

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Kiewit Louisiana Company

File: B-403736

Date: October 14, 2010

Neil H. O'Donnell, Esq., Patricia A. Meagher, Esq., and Dennis J. Callahan, Esq.,
Rogers Joseph O'Donnell, for the protester.

Marguerite K. Kingsmill, Esq., Kingsmill Riess, LLC, for Boh Bros. Construction Co.,
LLC, an intervenor.

Matthew R. Keiser, Esq., U.S. Army Corps of Engineers, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Where protester fails to timely protest a patent ambiguity in solicitation's initial proposal award provision--the solicitation failed to incorporate one of two mandatory clauses to indicate whether award was to be made with or without discussions--agency's decision to award on basis of initial proposals to a higher-rated, higher-priced offeror was unobjectionable.

DECISION

Kiewit Louisiana Company, of Fort Worth, Texas, protests the award of a contract to Boh Bros. Construction Company, LLC, of New Orleans, Louisiana, under request for proposals (RFP) No. W912P8-10-R-0044, issued by the U.S. Army Corps of Engineers for construction of improvements to the levee and floodwalls at the Causeway Bridge in Jefferson Parish, Louisiana. Kiewit maintains that the agency improperly failed to engage in discussions.

We dismiss the protest.

The RFP advised that the agency would make award on a "best value" basis considering price and several non-price considerations. The RFP did not indicate whether the agency intended to conduct discussions. Kiewit's proposal was assigned a marginal rating under the technical approach/key personnel evaluation factor for failure to include certain demolition work. Protest at 3. The agency

proceeded to make award to Boh Bros. on the basis of initial proposals, without discussions, at a price higher than Keiwit's.

An agency's intent with regard to discussions is required to be expressed in the solicitation. Specifically, under the Competition in Contracting Act (CICA), 10 U.S.C. § 2305(a)(2)(A)(ii)(I) (2006), solicitations in negotiated acquisitions are required to include:

either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary.

This provision is implemented by Federal Acquisition Regulation (FAR) § 15.209(a), which requires RFPs to include the clause at FAR § 52.215-1(f)(4) if the agency intends to make award without discussions, or the clause at FAR § 52.215-1 alternate 1, if the agency intends to make award after discussions.

Keiwit asserts that, since the RFP failed to include either of the above clauses, and the RFP was otherwise silent as to whether discussions would be conducted, the agency was required to conduct discussions by default. Keiwit claims that its omission of the demolition work was a minor error that it easily could have remedied through discussions, and that the cost of the demolition work would be lower than the price difference between its and Boh Bros.' proposals.

First, contrary to Keiwit's position, there is no basis for finding that the agency was required to conduct discussions given the RFP's silence on the point. In this regard, Keiwit cites no statutory or regulatory provision--and we are aware of none--establishing such a default rule.

Further, in the absence of either of the specified clauses, the RFP was patently ambiguous as to whether discussions were contemplated. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2010), protests based on improprieties apparent on the face of a solicitation must be filed prior to the deadline for submitting proposals. Here, it was apparent that the RFP did not include one of the two alternate clauses required to be included in an RFP to advise offerors of the agency's intention regarding discussions; as a result, it was unclear whether the agency would conduct discussions. This being the case, any question regarding the agency's obligation to conduct discussions--including Keiwit's assertion that discussions were required--had to be raised, if at all, prior to the closing time for receipt of initial proposals. Carter Indus., Inc., B-270702, Feb. 15, 1996, 96-1 ¶ 99 at 3-4. Since Keiwit did not protest prior to the closing time, its assertion that the agency was required to engage in discussions is untimely, and will not be considered.

Alternatively, Kiewit asserts that the agency abused its discretion in deciding not to initiate discussions here. However, given Kiewit's failure to timely challenge the RFP's patent ambiguity, it has no independent basis to allege that the agency was required to engage in discussions; nothing in the RFP suggested that the agency would conduct discussions, and the agency was not otherwise legally required to do so. More fundamentally, under current requirements there are no statutory or regulatory criteria specifying when an agency should or should not initiate discussions, and there also is no requirement that an agency document its decision not to initiate discussions. As a result, while we are not yet prepared to conclude that there are no circumstances under which an agency abuses its discretion by failing to initiate discussions, an agency's decision not to initiate discussions is a matter we generally will not review.¹

We note for the record that, in opposing the agency's request for dismissal, Keiwit cites cases where we concluded that an agency did not reasonably exercise its discretion in making award based on initial proposals. These cases interpreted a statutory provision that was deleted from the Competition in Contracting Act twenty years ago. See e.g. Monarch Enters., Inc., B-233724, Mar. 16, 1989, 89-1 CPD 281 at 3-4.²

¹ In the rare instances where we have found that an agency abused its discretion in not initiating discussions, we reached this conclusion after sustaining the protest on other grounds. Upon review, it appears those other grounds would have been sufficient--in and of themselves--to justify sustaining the protest. See, Jonathan Corp.; Metro Mach. Corp., B-251698.3, B-251698.4, May 17, 1993, 93-1 CPD ¶ 174 at 15 (failure to initiate discussions); see also TRW, Inc., B-254045.2, Jan. 10, 1994, 94-1 CPD ¶ 18 at 11 (failure to reopen discussions after the receipt of best and final offers).

²Previously, 10 U.S.C. § 2305(b)(4)(A) (1988), allowed agencies to make award on the basis of initial proposals only where it could clearly be demonstrated from the existence of full and open competition, or accurate prior cost experience with the product or service, that award without discussions would result in the lowest overall cost to the government. See Wetlands Research Assocs., Inc., B-246342, Mar. 2, 1992, 92-1 ¶ 251 at 4 n.4; Raytheon Co.-Recon., B-240333.2, Mar. 28, 1991, 91-1 CPD ¶ 334 at 3-4. That provision was amended to eliminate the requirement that award based on initial proposals result in the lowest overall cost to the government. National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510, § 802, 104 Stat. 1485, 1589 (1990). The same amendment also changed 10 U.S.C. § 2305(a)(2)(A)(ii)(I) to include the current requirement that agencies expressly advise offerors about whether the agency intends to make award with, or without, discussions. Accordingly, the cases cited by the protester decided before the statutory change have no application to the language under the new provisions. Compare Raytheon Co., B-240333, Nov. 9, 1990, 90-2 CPD ¶ 384, aff'd, Raytheon Co.-Recon., supra.

In any case, although Keiwit maintains that the agency abused its discretion by not initiating discussions, it concedes that its proposal omitted a portion of the required work, and acknowledges that including the work will increase its price. See Protester's Opposition to Request for Dismissal, Sept. 16, 2010, at 5 (explaining it was unreasonable not to initiate discussions "...simply because Kiewit had omitted from its proposal readily segregable demolition work worth much less than \$1 million.").

In our view, Kiewit's contention essentially amounts to an assertion that the agency, not Keiwit, must bear responsibility for its failure to tender a proposal that commits to performing, or includes a price for, all of the work covered by the solicitation. We disagree. Kiewit's assertion is so untenable that it fails to state a valid basis of protest. Our Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (f) (2010), require that a protest include a detailed statement of the legal and factual grounds for the protest. This requirement contemplates that protesters will provide, at a minimum, either allegations or evidence sufficient for this Office to reasonably conclude that a violation of statute or regulation has occurred. See, e.g., Saturn Landscape Plus, Inc., B-297450.3, Apr. 18, 2006, 2006 CPD ¶. 66 at 9. Since offerors are responsible for submitting an adequately written proposal, Hardiman Remediation Servs., Inc., B-402838, Aug. 16, 2010, 2010 CPD ¶ 195 at 3, and since the protester concedes that its proposal did not address a solicitation requirement, its contention that the agency erred in not initiating discussions, standing alone, cannot go forward.

The protest is dismissed.

Lynn H. Gibson
Acting General Counsel