

**December 16, 1993**

**P.S. Protest Nos. 93-21; 93-25**

**GOVERNMENT CONTRACT ADVISORY SERVICES, INC.**

**B & B GENERAL CONTRACTING, INC.**

**Solicitation No. 169982-93-A-0001**

**DIGEST**

Protests against awards of indefinite quantity contracts for general construction work are denied where the protesters fail to show that their rejection for technical unacceptability was arbitrary or an abuse of discretion; proposals clearly did not meet solicitation's documentation requirements and the contracting officer had no obligation to discuss the proposals' deficiencies with the protesters.

**DECISION**

Government Contract Advisory Services, Inc., ("GCAS") and B & B General Contracting, Inc., ("B & B") protest the award of contracts for construction renovations in six geographic areas of Michigan,<sup>1</sup> challenging the rejection of their proposals as technically unacceptable.

Solicitation 169982-93-A-0001 was issued by the former Chicago Facilities Service Center<sup>2</sup> on November 2, 1992, seeking offers for indefinite quantity contracts for general construction work.<sup>3</sup> Offerors were invited to submit proposals for any or all of the

<sup>1</sup> The areas were Area 1, Northern Michigan; Area 2, Western Michigan; Area 3, Southwestern Michigan; Area 4, Northeastern Michigan; Area 5, Eastern Lower Peninsula; and Area 6, South Central Michigan.

<sup>2</sup> That office is now the Chicago Facilities Service Office.

<sup>3</sup> Indefinite quantity construction contracts are governed by Procurement Manual (PM) 11.5.3, which

geographical areas, and instructed to submit proposals on the forms provided in the solicitation with a separate multiplier for each area.<sup>4</sup> The solicitation stated that one or more contracts might be awarded for each geographic area.

The solicitation, at cover page 1, stated that "[t]his is not a public opening. No information will be provided until time of contract award" and that "evaluation criteria in addition to price have been specified. Refer to Section M, Item M.2 for further details."<sup>5</sup> Cover page 2 noted that offers "must set forth full, accurate and complete information as required by this solicitation (including attachments). . . ."

Solicitation Section I, Attachment D, was the "Qualification Statement Package." The "Contractor Background Qualification Statements," which offerors were required to fill out to facilitate the evaluation as described both in Section M.2 and at page 1 of Attachment D, contained the instruction: "It is required that qualifications be presented ON THE FORMS FURNISHED BELOW." (Emphasis in original.) The forms contained space for information to be inserted which pertained to the firm in general. Another form, "Comparable Projects Completed," asked for information regarding specific projects, including project type, project location, contract type, original completion and actual completion dates, original and final dollar amounts, and references.

Solicitation Section J.1, Preparation of Proposals, stated that each offeror "must furnish the information required in the solicitation. . . ." Section K.1, Award Without Discussions (Provision A-9), provided: "The Postal Service may award a contract on the basis of initial proposals received, without discussions. Therefore, each initial proposal should contain the offeror's best terms from a cost or price and technical standpoint."

states, in part, that such contracts "permit a large number of projects to be accomplished through work orders against a single contract rather than through individual solicitations." That section goes on to state, at 11.5.3 b.1.: "A solicitation must be used to request proposals based on a unit price schedule prepared by the Postal Service. Offerors must . . . submit a multiplier that will apply equally to all prices listed in the unit price schedule."

<sup>4</sup> The terms of the contracts were to be 24 months. The solicitation stated:

Work will be done on work orders issued for various amounts and types of work. Offer will be a multiplier of the unit prices. Multiplier must contain offeror's overhead, profit and all other costs of doing business. Contract will be for general construction work on various postal facilities at predetermined unit prices. Specific work orders will be issued for not less than \$500.00 each nor more than \$100,000.00 each during [the contracts]. Total quantity of work under [the contracts] will not be less than \$10,000.00 nor more than \$300,000.00 for each area.

<sup>5</sup> Section M.2, Evaluation and Award Factors, stated that award would be made "to the responsible offeror who submits the best combination of Technical Proposal, Business Proposal (cost/price) . . . and other factors considered," and that: "Cost/Price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price." Section M.2 asked offerors to submit information related to six "primary areas to be used in determining which proposal is most advantageous to the Postal Service." In descending order of importance, these areas of evaluation were: the prospective contractor's experience; the company's references; satisfactory performance on any previous postal contracts; key personnel; financial stability; and current workload and capacity.

On November 23, the solicitation was amended to reflect updated wage rates. By the initial offer due date of December 2, between seven and eleven proposals were received for each area, and several offerors proposed for more than one area. GCAS proposed for all six; B & B for Area 4 only. Subsequent to the receipt of offers but before they were opened, the Facilities office discovered errors in the price schedule, including duplicated descriptions of work with different unit prices. On December 18, letters containing corrected unit price schedules were sent to all of the original offerors. The letters contained blank offer sheets on which the offerors were asked to submit "best and final offers" ("BAFOs") by January 12, 1993, if their original offers were affected by the unit price errors.

A three-member evaluation committee appointed by the contracting officer opened the offers on March 1.<sup>6</sup> The committee rejected several proposals, including those of GCAS and B & B, as technically unacceptable because they did not contain information required by the solicitation, specifically, in the cases of the protesters' proposals, the contractor qualifications statements. By the first of April the evaluation committee completed its evaluations and made recommendations for award to the contracting officer. The contracting officer proceeded to review the responsibility of the recommended firms, determining that two of those firms were not responsible. Four contracts were executed May 5, one on July 29, one on August 10, and two on August 12.<sup>7</sup>

In letters dated September 1, the unsuccessful offerors, including the protesters, were advised of the awards. Regarding these notifications, the contracting officer explains:

[T]he notifications of award were made soon after the issuance of the final contract award. This was due to the fact that the solicitation provided for multiple contract awards, and as such, notification prior to the final contract award could have adversely affected the award of subsequent contracts under the same solicitation by announcing privileged solicitation information such as number of offerors, multiplier awarded, etc.

These protests followed.

GCAS claims that the contracting officer improperly rejected its lowest or second lowest-priced offer for each area. GCAS alleges that the omitted information which occasioned its rejection related only to its responsibility, rather than to the technical acceptability of its offer, and that the contracting officer was obligated to request clarification concerning its responsibility.<sup>8</sup>

According to GCAS, it was also improper for the contracting officer to reject GCAS without discussions since it had the most favorable initial proposal due to its low multipliers and

<sup>6</sup> The contracting officer provides no explanation for the delay between the receipt of offers and their opening.

<sup>7</sup> D.N. West Company received contracts for Areas 1, 2, 4, 5 and 6, Reliance Building Company also was also awarded contracts for Areas 5 and 6, and L.D.Docsa Associates, Inc., received an award for Area 3.

<sup>8</sup> The protester cites PM 4.1.5 (2), apparently intending to refer to 4.1.5 a.2., which defines "clarification" as "[c]ommunication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in proposal."

there was uncertainty as to technical or other aspects of the proposal which would have been resolved through discussions.<sup>9</sup> GCAS asks this office to direct the contracting officer to consider GCAS' proposal.

In reply to GCAS' protest, the contracting officer raises the question of timeliness under PM 4.5.4 d., since the last award under this solicitation was made August 12 and GCAS' protest was received September 8, more than fifteen working days after award.<sup>10</sup>

The contracting officer asserts that contrary to GCAS' contention, GCAS' proposal was properly found to be technically unacceptable because GCAS did not submit information required by the solicitation. The contracting officer describes GCAS's proposal:

The offer included a general cover letter which stated that [its] proposal adheres to the format defined in the solicitation, takes no exception to the requirements and is fully compliant with USPS instructions. The letter include[d] extremely brief references to projects GCAS was involved with using numerous acronyms for which no explanation was included.<sup>[11]</sup>

The contracting officer asserts that GCAS' was not the most favorable initial proposal because it was technically unacceptable. He believes that GCAS has assumed, incorrectly, that because it submitted the lowest multiplier its was the most favorable initial

<sup>9</sup> The protester cites PM 4.1.5 f.2., which states:

Whenever there is uncertainty as to the pricing, technical, or other aspects of the most favorable initial proposal, award may not be made without discussions, unless the uncertainty can be resolved by clarification. . . .

<sup>10</sup> PM 4.5.4 d. states that "protests must be received not later than ten working days after the information on which they are based is known or should have been known, whichever is earlier; provided that no protest will be considered if received more than 15 working days after award of the contract in question."

<sup>11</sup> The GCAS proposal cover letter included:

-- A list of "[s]ome examples of contracts that GCAS has assisted with . . . ." with names and abbreviated locations, for example, "Greg Construction in the JOC at TACOM in Michigan";

-- A statement that GCAS "is the prime JOC contractor at Sioux Falls, SD, Battle Creek, MI, Des Moines, IA, as well as several others";

-- The statement "GCAS has also performed indefinite quantity projects for the U.S. Postal Service at the Detroit Post Office"; and

-- The statement that Morrison Knudsen selected GCAS to assist it with several contracts.

GCAS' proposal contained six sections, one for each geographical area. The offer contained a multiplier for each area, an acknowledgment of the amendment, the representations and certifications (solicitation section L) and a signed copy of the amendment cover page. The contracting officer states that GCAS' proposal contained no other information required by the terms of the solicitation.

proposal, and refers to the solicitation sections referenced above which provided for evaluation criteria other than price and stated that award might not necessarily be made to the lowest priced offeror. He points out that the solicitation also said that awards may be made without discussion and that therefore, it was incumbent upon all offerors to submit complete proposals.

The contracting officer states that the protester's interpretation of PM 4.1.5 f. as requiring that discussions be held with GCAS is incorrect because its proposal was not the most favorable initially due to its technical unacceptability, and that there was no uncertainty about its technical unacceptability.<sup>12</sup>

Replying to the contracting officer's statement, the protester cites *Flamenco Airways, Inc.*, P.S. Protest No. 91-21, May 21, 1991, and *American Telephone Distributors, Inc.*, P.S. Protest No. 87-117, February 23, 1988, for the proposition that its protest is timely because GCAS was notified that it was an unsuccessful offeror too late to protest within fifteen working days of the last award.

Reasserting that it submitted either the lowest or second lowest multiplier for each geographical area, GCAS submits a table showing the "potential waste" of Postal Service money caused by the contracting officer's awards to other, higher-priced offerors. The protester alleges that the higher price should not be paid unless it "truly and unmistakably provides the 'best value' to the Postal Service."

GCAS stresses that all six evaluation criteria involved offeror responsibility, not technical acceptability. GCAS cites *Cordova Air Service, Inc.*, P.S. Protest No. 92-86, January 22, 1993, for the proposition that where information relates to the ability of a bidder to perform a contract, then the matter is one related to responsibility, and also cites Comptroller General decisions to show that the contracting officer should have accepted information concerning its responsibility rather than rejected the proposal. "[I]t is well established that the terms of a solicitation cannot convert a matter of responsibility into one of responsiveness."<sup>13</sup> GCAS asserts that the contracting officer should have asked for information about its ability to perform the contracts, which would not have constituted discussions and would not have required discussions to be held with all offerors.

GCAS admits that it did not fill out the contractor qualifications statement but claims that the solicitation and "standard practice in the industry" contributed to its failure.

<sup>12</sup> The contracting officer also offers a possible explanation for the incompleteness of GCAS's proposal. The Postal Service received GCAS' request for the solicitation documents on November 17, subsequent to the "request cut-off date" of November 25, which was published in the Commerce Business Daily. Nevertheless, the Postal Service sent the documents to GCAS, which probably received them on December 1, the date GCAS submitted its offer. The contracting officer surmises that "[p]erhaps a contributing factor was that [its] request for solicitation documents was made late in the proposal submission period . . . affording [GCAS] [in]adequate time to fully read and understand the solicitation."

<sup>13</sup> The protester cites *Mobility Systems and Equipment Company*, Comp. Gen. Dec. B-243332, April 25, 1991, 91-1 CPD 412 (agency should have referred matter of responsibility to Small Business Administration) and also states that the contracting officer should solicit and consider information on responsibility at any time before award, citing *N.G. Simonowich*, Comp. Gen. Dec. B-240156, October 16, 1990, 90-2 CPD 298.

[W]hile the solicitation does contain various references to filling out "all attachments," there is no clear and unambiguous statement in the solicitation requiring that the Contractor Background Qualification Statement be submitted with the initial offer. In fact, Contract Item J.1e (Standard Contract Provision A-1) . . . provides that the Contractor's Financial Statements may be submitted "immediately upon request" rather than including them with the offer.

GCAS asserts that the PM uses the term "qualification. . . solely in the context of responsibility" and therefore, such information should have been accepted after "bid opening." According to GCAS: "All [evaluation factors] other than price related to ability to perform and therefore the responsibility of the contractor. Because these evaluation factors related to responsibility, it was appropriate and required for the Contracting Officer to seek additional information related to GCAS's responsibility and to determine whether an award to GCAS would provide the 'best value' to the Postal Service."

The protester also claims that "most of the information related to the evaluation factors listed in Item M.2 [was] at least briefly discussed in GCAS's cover letter" and that that information should have prompted the contracting officer to request additional information about its qualifications per PM 3.2.1 e.4.<sup>14</sup>

GCAS further claims that the contracting officer is incorrect in contending that award was made without discussions because offerors were asked for their "best and final offers" ("BAFOs") which, under PM 4.1.5 g.4, are only requested "upon completion of discussions." The protester claims that the request for BAFOs permitted the offerors to make any revisions they deemed necessary.

GCAS claims that documents submitted by the contracting officer with his report, including memoranda of the evaluation committee, indicate that award was not made in accordance with the solicitation evaluation factors; "[r]ather, the contractors were ranked only according to the lowest submitted multiplier price, and award was recommended to the lowest priced offeror upon a finding that the firm was a 'responsible offeror.'" There is no written evidence in the evaluation committee memorandum that each offeror was evaluated based on each of the separate evaluation factors listed in the solicitation."<sup>15</sup> GCAS concludes that it was

<sup>14</sup> PM Section 3 relates to contractor qualifications and sets forth the standards for responsibility determinations. PM 3.3.1 e.4. states: "Communication with a prospective offeror for the purpose of obtaining or clarifying information needed to determine responsibility is not 'discussion' as defined in 4.1.5, and does not require that discussions be held with all those in the competitive range (see 4.1.5. g.1)."

<sup>15</sup> The record contains the following:

-- A memorandum from the evaluation committee to the contracting officer dated March 19, in which the committee listed, for each geographic area, the offerors and their multipliers, from lowest to highest. The proposals of several firms, including GCAS and B & B, were found technically unacceptable for failure to "submit their respective contractor's background and qualifications as necessary under the solicitation documents." Other offers were found technically unacceptable for other reasons. The memorandum discussed the technical acceptability of the offerors and, for some of the offerors in Areas 5 and 6, their experience and financial stability.

"inappropriate for the contracting officer to 'reject' GCAS' offer because it failed to include evidence supporting evaluation criteria which were never fully considered by the evaluation committee or contracting officer in the award decision" and asks that GCAS "now be allowed to demonstrate its ability to perform the contract and save the Postal Service over \$100,000."

In rebuttal, the contracting officer terms "ludicrous and without merit" the protester's argument that the "brief form letter accompanying [its] offer, full of unknown acronyms, devoid of pertinent information required by the terms of the solicitation, should have provide[d] the Contracting Officer an adequate basis for further considering GCAS."

The contracting officer discusses how the protester's submissions continue to misuse the terms "responsiveness," "responsibility," and "bidder," demonstrating a lack of understanding of postal procurement regulations. He states that the evaluation criteria are not solely related to responsibility as the protester claims:

PM 3.3.1 b. lists eight factors that are the basis for a responsibility check. While they may appear to be similar in nature to the six evaluation factors included in solicitation paragraph M.2, they are clearly different, and serve a different purpose. . . . PM 3.3.1 b. also states that at times the key areas listed for responsibility may be used as evaluation factors.

The contracting officer states that the protester has confused the evaluation of offers, performed by the evaluation committee, with the responsibility determination which is made by the contracting officer.<sup>16</sup> The contracting officer goes on to state that the protester

is correct in [its] statement that since best and final offers were solicited, that the contracts were actually awarded with discussions. What the Contracting Officer was attempting to indicate was the fact that no further (additional)

-- A March 23 memorandum from the contracting officer directing the committee to reevaluate some of the offers that had been declared technically unacceptable, stating that if the offeror had submitted qualification forms for one area they could be used for the other geographic areas as well.

-- A March 26 memorandum from the committee to the contracting officer, in which the committee again listed the offerors and their multipliers, explained why some proposals were technically unacceptable and commented on experience and financial data for some offerors proposing for Areas 3, 4, 5 and 6.

The memoranda indicate that proposals of offerors other than the protesters were rejected for technical unacceptability despite multipliers lower than those of the awardees. Although the contracting officer correctly states that award was not made to the offerors submitting the lowest multipliers, the evaluation committee's memoranda indicate that for each award, the committee recommended the lowest-priced technically acceptable offeror. The contracting officer followed those recommendations except where he determined that the recommended awardees were nonresponsible.

<sup>16</sup> While the evaluation memoranda on the record indicate that the evaluators made recommendations regarding responsibility, the record also shows that the contracting officer properly gathered information and made responsibility determinations himself after receiving the evaluation memoranda.

discussions took place after original offers and the best and final offers were received and opened by the committee. The best and final offers were requested after receipt of, *but prior to opening*, the original offers. The fact that offerors were advised of discrepancies in the unit price schedule, and provided a new schedule, did constitute conclusion of discussions, and therefore, best and final offers were requested properly.

(Emphasis in original.) The contracting officer denies that award was made on the basis of price. He states that the technical evaluation first consisted of checking compliance with document submittal requirements. At that point, he states GCAS' proposal was found technically unacceptable. According to the contracting officer, the committee then passed or eliminated other offerors based on the evaluation factors. "While the evaluation memorandum does list the offerors by multiplier, from low to high, the protester is mistaken in the assumption that the multipliers were the only basis of award. The [offers] were only ranked in this manner for comparison purposes; one must read the evaluation memorandum in its entirety, not selectively, to understand the evaluation process." While the contracting officer suggests that the evaluation documentation "could have been better" he asserts that it shows that other factors were considered and that evaluation was made in accordance with the solicitation. He concludes that "it is the responsibility of the contracting officer to make the selection decision, and be responsible for trade off judgments regarding cost and other evaluation factors." The contracting officer asks that the protest be denied.

B & B's protest, challenging only the award for Area 4, was received by the contracting officer on September 15 and subsequently referred to this office. It relies on the same grounds as does GCAS. B & B claims that its multiplier was lower than D.N. West's and asks why it was not notified that its proposal lacked documentation. B & B complains that it "seems you have given the entire state of Michigan to D.N. West Enterprises. This does not appear to be in the best interests of the U.S. Postal Service due to the work load this contractor will have." The protester concludes: "Our main office is centrally located in the area of the Northeastern term contract and we believe we have a proven track record with you and that we were the low bidder on this contract."

The contracting officer replies that B & B's offer consisted of cover pages 1 and 2, its multiplier, an acknowledgment of amendments, a completed section L and a signed copy of the amendment cover page. The contracting officer states that B & B submitted no other information required by the solicitation in its original offer. The contracting officer states that after B & B received the December 18 letter regarding the errors in the price schedule, its multiplier did not change and it submitted only the Area 4 offer form enclosed with the letter.

The contracting officer suggests that B & B's protest, like GCAS', is untimely. On the merits, the contracting officer states that because B & B's offer was rejected as technically unacceptable for failure to supply documents required by the solicitation, its lower multiplier is irrelevant. He points out that like GCAS, B & B confuses sealed bid procedures with those governing Postal Service negotiated procurements, and asserts that it was proper to reject B & B's proposal without contacting it for further information. The contracting officer asks that the protest be denied.

One of the awardees, L.D. Docsa Associates, Inc., commented on GCAS' protest, stating: "If a firm fails to comply with the requirements as stated in the documents, . . . that is a sufficient reason for their bid to be rejected on a technicality. . . ."

## DISCUSSION

We first address the contracting officer's suggestion that both protests are untimely. While we generally have no authority to consider protests received more than fifteen working days after award, a recognized exception to that rule occurs when the contracting officer makes the filing of a timely protest impossible. In that case, "the timeliness period is tolled until the protester knows or should have known of the award." *Flamenco Airways, supra*. Here, neither GCAS nor B & B could have known that they were unsuccessful offerors until they received the contracting officer's notification of the contract awards. That notification was dated September 1, fourteen working days after August 12, the date of the final award. Since each had ten working days from receipt of that letter to submit its protest, PM 4.5.4 d., the September 8 (GCAS) and September 15 (B & B) protests were timely filed.

The contracting officer is correct that the protesters confuse sealed bid procurements, awards for which are based on price alone, with "best value" negotiated procurements, awards for which usually are made based on a combination of technical and business factors. "Best value" awards are made to offerors submitting the proposals most advantageous to the Postal Service. PM 4.1.5 b.1. The misunderstanding is evidenced by the protesters' use of the terms "bid," "bidders" and "responsiveness" instead of the correct terms "offer," "offerors" and "technical acceptability," and, in GCAS' case, its argument that information related to its qualifications was solely a matter of responsibility rather than required for proposal evaluation under the solicitation in this case.<sup>17</sup>

While GCAS is correct that experience is often a determining factor for responsibility, this solicitation listed experience as the most important evaluation criterion and, as other provisions of the solicitation discussed above clearly indicated, offerors were directed to submit this information on the forms in the "Qualification Package" with their initial proposals. To be considered for award, offerors had to furnish sufficient information on those forms to allow their proposals to be evaluated under the criteria listed in Section M.2 and Attachment D.<sup>18</sup>

Our review thus has to do with a contracting officer's determination that a proposal is

<sup>17</sup> Most postal solicitations are conducted on a negotiated basis; as such, proposals are evaluated to determine technical acceptability or unacceptability. See PM 4.1.4. "Responsiveness" and "nonresponsiveness," "bid" and "bidders," are not proper terms to use with respect to negotiated procurements. See, e.g., *TLT Construction Corp., Inc.*, P.S. Protest No. 89-75, January 18, 1990. GCAS' citation to *Cordova Air Service, supra*, is inappropriate; the transportation procurement in that case was conducted under sealed bid procedures, where price was the only award criterion and information related to that protester's ability to perform the contract could only have been relevant to the post-ranking responsibility determination. The Comptroller General decisions which GCAS cited (see footnote 13) are inapposite for similar reasons.

<sup>18</sup> Compare *C.J.M. Construction, Inc.*, P.S. Protest No. 91-74, December 10, 1991, where even though subcontracting and bond information were listed in the solicitation as evaluation factors, we held that several solicitation provisions, read together, indicated that information related to subcontractors actually was to be evaluated and relevant only with regard to responsibility. Unlike the solicitation here, the solicitation in *C.J.M.* did not put offerors on notice that the requested information must be provided in order to demonstrate technical acceptability.

technically unacceptable. "This office will not substitute its judgment for that of the contracting officer or disturb his evaluation of an offer's technical acceptability unless it is shown to be arbitrary or in violation of procurement regulations." *Federal Properties of Rhode Island, Inc.*, P.S. Protest No. 93-02, May 20, 1993; *Doninger Metal Products Corporation*, P.S. Protest No. 90-50, October 10, 1990. The purpose of our review is only to ensure that the determination of technical unacceptability has a reasonable basis. *Id.*; accord, *Cohlma Airline, Inc.*, P.S. Protest No. 87-41, October 30, 1987; accord *B&D Supply Company of Arizona, Inc.*, Comp. Gen. Dec. B-210023, 83-2 CPD 50, July 1, 1983. Further, "[t]he choice as to what is in the best interest of the Postal Service is a business decision within the discretion of the contracting officer and will not be overturned unless the contracting officer has clearly abused his discretion." *Georgia Power Company*, P.S. Protest No. 90-01, February 14, 1990. The record in this case does not support findings either of arbitrariness or of abuse.

Both GCAS and B & B were rejected because their proposals clearly did not conform to the requirements of the solicitation. GCAS admits that it did not submit the qualification statement, but asserts that the cover letter to its offer, which it admits "briefly" discussed the firm's accomplishments, was sufficient. That argument is not persuasive in that there is a significant difference between the information required by the forms and that furnished in the cover letter. As previously discussed, neither protester provided required details, such as the specific types of procurements or contracts previously held, or dates and dollar amounts involved in specific contracts. GCAS' cover letter and B & B's submissions did not come close to accomplishing the purpose of the contractor qualification forms, to provide sufficient information for the evaluators to apply the evaluation criteria.

Both protesters argue that they should have received an opportunity to clarify any uncertainty about their qualifications. However, the solicitation provisions stated that the Postal Service might award a contract on the basis of initial proposals received. Since the solicitation itself gave ample notice of the documentation requirements, the protesters were fully apprised of them and have no basis to complain about being rejected because of them.<sup>19</sup> *Hill's Capitol Security, Inc.*, P.S. Protest No. 90-25, July 20, 1990; *Sea-Land Service, Inc.*, P.S. Protest No. 77-28, August 18, 1977.

When a solicitation contains Provision A-9, Award Without Discussions, as did the solicitation at issue here, award may be made without discussions, PM 4.1.5 c.1.; 4.1.5 f.1. Nonetheless, GCAS alleges, and, in his rebuttal, the contracting officer agrees, that since BAFOs were requested, discussions were held in this procurement. While it is correct that the requesting of BAFOs is, itself, the conduct of discussions in a negotiated procurement, *Weber's White Trucks, Inc.*, P.S. Protest No. 91-63, December 16, 1991, and that when discussions are held, they must be held with all offerors still in the competitive range, PM 4.1.5 g.4.(a), it does not appear that what occurred here was, in fact, the conduct of discussions, and the use of the term BAFO in the contracting officer's December 18 letters does not make what occurred discussions. PM 4.1.5 a.3 defines discussions as:

Any oral or written communication between the Postal Service and an offeror (other than communications conducted for the purpose of clarification) that is

<sup>19</sup> The omissions involved in this case are not so minor as to be appropriate subjects for "clarification." See the PM's definition, footnote 8, *supra*; compare *Hratch Kouyoumdjian & Associates, Inc.*, P.S. Protest No. 93-03, April 16, 1993.

initiated by the Postal Service and (a) involves information essential for determining the acceptability of a proposal or (b) provides the offeror an opportunity to revise its proposal.

The December 18 communication to offerors was for the sole purpose of correcting the unit price schedule mistake in the solicitation, and to allow offerors to correct their unit pricing accordingly. The letters were issued before offers were opened and the Postal Service did not discuss any individual offeror's proposal.<sup>20</sup>

Since no discussions were required to be held in this case, and none in fact were held, the contracting officer could deal with the matter as a contract award without discussion, as long as "adequate competition or price analysis . . . [made] it clear that acceptance of the most favorable initial proposal [would] result in a reasonable price," PM 4.1.5 f.1., and he had no obligation to point out deficiencies in any offeror's proposal. *Service America Corporation*, P.S. Protest No. 91-56, October 30, 1991.<sup>21</sup>

The burden was on the protesters to submit adequately written and complete proposals. *Service America Corporation, supra*. "Any reduction in the evaluation scoring that results from an incomplete proposal is attributable only to the offeror." *Id.*; see also, *Hill's Capitol Security, supra*; *Chamberlain Manufacturing Corporation*, P.S. Protest No. 85-83, February 14, 1986; accord, *ATI Industries, Comp. Gen. Dec. B-215933*, November 19, 1984, 84-2 CPD 540; *Marvin Engineering Co., Inc., Comp. Gen. Dec. B-214889*, July 3, 1984, 84-2 CPD 15.

GCAS has alleged that the evaluation memoranda show that the awards were not made in accordance with the solicitation's evaluation factors, in effect arguing that the evaluators turned a best value procurement into one based on price alone. The contracting officer has

<sup>20</sup> If the December 18 letters constituted "discussions," the determination of the protesters' technical unacceptability would have constituted their exclusion from the competitive range in the course of award with discussions. In such a case, PM 4.1.5 g.2(c) requires that the excluded offerors be promptly notified of their exclusion. That the contracting officer did not provide such notification thus is consistent with his initial view that no discussions were held.

The unit price schedule mistake could have been an appropriate subject of an amendment to the solicitation. As PM 4.1.2 i.1. states: "If it becomes necessary to make changes in a solicitation in matters such as quantity, specifications, delivery schedule, or date for receipt of proposals, or to clarify or correct ambiguities or defects, a solicitation amendment must be issued." See also, *Federal Sales Service, Inc.*, P.S. Protest No. 92-13, May 7, 1992.

<sup>21</sup> The fact that the protesters offered lower prices does not necessarily mean that the prices of the awardees were unreasonable. See, e.g., *Novadyne Computer Systems, Inc.*, P.S. Protest No. 90-49, November 9, 1990 (awardee's price, although higher than protester's, was found to be reasonable and the contracting officer's trade-off determination was consistent with the stated evaluation criteria); see also PM 4.1.5 b.2 (contracting officer is responsible for trade-off judgments involving cost and other evaluation factors). In any case, any monetary saving which might be realized by contracting with the protesters is irrelevant. See, e.g., *Proffitt and Fowler*, Comp. Gen. Dec. B-219917, 85-2 CPD 566, November 19, 1985 ("once a proposal is determined to be outside of the competitive range as a result of the technical evaluation, the potentially lower price which that offer might provide is irrelevant since an offer not within the competitive range cannot be considered for award").

countered that the awards were not based on price in that contracts did not go to the offerors submitting the lowest multipliers. GCAS' contention is of no avail. Since its proposal was correctly determined to be technically unacceptable, it has no standing to protest any improper ranking of the technically acceptable proposals which did not prejudice it.<sup>22</sup> *Rickenbacker Port Authority and The Turner Corporation*, P. S. Protest No. 91-78, February 10, 1992. Without prejudice, there can be no remedy. *Id.*

The fact that the awards ultimately went to the lowest priced technically acceptable and responsible offerors is not necessarily inconsistent with a best value procurement, as long as the evaluators properly applied all of the evaluation criteria as published and weighted in the solicitation.<sup>23</sup> It is true that the evaluation memoranda contain explanations of the technical acceptability determinations and list the multipliers, but contain relatively few comments about experience and other important evaluation factors. Nevertheless, the contracting officer asserts that the decisionmaking process was proper, and there is insufficient evidence on the record to overcome the presumption of correctness that attaches to a contracting officer's actions and statements. *See, e.g., Federal Properties, supra.*

The protests are denied in part and dismissed in part.

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Contract Protests and Policies

<sup>22</sup> The record shows that the evaluators consistently rejected offers other than the protesters' which, like the protesters', were technically unacceptable under the solicitation's evaluation criteria.

<sup>23</sup> This could be the case, for example, if after technical evaluation the offers are closely ranked, justifying greater attention to price than to the relatively equivalent technical scores.