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**Comptroller General
of the United States**

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

Decision

Matter of: All Building Services, Inc.

File: B-293519

Date: March 23, 2004

Sam Z. Gdanski, Esq., Jeffrey I. Gdanski, Esq., and Scott H. Gdanski, Esq., for the protester.

Rita M. Liotta, Esq., General Services Administration, for the agency.

Katherine I. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against rejection of proposal as unacceptable is denied where, although proposal included acknowledgment of amendment adding contract line item number (CLIN) that added additional work, proposal did not include a price for the new CLIN because offeror submitted the original rather than the revised price schedule; by not submitting a price or indicating that the new CLIN would be performed at no charge, the offeror created doubt as to whether it was obligating itself to perform the additional work and the proposal therefore was technically unacceptable.

DECISION

All Building Services, Inc. (ABS) protests the General Services Administration's (GSA) award of a contract to Enovity, Inc., under request for proposals (RFP) No. GS-09P-03-KSC-0155, for operation and maintenance services at the Phillip Burton Federal Building in San Francisco, California. ABS challenges the agency's rejection of its proposal as unacceptable.

We deny the protest.

The RFP, issued as a small business set-aside for a commercial item, contemplated the award of a fixed-price contract, for a base year with four option years, for operation, maintenance and repair services. Award was to be made to the responsible offeror whose offer, conforming to the solicitation, would be most advantageous to the government, price and other factors considered. According to the RFP, the technical evaluation factors, when combined, were significantly more important than price. The RFP advised that since the agency intended to evaluate

proposals and award a contract without conducting discussions, an offeror's initial proposal should contain the firm's best terms from a technical and price standpoint.

On October 15, 2003, prior to the scheduled October 20 closing time for receipt of initial proposals, the agency issued amendment No. 1, which deleted and modified significant portions of the solicitation, and added two additional contract line item numbers (CLINs), CLIN 0005 and 0006. CLIN 0005 represented an option, to be exercised at the discretion of the agency, that the service call desk, already required under the RFP, receive and input data from utility invoices on all utility accounts in GSA buildings located throughout GSA's Pacific Rim Region, which includes California, Nevada, Arizona and Hawaii. According to the agency, this region averages 600 to 700 accounts invoicing monthly, for a maximum average of 35 invoices per working day. The contractor would receive the invoice from the appropriate GSA representative, input the data from each invoice, point out to the respective GSA official any charges that cannot be input for that utility company and service, and send the invoices to the GSA Finance Center within 2 working days. Amendment No. 1, Performance Work Statement § C.4.8. Under CLIN 0006 offerors were to specify a credit if the agency "relamped" certain lamps, and provided certain "lamp stockage" from that point forward. Amendment No. 1 included a revised price schedule that included boxes in which offerors were to provide prices for these two additional CLINs on a monthly basis. Amendment No. 1 also extended the closing time to October 24.

Eight proposals were received by the closing date. The agency was unable to evaluate two proposals, including ABS's, because the pricing was incomplete. Although ABS acknowledged amendment No. 1, it submitted its prices on the original price schedule, rather than on the revised price schedule that was furnished with the amendment; as a result, ABS did not provide prices for CLINs 0005 and 0006, and its proposal was determined to be unacceptable. The agency made award based on initial proposals to Enovity, which offered the second highest price of \$8,680,658 but received the highest technical score.

ABS states that its failure to submit prices for CLINs 0005 and 0006 was a minor informality. According to the protester, by acknowledging amendment No. 1, it obligated itself to perform in accordance with the terms of the RFQ as revised by the amendment. In any case, argues the protester, the amendment did make a material change to the RFP.

We find that GSA properly determined ABS's proposal to be unacceptable. Again, CLIN 0005, an option to be exercised at the discretion of the agency, requested a per-month price for having the service call desk, already required under the RFP, also receive and input data from utility invoices on all utility accounts in GSA buildings located throughout GSA's Pacific Rim Region, pointing out to the respective GSA official any charges that cannot be input for that utility company and service. Although ABS generally acknowledged amendment No. 1, ABS's failure to provide unit prices for this additional work, or indicate that the new CLIN would be

performed at no charge, created doubt whether ABS's proposal obligated it to input data from the utility invoices in accordance with CLIN 0005. HFS, Inc., B-248204.2, Sept. 18, 1992, 92-2 CPD ¶ 188 at 5, recon. denied, B-248204.3, Nov. 10, 1992, 92-2 CPD ¶ 337.

Further, we agree with GSA that CLIN 0005 was material. There is no precise rule for determining whether a change in requirements evidenced by an amendment is more than negligible, such that the offeror's failure to obligate itself to perform in accordance with the amendment renders the proposal unacceptable; rather, that determination is based on the facts of each case. Doty Bros. Equip. Co., B-274634, Dec. 19, 1996, 96-2 CPD ¶ 234 at 4. Generally, an amendment that imposes a legal obligation upon an offeror different from those imposed by the original solicitation is material, whereas an amendment that merely clarifies an existing requirement is not. Navistar Marine Instrument Corp., B-277143, B-277143.2, Feb. 13, 1998, 98-1 CPD ¶ 53 at 1; Innovation Refrigeration Concepts, B-271072, June 12, 1996, 96-1 CPD ¶ 277 at 2; Favino Mech. Constr., Ltd., B-237511, Feb. 9, 1990, 90-1 CPD ¶ 174 at 2.

While the protester contends that the cost of an administrative assistant to staff the service call desk was already included in its price under the original price schedule, and that the utility invoice entry work in CLIN 0005 could be easily handled by the existing staff, GSA notes that CLIN 0005 would require the contractor to input a considerable volume of utility invoices, coming not only from the Phillip Burton Federal Building, but also from every GSA building in GSA's Pacific Rim Region, and amounting to 600 to 700 utility invoices per month. Further, GSA indicates that it estimated that the cost of complying with CLIN 0005 could approach \$50,000 per year, as the contractor would most likely need to hire an additional staff person. GSA Comments, Mar. 10, 2004, at 2.¹ Thus, the record indicates that CLIN 0005 imposed an obligation on the contractor which was different from those imposed by the original solicitation and was not negligible. Given that ABS failed to provide unit prices for this additional work, and thus cast doubt on whether ABS's proposal obligated it to input data from the utility invoices, ABS's proposal was technically unacceptable since it did not conform to a material term of the RFP. HFS, Inc., supra, at 5.

ABS claims that the copy of amendment No. 1 that it downloaded did not contain a revised pricing schedule. GSA, however, reports that the amendment included the revised pricing schedule. Further, GSA's position appears to be consistent with the fact that the copy of amendment No. 1 which is accessed through the Federal

¹ While ABS correctly points out that the awardee indicated in its proposal that CLIN 0005 would be performed at no additional charge to the government, GSA's position that there was a potential additional cost to comply with CLIN 0005 that could approach approximately \$50,000 per year is generally confirmed by the per-year prices offered by the two offerors that priced that CLIN.

Business Opportunities (FedBizOpps) website is contained in a single zipped file which, while comprised of several files, includes a single file with the solicitation as amended, including the revised pricing schedule. Thus, it is not clear from the record how ABS could have received only a part of amendment No. 1, not including the revised pricing schedule, when it downloaded the amendment.

In any case, ABS's assertion constitutes a challenge to an alleged solicitation impropriety. Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules specifically require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1) (2004); International Corporate Sec., B-249562, Nov. 25, 1992, 92-2 CPD ¶ 382 at 4. Here, it is clear that the protester knew, or should have known, that its copy of amendment No. 1 was incomplete without a revised price schedule, because the original price schedule, utilized by the protester, did not include descriptions of CLINs 0005 and 0006, a box or space to price the additional CLINs for the base year and four option years, or even an indication as to the unit of pricing (i.e., monthly) to be used for these CLINs. Indeed, the record indicates that ABS recognized the omission of these items from the (original) schedule it used to prepare its offer; according to ABS in its protest, it did not provide prices for CLINs 0005 and 0006 because it "did not believe it to be prudent to modify a Government-issued form." Protest at 3. Under our regulations, the protester should have protested the apparent lack of any provision in the price schedule for pricing CLINs 0005 and 0006 by the October 24 closing time for receipt of initial proposals. ABS's failure to protest until December 19, almost two months after the closing date, renders this ground of protest untimely.

ABS contends that the agency should have given it an opportunity to submit prices for these CLINs after receipt of initial proposals (presumably through the conduct of discussions and submission of final proposal revisions). This argument is without merit. Because the RFP placed ABS on notice of the agency's intention to award without discussions, ABS could not reasonably presume that it would have a later opportunity to augment its proposal by submitting prices for CLINs 0005 and 0006. There is generally no obligation that a contracting agency conduct discussions where, as here, the RFP specifically instructs offerors of the agency's intent to award a contract on the basis of initial proposals. Techseco, Inc., B-284949, June 19, 2000, 2000 CPD ¶ 105 at 4. The contracting officer has broad discretion in deciding whether to hold discussions, which our Office will review only to ensure that it was reasonably based on the particular circumstances of the procurement. Id. There is no basis on this record to object to the agency's determination not to conduct discussions.

ABS also challenges the agency's decision to award to Enovity. Under our Bid Protest Regulations, however, a firm is not an interested party to maintain a protest if it would not be in line for award if the protest were sustained. 4 C.F.R. § 21.0(a). Since ABS's proposal was properly determined to be unacceptable, and there were

five technically acceptable, reasonably priced proposals, besides the awardee's, eligible for award, ABS is not an interested party to challenge the award. U. S. Constructors, Inc., B-282776, July 21, 1999, 99-2 CPD ¶ 14 at 5.

The protest is denied.

Anthony H. Gamboa
General Counsel