

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

DECISION AND ORDER

FAA Order Number: ODR-97-31

Matter: Protest by IBEX GROUP INCORPORATED of Award Pursuant to Solicitation No. DTFA14-97-R-33886

Docket: 97-ODR-00037

Served: July 16, 1997

DECISION AND ORDER

Appearances:

For the Protester: Eric J. Marcotte, Esq., Carl J. Peckinpaugh, Esq., Jason I. Hewitt, Esq., Winston & Strawn, Washington, D.C.

For the Agency: Glenn L. Brown, Esq., FAA Great Lakes Regional Office, Des Plaines, Ill.

I. Introduction

On April 7, 1997, IBEX Group, Inc., protested the award of multiple contracts under Solicitation DTFA14-97-R-33886, issued by the FAA's Great Lakes Regional Office, in Des Plaines, Illinois. Tab (1). The solicitation, which was issued under the FAA's Acquisition Management System, (AMS), sought weather observation services at twenty airports throughout the region for a base period and four option years. IBEX was the low offeror at four of the twenty sites. Its offer was rejected by the contracting officer because it was evaluated as providing inadequate vacation time for its employees as required by the Service Contract Act (SCA). IBEX contends that its offer contained a valid estimate of the vacation hours likely to be accrued, and that in any event, it would bear the financial risk of performance. IBEX asserts that it is a responsible contractor, and that its offer constituted an unequivocal promise to perform the work in accordance with the terms of the solicitation. The protester argues that since its offer was low at those four sites, it should have received the award, irrespective of any calculation by the contracting officer as to its cost of performance.

For the reasons expressed below, I am sustaining this protest.

II. Findings of Fact

On January 13, 1997, the FAA's Great Lakes Regional Office issued a Screening Information Request, (SIR), seeking offers to provide weather observation services at various sites throughout the Region. Two amendments

were issued before the closing date of January 31, adding locations and clarifying other aspects of the SIR. The services at issue were subject to the Service Contract Act, and accordingly, the contracting officer (CO), attached Department of Labor wage determinations to the SIR for each of the twenty sites. Tab (2).

The CO was concerned about the offerors' compliance with the provisions of the SCA and the wage determinations. Accordingly, the SIR incorporated a "cost proposal" in Section "B" in which the offerors were to break down the component parts of their overall price. The "cost proposal" was a single page document, in matrix format, which asked for the proposed quantity of hours, the proposed hourly rate, and the proposed extended cost for the categories of: Supervisor, Day/night/Sunday/Holiday/Vacation, and Technicians, Day/night/Sunday/ Holiday/Vacation. The matrix also contained lines for the offerors to state their cost of applicable state and federal taxes, as well as overhead, profit, and total monthly cost. See Tab (2), Section "B."

Seventeen offers were received by the closing date of January 31. On review, the CO found that there was a large disparity among the offers and apparent confusion about the requirement for supervisory weather observers. In an effort to correct these problems, Amendment 0003 was issued on March 13, 1997. This Amendment specified the number of supervisor hours, and made certain other clarifications. The cost proposal matrix was also revised to specify the exact number of supervisory and technician hours, as well as the precise health & welfare rates and FICA rate to be used. It also noted that 10 holiday days were required in the "Supervisor" category, but the matrix still did not indicate anything about the number of vacation hours required for supervisors or technicians. See Tab (2), Amendment 0003.

On March 19, offers were timely received from 15 of the original 17 firms. IBEX was low at four of the twenty sites, (Indianapolis, Kalamazoo, Pontiac, and Champaign), but its offer was rejected because the CO calculated that it incorporated insufficient vacation hours. Although the cost proposal matrix provided no numbers for the vacation line item, the CO had calculated from the wage determinations that 80 hours of vacation time would be earned by the employees in each full year of performance at each of the four sites. IBEX's cost breakdown, however, had estimated [* * * * *], respectively, for the first full year of performance at each site. Low offers were rejected at several other locations for similar deficiencies. At some sites, award was eventually made to the third or fourth low offeror. See Tab (3). No communications were held with any of the offerors between receipt of the March 19 offers and award.

IBEX's protest was filed with the Office of Dispute Resolution, (ODR), on April 7, 1997. ODR conducted a teleconference with the parties on April 17 in which the issues were identified and a timetable for discovery and briefing was established. See Tab (4). The agency submitted its report on May 1, Tab (3), and the Regional Office produced the last of the agreed-upon discovery to the protester's attorney on May 21. IBEX filed its response to ODR on June 3.

Tab (5).

III. Issue presented

Did the contracting officer have a rational basis for rejecting IBEX's offer?

IV. Analysis

In deciding all substantive protest issues, the FAA will apply the standard of review applicable under the Administrative Procedures Act, 5 U.S.C. 706. Agency actions will be upheld so long as they have a rational basis, supported by substantial evidence. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, (1971).

I believe that the resolution of this protest flows from the terms of the underlying solicitation. The Screening Information Request, (SIR), issued by the Great Lakes Region requested fixed prices for a base period plus option years at twenty sites throughout the midwest. Section "M," "Evaluation Factors for Award," specified:

Award will be based on the lowest overall cost to the government for each location, initial period and option periods cost combined, submitted by a qualified and responsible offeror.

(Emphasis added.) See Tab (2).

From this language, I find that the intent conveyed to all offerors was that the lowest overall price from a qualified and responsible offeror would win the award at each site.

At the same time, however, Section "B," the "cost proposal," requested a breakdown of the total price for each site into the subcategories of "supervisors" and "technicians," direct pay, nighttime differential, weekends, holiday, and vacation. It also requested specific cost elements of applicable taxes, profit, and overhead. See Tab (2) at Section "B." No explanation appears anywhere in the SIR as to why this information was requested or necessary, or what its relationship to Section "M" would be. Since "M" was explicit about award being based on lowest overall price, I can only conclude that the cost breakdown in Section "B" was elicited to assist in the determination of "qualified" and "responsible," mentioned in that same paragraph. The basis for award, however, remained lowest price.

This interpretation is supported by the fact that the SIR contained aspects of both a sealed bid and a negotiated procurement. The solicitation's cover page noted that it "more closely resembles a negotiated solicitation." See Tab (2). Clearly, discussions with the offerors were permissible, although they were not required. See also AMS Section 3.2.2.3.1.2.2., which gives the CO discretion to conduct discussions whenever he or she deems appropriate. In the event, the contracting officer determined not to conduct discussions with anyone, and instead made award from analysis of initial offers. IBEX's low offer was rejected at four sites. In some locations, the lowest two or three offers were rejected for similar reasons. I believe that, given the clear language in Section "M," the only rational use of the information elicited in the cost breakdown schedule was to assess an offeror's responsibility.

My review of the record indicates that, because of the fixed-price nature of the work and the stated basis for award, offerors were encouraged to minimize costs and to assume certain risks of performance. Accordingly, information derived from the cost breakdown schedule should not have formed a basis for a finding of nonresponsiveness, unless the firm's proposal otherwise evidenced an exception to the requirements or an intent not to comply with the SCA. In fact, the agency report confirms that IBEX's proposal was rejected as nonresponsive solely because it contained fewer vacation hours in the breakdown schedule than estimated by the contracting officer from the wage determinations. For the reasons that follow, I believe that rejection was unreasonable.

A. Responsiveness.

The record is clear that the only reason for rejecting the protester's offer was vacation pay; the agency took no issue with any of the other aspects of IBEX's cost breakdown, including, direct pay, overtime, holiday, weekends, and taxes. At four sites, however, IBEX proposed an amount for vacation pay that was less than the amount assumed by the CO. There is nothing else in the record that would suggest that IBEX did not intend to comply with the SCA; on the contrary, it's cost breakdown evidences strict adherence to the Wage Determinations in all other respects. The issue thus confronting me, is whether the Contracting Officer acted reasonably in rejecting IBEX's offer as nonresponsive solely because it's cost breakdown sheet evidenced a lesser number of vacation hours than the agency's estimate.

The four sites at issue are Indianapolis, Kalamazoo, Pontiac, and Champaign. The Wage Determination for each contained the following clause:

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 8 years; 4 weeks after 15 years; 5 weeks after 30 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility.

See Tab (2), Wage Determinations for Indianapolis, Kalamazoo, Pontiac, and Champaign

From this language, the contracting officer assumed that in each year of performance, (except the base period), each employee would accrue 80 hours of vacation time, and thus all offers were reviewed to ensure that they contained at least 80 hours per year. As noted above, however, the cost proposal matrices in Section "B" did not specify any particular amount of vacation hours; the spaces on the "Vacation" line were left blank. See Tab (2), Amendment 0003. In its proposal, IBEX's cost breakdown listed vacation hours in the first full year of performance at each site ranging from [*] at Indianapolis, to [*] at Kalamazoo and Pontiac, to [*] at Champaign. See Tab (3). Because these figures were less than the 80 hours estimated by the contracting officer, IBEX's offer was rejected at each of those four locations, even though it was low priced.

From my perspective, the problem with the CO's approach is that, having elected to treat the procurement as a sealed bid, there was no basis for concluding that IBEX would not comply with the SCA. By submitting its offer, IBEX agreed to complete the statement of work under the terms and conditions of the SIR for the fixed prices stated, and its estimation of a lesser number of vacation hours in a cost breakdown sheet could not reasonably be interpreted as an exception to those requirements, or as evidence that the protester did not intend to comply with the SCA.

The critical point here is that since the SIR did not specify the vacation hours to be used, both the government and the protester made certain assumptions. The wage determination, by itself, provided only a formula, not an exact number of hours. The actual accrual of vacation hours would vary among employees depending on each individual's employment longevity, and because the cost breakdown schedule was left open on this point, the protester was justified in using its own estimates.

[* * * * *] There was no guaranty that the same would hold true in the performance at these particular sites, but that was a risk that IBEX was willing to undertake at a fixed price.

As IBEX points out, a particular employee at any of these sites may have already been continuously employed for eight years, thus entitling him to three weeks vacation time, in which case both the protester's and the government's estimate were understated. This reinforces the point that even under the wage determinations, there would be some variation in the exact cost of performance. The protester and others recognized that there was some room for estimation and risk assumption, and they signaled their willingness to assume that risk by stating their assumptions in the cost breakdown. IBEX never disputed the potential for 80 hours in the first option year. What the protester said was that it had reason to estimate a lower figure, and since the solicitation did not say that it couldn't, and since this was a fixed price contract, the company would assume the risk that it may end up having to pay out more vacation time.

I note that the above analysis is consistent with prior law in this area. The General Accounting Office and the federal courts have long held that offers priced below Service Contract Act rates are eligible for award so long as the firm is deemed responsible and proposal does not otherwise evidence an intent to violate the Act. *Allen-Norris-Vance Enterprises*, 91-2 CPD 23, *Solid Waste Services, Inc.*, 92-2 CPD 327. The rationale has been that under fixed-price contracts, the offeror will bear the risk of increased costs, and so long as its proposal unequivocally promises to perform the work in accordance with the wage determinations, there is no risk of increased cost to the government. *Halifax Technical Services, Inc.*, 848 F. Supp 240 (D.D.C. 1994). While the

FAA is not strictly bound by this precedent, ODR believes that the reasoning is compelling under the facts of this case because the solicitation stated that award would be made to the low priced, responsible offeror. The field of competition was purposely focused on price, which encouraged the offerors to assume the risk of estimating certain costs. See AMS Section 3.2.2.3.1.2.3, which provides that evaluations and awards will be based solely on the stated evaluation criteria.

B. Responsibility.

The Agency report also implies that the issue of responsibility was part of the reason that IBEX's offer was rejected. Because the protester's bid was below the FAA's estimate of total cost to perform, the agency says that the offer evidenced either a lack of understanding or a general inability to perform the work.

The problem with this argument is that nothing in the SIR prohibited below-cost bids, and given all the other information available on IBEX and its past performance, the submission of a below-cost bid, by itself, was an unreasonable basis for summarily rejecting the offeror as nonresponsible. IBEX had recently been admitted to the Qualified Vendors list in two other FAA Regions, and had successfully completed weather observation contracts at numerous locations, including the Great Lakes Region. If the Agency had concerns that IBEX's pricing might prove to be below-cost, it could have called the offeror and asked for confirmation of its intent to bear that liability. Alternatively, if the prospect of potential below-cost bids raised such serious responsibility concerns, the SIR should have said so, or an amendment to that effect could have been issued when it became apparent that a number of offerors were willing to take that risk. By summarily rejecting every offer which assumed that risk, however, the Agency deprived itself of the better pricing created by its own solicitation.

The Region has also argued that rejection of below-price offers is reasonable because the agency has an interest in avoiding undue employee turnover and disrupted performance. It states that below-cost bids may lead to performance problems during administration of the contract. Accordingly, the Region says it is willing to pay a premium to avoid such performance problems. This may be true, but in this case, Section "M" stipulated that award would be based on low price. There was no room for such "best value" considerations here because the solicitation said that price alone was the deciding factor. See AMS Section 3.2.2.3.1.2.4, dealing with changes in requirements during the evaluation process. Those factors could have been built into the SIR, but were not. Since they were not, it is irrational to evaluate them without amendment or discussions, because the Agency's own solicitation generated a field of competition that focused strictly on price.

V. Conclusion

In conclusion, I find that the only rational reconciliation between Section "M" and Schedule "B" is to interpret "B" as requesting detailed cost information for responsibility purposes. In IBEX's case, that information revealed a strategy that assumed minor risks of performance which were not prohibited by the terms of the solicitation. Absent any communications with the protester on this point, the assumption of those risks was an irrational basis to summarily reject the IBEX offer as nonresponsive, or to find the protester nonresponsible.

The contracting office shall review all the offers received in this procurement to determine at which sites low offers were rejected for this or similar reasons. For any locations in which award was made to other than the low offeror, the contracting office will determine whether, as a whole, the low offer was an unequivocal promise to perform, and whether that firm is responsible. Absent any evidence that the low offeror does not intend to comply with the wage determinations, or that it is not responsible, the contracting office will award to the low, responsible offeror in accordance with the terms of the SIR. At those sites where performance has not yet commenced, the existing contract should be terminated for convenience. Where performance has begun, the option year beginning October 1 1997 should not be exercised.

Pursuant to section 3.9 of the Federal Aviation Administration Acquisition Management System, this protest is sustained.

_____/S/_____

BARRY L. VALENTINE

ACTING ADMINISTRATOR

Issued this *15th* day of July 1997