requirements for safety shields completely enclosing light fixtures, and for built-in or permanently attached stoppers for the sink drains. In addition, the TEB determined that the certification that National Shower had submitted to meet the requirement that potable water vehicles have a seal, sticker or certificate indicating that the state or local authority had inspected and found the vehicles in compliance with potable water standards, was not for the vehicle proposed.

Based upon its evaluation of revised proposals, the Forest Service made a “best value” determination for each designated dispatch point. In making that determination for any given dispatch point, if an otherwise acceptable proposal was selected for award at another dispatch point, the agency eliminated that proposal from consideration for award at the dispatch point being evaluated (unless that offeror proposed multiple facilities and one of its facilities was not yet selected for award elsewhere). The agency was able to make best-value determinations in this

manner for all but seven dispatch points, for which there were no acceptable proposals available for award. At those seven dispatch points, the agency conducted a second round of discussions telephonically with all remaining offerors who had submitted proposals for those locations, and then requested revised proposals for the seven locations.

The Forest Service ultimately awarded contracts for all 30 dispatch points, with award being made to Bishop for Salt Lake City, Utah, and to Rickaby for Idaho Falls, Idaho. Although National Shower had submitted a lower-priced proposal for both locations, its proposal was found to be ineligible for award on the basis that it was noncompliant with the stated minimum technical requirements, and also did not include the required detailed cost breakdown.

Following a debriefing, National Shower filed an agency-level protest challenging the awards to Bishop and Rickaby. When its agency-level protest was denied, National Shower filed a protest with our Office challenging both awards.

Subsequently, however, the Forest Service notified our Office that, because the agency had reopened discussions with Rickaby after the closing time for receipt of revised proposals, the agency intended to reopen discussions with offerors in the competitive range for Idaho Falls, including National Shower, request revised proposals, and make a new source selection decision for that location. As a result, National Shower withdrew the portion of its protest that challenged the award to Rickaby, while Rickaby filed this protest with our Office against the reopening.

NATIONAL SHOWER PROTEST

National Shower asserts that the agency unreasonably determined that its proposal failed to meet the RFP's minimum equipment requirements and improperly eliminated its proposal on that basis. In addition, National Shower challenges the agency's evaluation under the experience factor.¹

Where a protester challenges an agency's evaluation resulting in the rejection of its proposal as technically unacceptable, our review is limited to considering whether the evaluation is reasonable and consistent with the terms of the RFP and applicable procurement statutes and regulations. Outdoor Venture Corp., B-288894.2, Dec. 19, 2001, 2002 CPD ¶ 13 at 2-3. Clearly stated RFP technical requirements are

¹ In its comments, National Shower asserts that the agency improperly failed to consider its proposal for award at the seven dispatch points for which no revised proposals were acceptable. However, National Shower did not submit a proposal for any of these locations, and it has not stated a basis upon which its proposal could have been considered for award at those dispatch points. Contracting Officer's Statement (Rickaby) at 5; Best Value Analysis Report, Revised Proposals.

considered material to the needs of the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis for award. Id.; Team One USA, Inc., B-272382, Oct. 2, 1996, 96-2 CPD ¶ 129 at 8.

Here, the RFP set forth in the specifications/statement of work “the minimum equipment requirements for a Mobile Shower Facility,” RFP § C.3, and indicated that the “[m]inimum requirements will be evaluated on a pass/fail basis.” RFP § M.3.A.1. Further, during discussions, the agency’s letter to National Shower cautioned that its proposal “failed to address several minimum equipment requirements”; reminded National Shower that the stated “minimum requirements will be evaluated on a pass/fail basis”; furnished an equipment evaluation checklist which restated the minimum requirements and which the letter indicated would be “used to determine to what extent the units will meet or exceed the stated performance requirements”; and specifically instructed National Shower to complete the checklist, “identify[ing] which page of your proposal addresses each requirement for each unit,” and return it with the offeror’s revised proposal.

Based upon our review of the record, we find that the Forest Service reasonably determined that National Shower’s proposal was technically unacceptable for failing to demonstrate compliance with several of the stated minimum, “pass/fail” specification requirements. For example, the RFP established a minimum requirement for enclosed light bulbs, as follows:

C.3.1.16. Light bulbs, tubes, etc. shall be covered with a completely enclosed plastic safety shield, tempered safety glass, or its equivalent for all light fixtures. Light fixtures shall be installed so as not to constitute a hazard to personnel or shower unit materials.

RFP § C.3. National Shower’s entry on the checklist for this requirement identified photographs “e” and “f” submitted with its proposal revisions. National Shower Proposal Revisions at 11. These two photographs (which are not close-up pictures) show examples of light fixtures inside a shower trailer and outside of a trailer above sinks. Id. at 27. We agree with the agency that neither of these photographs demonstrates that these light fixtures are completely enclosed with plastic safety shields, tempered safety glass, or its equivalent. Moreover, the captions under these photos do not mention such enclosures for the light fixtures. Although National Shower has now identified additional photographs in its proposal to show compliance, National Shower did not, as expressly required by the RFP, identify the additional photographs for this purpose during the competition. In any case, the additional photograph similarly fail to demonstrate compliance with the requirement that these light fixtures be completely enclosed with plastic safety shields, tempered safety glass, or its equivalent. The record thus supports the agency’s determination that the proposal did not demonstrate compliance with the minimum requirement stated at RFP § C.3.1.16.

The RFP also established a minimum requirement for built-in or permanently attached sink stoppers, as follows:

C.3.2.1. . . . Each wash basin (sink) shall also have the ability to hold water with built in or permanently attached stoppers.

RFP § C.3. National Shower's entry on the checklist for this requirement identified paragraph "B.2.v" in its initial technical proposal, and photographs "s, v and w" submitted with its proposal revisions. National Shower Proposal Revisions at 12. We agree with the agency that neither the referenced paragraph in the initial technical proposal nor the photographs (which are not close-up pictures) in the revised proposal clearly show or address any method of holding water in the sinks. *Id.* at 34, 36; National Shower Initial Technical Proposal, § B.2.v. Although National Shower has now identified additional photographs in its proposal, National Shower did not, as expressly required by the RFP, identify the additional photographs for this purpose during the competition. In any case, the additional photographs similarly fail to demonstrate compliance with the requirement for built-in or permanently attached sink stoppers. The record thus supports the agency's determination that the proposal did not demonstrate compliance with the minimum requirement stated at RFP § C.3.2.1.

National Shower asserts that because its proposal generally stated that its equipment complied with all the requirements, and it submitted the checklist with all of the requirements marked "pass," its proposal demonstrated compliance with all of the requirements.² We disagree. It is the offeror's responsibility to include sufficiently detailed information in its proposal to establish that the item offered will meet material solicitation requirements, and blanket statements of compliance are insufficient to fulfill this obligation. *Outdoor Venture Corp.*, *supra*, at 3. Furthermore, National Shower's general statements of compliance were insufficient to comply with the solicitation's requirement for specific information which the agency deemed necessary for evaluating the technical acceptability of proposals. See *Johnson Controls, Inc.*, B-282326, June 28, 1999, 99-2 CPD ¶ 6 at 5-6; *Benton Corp.*, B-249091, Oct. 21, 1992, 92-2 CPD ¶ 264 at 4.

In its protest, National Shower notes that the agency did not specifically call attention in the discussion letter to National Shower's failure to demonstrate compliance with the stated minimum, "pass/fail" specification requirements for

² National Shower also alleges that the agency should have considered its compliance with minimum requirements under past contracts. Each federal procurement, however, stands alone; the agency's acceptance of a proposal as acceptable under a prior procurement does not require the agency to find the proposal acceptable under the present procurement. *Career Quest, Inc.*, B 292865, B-292865.2, Dec. 10, 2003, 2004 CPD ¶ 4 at 5-6.

enclosed light fixtures and built-in or permanently attached stoppers for the sinks. However, to the extent the protester is claiming that it was thus deprived of an opportunity to demonstrate compliance with these minimum requirements, the record clearly shows otherwise. As stated, the agency instructed National Shower that its initial proposal did not demonstrate compliance with several of the minimum technical requirements; provided a checklist specifically stating what a proposal had to demonstrate to show compliance; and instructed the offeror to identify the page number of the proposal which showed compliance with each of the requirements on the checklist. This checklist included, and requested a response to, separate items for (1) RFP § 3.1.16, restating the specification to require that “[a]ll light fixtures, light bulbs, tubes, etc. [be] covered with a completely enclosed plastic safety shield, tempered safety glass, or equivalent,” and (2) RFP § C.3.2.1, setting forth solicitation requirements for the wash basins, including the requirement that “[e]ach wash basin (sink) shall also have the ability to hold water with built in or permanently attached stoppers.” National Shower completed and returned the checklist, specifically identifying a page from its initial proposal and additional photographs furnished with its revised proposal which it represented showed compliance with the requirements for enclosed light fixtures and built-in or permanently attached stoppers. Thus, the record indicates that National Shower was on notice of the need to address these specification requirements in its revised proposal and, in fact, specifically responded, including by furnishing additional material regarding its shower units.³

In sum, we find that the Forest Service reasonably determined that National Shower’s proposal did not demonstrate compliance with the minimum, “pass/fail” technical requirements. In these circumstances, we conclude that the agency properly eliminated National Shower’s technically unacceptable proposal from consideration for award. Given our conclusion in this regard, we need not address National Shower’s other challenges to the evaluation.

RICKABY PROTEST

Rickaby alleges that the agency’s decision to reopen discussions for the Idaho Falls dispatch point is improper because the agency, in permitting Rickaby to revise its price after the receipt of revised proposals, was merely trying to correct a calculation error made by the agency during the evaluation.

³ National Shower, who did not have counsel admitted to the protective order (and thus did not have access to the awardee’s proposal or other protected information), speculates that the awardee’s proposal similarly failed to comply with the RFP requirements. However, our review of the awardee’s proposal and the record of evaluations and discussions furnishes no basis to question the reasonableness of the agency’s determination that Bishop’s proposal adequately and specifically demonstrated compliance with the minimum requirements.

As noted above, after receipt of proposal revisions, the contracting officer realized that, due to a misunderstanding of Rickaby's proposal, the agency had incorrectly advised Rickaby that its pricing was low. Specifically, in calculating a daily rate per showerhead, the agency price evaluator interpreted the fact that Rickaby had completed the solicitation's price schedule by entering "16" for the number of showerheads for males and "4" for the number of showerheads for females to mean that Rickaby was proposing a total 20 showerheads per mobile shower unit. In fact, it appears that Rickaby proposed only 16 shower heads per mobile shower unit, with 4 being private showerheads that could be used for women. Since Rickaby had responded to the contracting officer's expression of concern regarding its price by significantly increasing its price in its revised proposal, the contracting officer, after the closing time for receipt of revised proposals, advised Rickaby that its initial overall price was neither low nor high, and afforded Rickaby the opportunity to revise its price proposal based on this information. Rickaby then reduced its final proposed price to an amount close to the price in its initial proposal. Contracting Officer's Statement (Rickaby) at 4-6; Best Value Analysis Report at 9.

The agency reports that, while reviewing the contract file in response to National Shower's protest, the agency realized that the contracting officer's conversation with Rickaby following receipt of final proposal revisions, and her providing Rickaby with another opportunity to revise its price proposal constituted an improper reopening of discussions with only one offeror in the competitive range. The agency determined that additional discussions with all offerors for the Idaho Falls location whose proposed facilities remain available, and an opportunity to submit second revised proposals, were appropriate to ensure that all offerors who had proposed performing these services were treated equally and fairly. Agency Report (Rickaby) at 5-6.

Contracting agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure fair and impartial competition. RS Info. Sys., Inc., B-287185.2, B-287185.3, May 16, 2001, 2001 CPD ¶ 98 at 4. We generally will not object to corrective action that places all offerors in the same competitive posture they enjoyed prior to the defect in the source selection process. Henkels & McCoy, Inc., B-250875 et al., Feb. 24, 1993, 93-1 CPD ¶ 174 at 3.

Discussions occur when an offeror is given the opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of its proposal. If a procuring agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range. Federal Acquisition Regulation § 15.306(d); International Res. Group, B-286663, Jan. 31, 2001, 2001 CPD ¶ 35 at 6. Similarly, if discussions are reopened with one offeror after receipt of final revised proposals, they must be reopened with all offerors whose proposals are in the competitive range. Rockwell Elec. Commerce Corp., B-286201.6, Aug. 30, 2001, 2001 CPD ¶ 162 at 4.

Here, after receipt of final revised proposals, the Forest Service afforded Rickaby the opportunity to revise its price, and Rickaby in fact significantly lowered its price. While the agency's action may have resulted from an attempt to remedy the effects of misleading agency advice during discussions, nevertheless, in giving Rickaby an additional opportunity to revise its price, the Forest Service reopened discussions with Rickaby, and only with Rickaby. Since the agency reopened discussions with one offeror in the competitive range, the agency should have reopened discussions with all offerors in the competitive range at that time. Rockwell Elec. Commerce Corp., supra. In these circumstances, we find unobjectionable the agency's subsequent determination to do what it should have previously done, that is, reopen discussions with all offerors. The fact that the agency took corrective action after announcing an award to Rickaby and disclosing Rickaby's contract price does not render the corrective action improper. Where the corrective action taken by an agency is otherwise unobjectionable, a request for revised price proposals is not improper merely because the awardee's price has been exposed. Strand Hunt Constr., Inc., B-292415, Sept. 9, 2003, 2003 CPD ¶ 167 at 6.

The protests are denied.

Anthony H. Gamboa
General Counsel