Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Morganti National, Inc.

File: B-274627; B-274627.2

Date: December 20, 1996

J. Randolph MacPherson, Esq., Sullivan & Worcester LLP, for the protester.
Robert S. Brams, Esq., Patton Boggs, L.L.P., for Sayed Hamid Behbehani and Sons, Co. W.L.L., an intervenor.
Paul W. Manning, Esq., United States Information Agency, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An agency may reasonably accept an offeror's certification and worksheets as demonstrating compliance with the solicitation's mandatory domestic content requirements in the absence of information suggesting that the offeror otherwise does not intend to comply with those requirements.

DECISION

Morganti National, Inc. protests the award of a contract to Sayed Hamid Behbehani and Sons, Co. W.L.L. (SHB) under request for proposals (RFP) No. IA2101-S5234574-EP, issued by the United States Information Agency for the design, fabrication, and construction of a Voice of America (VOA) shortwave relay broadcasting station on the Island of Tinian, Commonwealth of the Northern Mariana Islands. Morganti basically contends that SHB was ineligible for award because it failed to demonstrate compliance with the RFP's mandatory domestic content requirements.

We deny the protests.

The RFP contemplated the award of a fixed-price contract to the offeror whose proposal was most advantageous to the government, price being considered more important than the technical evaluation factors. The Tinian station, which will broadcast VOA radio programs to mainland China, was the last VOA relay station modernization project. Like the other projects, this procurement was subject to domestic content requirements, as described in the Foreign Relations Authorization

Act for Fiscal Years 1988 and 1989, Pub. L. 100-204, § 403(b), 101 Stat. 1381 (1987), which provides as follows:

> "A bid shall not be treated as a responsive bid for purposes of the facilities modernization program of the Voice of America unless the bidder can establish that the United States goods and services content, excluding consulting and management fees, of his proposal and the resulting contract will not be less than 55 percent of the value of his proposal and the resulting total contract."

To implement the statutory provision, the RFP included clause L.8, captioned "United States Goods and Services Content Requirements (Pub. L. No. 100-204)," and clause L.18, captioned "Computing United States Goods and Services Content as a Percentage of the Value of the Contract and Percentage of Value of the Proposal." Clause L.8 required offerors to submit completed domestic content percentage worksheets prepared in accordance with the format and instructions provided in clause L.18 for all goods and services included in the RFP's pricing schedule. The worksheets were included as attachments to the RFP. Basically, on the worksheets, offerors were required to provide their total price for domestic and foreign goods and services, and to state a total price percentage of domestic to foreign goods and services content. A footnote at the end of clause L.18 explained that an offeror's satisfaction of the domestic content requirements constituted a "threshold mandatory evaluation factor," that is, if an offeror's proposal did not meet the 55-percent value of the proposal and 55-percent value of the contract requirements, the offeror would be considered unqualified and its proposal would be considered ineligible for award.

As relevant to these protests, included as another attachment to the RFP was a list of government-furnished equipment (GFE). Specifically, the government was furnishing four generators, with auxiliary equipment and materials, for installation and integration by the contractor. The RFP advised, however, that because the generators were GFE, offerors should not include the value of these items in their price proposals. Neither the RFP's pricing schedule nor the domestic content worksheets included a line item for GFE.

Prior to the submission of initial proposals, clause K.19 was added to the RFP by amendment No. 1. This clause provided as follows:

> "By submission of this offer, the offeror hereby certifies that its offer is responsive under requirements of Section 403(b) of P.L. 100-204. An offeror will not be considered responsive unless the offeror can establish that the United States goods and services content, excluding consulting and management fees, of its proposal and the resulting

> contract will not be less than 55 percent of the value of its proposal and the resulting total contract."

By the closing date of May 16, 1995, Morganti, an American firm, and SHB, a Kuwaiti firm, submitted initial proposals, including completed worksheets demonstrating their compliance with the domestic content requirements. Both proposals were included in the competitive range. Following discussions, each firm submitted a best and final offer (BAFO) by the closing date of August 15.

Subsequently, as a result of a congressional budget reduction, the agency issued amendment No. 7, reducing the scope of the project. This amendment made no changes to the domestic content requirements and continued to state that the generators would be provided as GFE.

Following another round of discussions and by the next closing date of May 15, 1996, Morganti and SHB submitted second BAFOs. Both firms continued to demonstrate their compliance with the domestic content requirements.

Following the next round of discussions and as a result of additional budgetary reductions, on June 20, the agency issued amendment No. 9, further reducing the scope of the project. Amendment No. 9 also stated that all four generators and all associated equipment and materials would be furnished to the contractor,

> "[which] may use some, all, or none of the GFE and materials in constructing a power generating system that will support the relay station requirements. Title to all of the listed equipment and materials shall convey to the Contractor at a mutually agreed-upon date not to exceed 12 months after [the notice to proceed]."

The amendment provided that if the offeror decided not to use the GFE to perform the contract, an alternate configuration for the power generating system would have to be proposed. Amendment No. 9 did not change the domestic content requirements or add a line item for GFE to the RFP's pricing schedule or to the domestic content worksheets.

Morganti and SHB submitted third BAFOs by the July 3 closing date. Neither offeror proposed to use the generators provided by the government as GFE on the Tinian project. In addition, neither offeror considered the value of GFE in calculating its respective percentage of domestic content. Morganti's domestic content was 79 percent and SHB's domestic content was 62.26 percent. Since SHB satisfied the threshold mandatory domestic content requirements, that is, the domestic content of its proposal exceeded the mandatory 55 percent, and since SHB's price was significantly less than Morganti's price, the agency awarded a

contract to SHB as the offeror whose proposal was most advantageous to the government.

Morganti questions the acceptability of SHB's proposal for award since none of SHB's proposal submissions, including its third BAFO, expressly included the language of clause K.19 certifying compliance with the RFP's material domestic content requirements.

Clause K.19 was added to the RFP by amendment No. 1 and provided that "[b]y submission of this offer, the offeror hereby certifies that its offer is responsive under requirements of Section 403(b) of P.L. 100-204." Although SHB did not include the language of clause K.19 in any of its proposal submissions, the record shows that in its initial proposal and first BAFO, SHB submitted Standard Form 33 on which it acknowledged receipt of amendment No. 1. In addition, in the cover letter to its second and third BAFOs, SHB specifically referenced amendment No. 1, as well as all other amendments and stated its "intention to be fully compliant with the letter and spirit of the solicitation." Since clause K.19, by its terms, recognized the submission of a proposal as an offeror's certification of compliance with the statutory domestic content requirements, and since SHB clearly acknowledged or referenced amendment No. 1 in all proposal submissions, we think that SHB's failure to expressly repeat the language of this clause in any proposal submission did not render these submissions unacceptable. Rather, we think that such failure was properly waivable as an informality or minor irregularity in accordance with the clause at Federal Acquisition Regulation § 52.215-16(b)(3), which was incorporated in the RFP. Moreover, at no time during the multiple rounds of discussions conducted with SHB or in any of the firm's proposal submissions did SHB take exception to the statutory domestic content requirements or otherwise indicate that it would not comply with these requirements. For these reasons and in the absence of any information suggesting that SHB does not intend to comply with the RFP's statutory domestic content requirements, we conclude that the agency reasonably determined that SHB's proposal submissions constituted the firm's certification that it would comply with such requirements.[1]

Morganti next argues that SHB overstated its percentage of domestic content by ignoring in its calculation of domestic content the value of the generators provided as GFE.[2] According to Morganti, if SHB assigned a value of $2 million to the

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[1]According to the RFP, any post-award failure by SHB to comply with its certification of domestic content could result in the rejection of foreign goods or services or other appropriate action.

[2]In making this argument, Morganti contends that the generators do not constitute

(continued...)

generators, the same value assigned by Morganti to the generators, and the costs associated with such value represented 100-percent foreign content, SHB's domestic content percentage would decrease to 55.82 percent, less than 1 percent above the mandatory 55 percent.

Morganti fails to state a valid or a timely basis for protest. In this regard, the RFP did not require offerors to provide a value for GFE on the pricing schedule or on the worksheets used to calculate the offeror's percentage of domestic content. More specifically, as initially issued, the RFP expressly stated that "[b]ecause the four . . . generators are [GFE], their value should not be included in pricing information." This term of the RFP was never amended. Also, as conceded by Morganti, the domestic content worksheets did not include a line item for GFE. As evidenced by their proposals, both offerors, consistent with the terms of the RFP, treated GFE in the same manner--neither proposed to use the generators on the Tinian project and neither included the value of GFE in their price proposals or in their calculations of domestic content. If Morganti believed that all offerors (including itself, not just SHB) should provide a value for GFE on the pricing schedule or on the worksheets used to calculate domestic content, its post-award protest concerning defects in the RFP's pricing scheme and instructions for calculating domestic content should have been raised well before discussions were concluded, BAFOs evaluated, and award made. Bid Protest Regulations, section 21.2(a)(1), supra.

In any event, assuming the RFP did require an offeror to consider the value of GFE in calculating its domestic content and using Morganti's valuation of GFE, Morganti

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[2](...continued)
GFE, as defined by regulation, because title to the generators will be transferred from the government to the contractor, and before award, the agency knew that the successful offeror (whether Morganti or SHB) did not intend to use these generators to perform the Tinian project. Morganti also contends that this is the first time the agency has decided to transfer ownership of government property as a form of payment to a contractor performing a VOA modernization project and that this transfer of ownership is not consistent with the agency's prior treatment of such property. Morganti's contentions concerning the treatment of the generators under the RFP constitute challenges of the terms of the RFP, as incorporated in the RFP by amendment No. 9, issued on June 20, 1996. Accordingly, Morganti should have protested the amended terms of the RFP by the next closing date following the incorporation of these terms, that is, by the July 3 closing date for receipt of third BAFOs. Morganti's post-award challenges are not timely. Bid Protest Regulations, section 21.2(a)(1), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(1)); NASCO Aircraft Brake, Inc., B-237860, Mar. 26, 1990, 90-1 CPD ¶ 330.

essentially concedes that SHB still satisfies the RFP's mandatory 55-percent domestic content requirements. Under such scenario, although SHB's domestic content percentage decreases to 55.82 percent, the percentage still exceeds the mandatory minimum.[3] Since offerors need only offer a domestic content equal to, but not necessarily exceeding, the 55-percent mandatory minimum, we have no basis to question SHB's compliance with the RFP's domestic content requirements.[4]

The protests are denied.

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[3]Since the RFP did not require an offeror to consider the value of GFE in calculating its domestic content, we disregard Morganti's speculation that in light of the significant reduction in SHB's total price in its third BAFO, SHB must have valued the generators at an amount significantly greater than $2 million, which would result in SHB's domestic content falling below the 55-percent mandatory minimum.

[4]Morganti also complains that SHB overstated its percentage of domestic content by ignoring in its calculation of domestic content the value of consulting and management fees. According to Morganti, if the value of these fees are included, SHB's domestic content would decrease to 58.76 percent. For the same reason, we have no basis to object to SHB's compliance with the RFP's domestic content requirements since, as again conceded by Morganti, inclusion of these fees still results in SHB having a domestic content exceeding the mandatory minimum.

Finally, Morganti argues that in SHB's third BAFO, there were several matters, in addition to those involving SHB's domestic content certification and its decisions regarding the valuation of the generators and consulting and management fees, which should have triggered further inquiry by the agency regarding SHB's commitment to comply with the RFP's domestic content requirements. We disagree. Our review of the record shows that the agency reasonably determined that SHB's worksheets supported the firm's domestic content certification.