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**Comptroller General
of the United States**

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

Decision

Matter of: Shindong-A Express Tour Company, Ltd.--Costs

File: B-292459.3

Date: March 25, 2004

Jin Wook Kim, Esq., and Sun Hee Cha, Esq., Kim & Chang, for the protester.
Maj. Gregory R. Bockin, Department of the Army, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protester's request for a recommendation that it be reimbursed the costs of filing and pursuing its protest is granted where the record shows that the initial protest filing was sufficient to put the agency on notice that the awardee's proposal was unacceptable under the solicitation's stated evaluation scheme yet the agency unduly delayed taking corrective action until after submission of the agency report and the protester's comments.

DECISION

Shindong-A Express Tour Company, Ltd. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the Department of the Army's award of a contract to New Kyungdong Tour Co., Ltd. for fare-free mass transit and shuttle bus services at various military installations in the Republic of Korea. The contract was awarded pursuant to request for proposals (RFP) No. DABP01-03-R-0035; the protest was filed on June 19, 2003. On August 12, after receipt of the protester's comments on the agency report, and after receipt of additional questions for the record prepared by our Office, the Army took corrective action in response to the protest. Based upon the corrective action, we dismissed the protest as academic. Shindong-A now seeks reimbursement of its protest costs on the grounds that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.

We grant the request, and recommend that Shindong-A be reimbursed the reasonable costs of filing and pursuing its protest, including those incurred in pursuing this request.

BACKGROUND

The solicitation, issued on March 12, 2003, sought offers to provide all buses, operators, fuel, facilities, and management required to perform fare-free mass transit and shuttle bus services for specified U.S. military installations in the Republic of Korea. RFP at 33. The solicitation contemplated the award of a fixed-price contract to the firm submitting the lowest-priced, technically acceptable offer. RFP at 75. Technical proposals were to be evaluated under the following five evaluation factors: quality control plan, safety plan, equipment vehicle list/insurance liability, offeror's qualifications, and past performance. RFP at 70. These factors were to be rated on a pass/fail basis as either acceptable or unacceptable. If any factor received an unacceptable rating, the proposal was to be rated unacceptable overall. Id.; see also RFP at 75.

The only technical factor at issue here is the one that considered an offeror's proposed equipment. The RFP required offerors to include the following information for evaluation under this factor:

- (1) Equipment utilization plan (owned and rented vehicle--provide a number of bus and plate number which is to be utilized is available).¹
- (2) Provide the type of equipment, giving details on the service and maintenance contract/adequately described procedures.
- (3) Provide insurance for the contractor operated buses with [Republic of Korea] accredited insurance company.
- (4) Bus(es) must be in a safe and serviceable condition at all times and will not exceed the life expectancy of 7 years of age.

Id. at 71.

The RFP did not require any specific number of buses, but instead required offerors to furnish all buses "necessary for satisfactory contract performance," and to provide bus service in accordance with numerous bus schedules included as appendices to the solicitation. RFP at 38.

¹ This subfactor is set forth as it appears in the RFP. The Army's August 12 corrective action amended this language to read:

Equipment Utilization Plan (owned and rented vehicles -- provide the total number of buses and, if available, license plate numbers which are to be utilized. There is no requirement to own or rent buses prior to award.).

Contracting Officer's Corrective Action Memorandum, Aug. 12, 2003, at 1.

The Army received offers from four firms, including Shindong-A (the incumbent contractor), and New Kyungdong, and forwarded the proposals for review to a technical evaluation board (TEB). The TEB rated Shindong-A's proposal acceptable under every factor, and acceptable overall; it rated New Kyungdong's proposal acceptable under every factor except the equipment factor, where it was rated unacceptable because the evaluators believed that the firm did not propose enough buses to perform the required services.² In the TEB's view, at least 47 buses would be needed to perform these services.

Although determining the precise numbers of proposed buses is not necessary for determining the merit of this protest, the Army explains that New Kyungdong's proposal: (1) indicated that the company would use 37 buses to perform the contract; (2) acknowledged that the company's bus fleet was currently comprised of 32 buses; and (3) advised that the company had an agreement to procure 25 more buses in the event it received the contract here.³ Agency Report (AR) at 4. In answer to the solicitation's requirement to provide the license plate numbers and insurance information for the buses to be used to perform this work, New Kyungdong provided the plate numbers (and other required information⁴) for its current fleet of buses. New Kyungdong's Proposal (AR, Tab 9, Part 1) at 6.

Despite its initial view that New Kyungdong's proposal was unacceptable, the TEB, after consulting with the contracting officer (CO), changed its rating of the New Kyungdong proposal to "acceptable." Specifically, as explained in the Price Negotiation Memorandum (PNM) provided with the agency report, the CO reviewed the solicitation's bus schedules and decided that only 37 buses would be needed. PNM at 5. Considering New Kyungdong's 32 buses on hand, together with its arrangement to procure additional buses, the CO found that the firm proposed "more than enough" buses and should be rated acceptable overall. *Id.* Since New Kyungdong's proposed price of 11,265,380,232 Korean won (or \$8,174,927), was lower than that Shindong-A's price of 11,338,845,720 won (or \$8,228,239), award was made to New Kyungdong on May 29.⁵ Shindong-A filed its protest with our Office after a debriefing.

² The other two proposals were rated unacceptable overall and are not at issue here.

³ It appears that some portion of New Kyungdong's current bus fleet may have been committed to other Army contracts, although we reiterate that the precise number of buses available to New Kyungdong is both in dispute, and not material to the determination of whether the protest had merit.

⁴ This includes, for example, the requirement to provide 12 months of maintenance and repair history for each bus proposed for use under the contract. RFP at 37.

⁵ The agency used an exchange rate of 1,378.0404 won to the dollar to calculate the price in U.S. dollars.

Shindong-A's protest primarily argued that New Kyungdong's proposal could not have provided the information required under the equipment evaluation factor (such as plate numbers, maintenance records, and proof of insurance) for the buses the awardee proposed to use to perform this effort, because the awardee did not yet have many of the buses it would use to perform.⁶ Initial Protest, June 19, 2003, attach. ("Statement of Factual and Legal Grounds of Protest") at S-6, S-7. Thus, the protester argued that the agency was required by the terms of the solicitation to reject the proposal as technically unacceptable. The protester also alleged that it was harmed by the Army's waiver of this solicitation requirement because the protester assumed that offerors would have to have obtained the buses to provide the required information, and therefore purchased additional buses prior to submitting its proposal, which increased its price. *Id.* at S-7.

The Army filed its agency report in response to the protest on July 21. With respect to the contention that the awardee's proposal had not identified a sufficient fleet of buses to meet the RFP's requirements, the Army responded that the CO reasonably determined that a smaller fleet of buses than originally estimated would be sufficient, and that the awardee's bus fleet was large enough for it to perform successfully. AR at 7. In addition, the Army disputed the protester's contention that the RFP required offerors to have their buses on hand as of the date of proposal submission. *Id.* at 9. With respect to the protester's contention that the agency improperly waived the RFP's requirements to provide license plate numbers, proof of insurance, and maintenance records for the buses to be used, the Army report was silent.

On August 4, Shingdong-A filed its comments on the agency report. In support of its contention that New Kyungdong's proposal should have been found technically unacceptable, the protester argued that the CO reached his decision about the adequacy of the awardee's proposed approach without regard to—and contrary to—the documentation requirements identified under the equipment factor. Comments at 5. The protester also challenged the CO's conclusions about the number of buses required to perform these services, and the adequacy of the CO's decision to reject the requiring activity's conclusion about the number of buses required to perform these services.

One day after receiving the protester's comments, on August 5, our Office prepared and transmitted to the Army and the protester several questions for the record,

⁶ The protester also argued that: (1) the awardee has an insufficient number of buses due to other contractual commitments; (2) the purchase orders for additional buses in the awardee's proposal were mere "window dressing" to obtain the contract because the buses the awardee eventually registered do not correspond to those shown in the purchase orders; and (3) the awardee planned to use a subcontractor to perform, but improperly failed to disclose its plans to the agency.

seeking more detailed explanations from the agency about the bases for its conclusions. These questions focused on the specific language of the awardee's proposal, and of the RFP, and asked how the awardee's proposal was rated acceptable under the equipment factor consistent with the solicitation's requirements. We also asked the agency to explain how the awardee's pending contract for the purchase of new buses met the requirements for the submission of information required by the RFP.

One week later, on August 12, the Army advised our Office that it was taking corrective action, and requested that the protest be dismissed as academic. Specifically, the Army advised that it would amend the solicitation, solicit revised proposals, reevaluate, make a new selection decision, and if New Kyungdong was not selected, terminate the company's contract for the convenience of the government. Contracting Officer's Corrective Action Memorandum, Aug. 12, 2003. Based on the proposed corrective action, we granted the Army's request for dismissal later that same day.⁷ On August 26, Shindong-A filed the instant request for reimbursement of its protest costs.

DISCUSSION

Shindong-A asks for reimbursement of its protest costs on the grounds that the agency should not have forced the protester to file comments in this case given that its initial protest filing stated its protest issues with sufficient clarity to put the agency on notice of the problems with its procurement. In response, the Army argues against reimbursement of protest costs because, in its view, the initial protest filing did not clearly establish that the awardee's proposal was unacceptable under the solicitation's stated evaluation scheme.

Where a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Georgia Power Co.; Savannah Elec. and Power Co.—Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position.

⁷ Though not relevant here, we note for the record that on August 14, Shindong-A requested reconsideration of our dismissal of its protest on the grounds that the agency's corrective action did not address one of its protest issues. By decision dated August 19, 2003, B-292459.2, we dismissed the request for reconsideration on the grounds that amending the solicitation and seeking revised offers rendered any remaining challenge to the earlier evaluation academic.

Martin Electronics, Inc.--Costs, B-291732.2, Apr. 22, 2003, 2003 CPD ¶ 84 at __. For a protest to be clearly meritorious, the issue involved must not be a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. Rather, the record must establish that the agency prejudicially violated a procurement statute or regulation. Tri-Ark Indus., Inc.--Declaration of Entitlement, B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101 at 3.

As a preliminary matter, we think it is clear that the protest challenged the acceptability of the awardee's proposal based on the lack of information about the buses being proposed. Specifically, the initial protest here consisted of a two-page cover letter on Shindong-A letterhead, and numerous attachments, one of which was an eight-page document titled, "Statement of Factual and Legal Grounds in Support of Protest."⁸ With great specificity, this attachment set forth the relevant solicitation provisions, and explained how the protester believed the awardee could not have met them. In particular, in paragraphs 26, 29, and 34, the protester questions how the awardee could have provided the required information about its buses, when "it did not, and does not yet, possess such buses." Initial Protest, attach. ("Statement of Factual and Legal Grounds in Support of Protest") ¶ 29.

Next, we think the record shows that the issue raised was clearly meritorious. In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. For Your Info., Inc., B-278352, Dec. 15, 1997, 97-2 CPD ¶ 164 at 3. In the case at hand, the record clearly shows that the agency's determination that Kyungdong's proposal was overall technically acceptable--and that it met the solicitation's requirements concerning the equipment factor--was inconsistent with the stated evaluation factors.

As indicated above, the solicitation here required offerors to submit specific information to be evaluated as technically acceptable under each evaluation factor; the solicitation also advised that if any factor was rated technically unacceptable, the entire proposal would be considered unacceptable. Under the equipment factor, offerors were required to provide plate numbers, maintenance records, and proof of "insurance for the contractor operated buses with [a] Republic of Korea accredited insurance company."⁹ RFP at 71. Similarly, the quality control plan factor required

⁸ For ease of reference here, and in citations, we have shortened the title of this attachment. The actual title, in its entirety, is "Statement of Factual and Legal Grounds in Support of Protest in Respect of Award for Contract No. DABP01-03-C-0055 (Fare Free Mass Transit and Shuttle Bus Services for Area I and Area III)."

⁹ The RFP's SOW required actual submission of the insurance policies for the contractor-operated buses as part of the technical proposal. RFP at 37.

offerors to provide the “[m]aintenance and repair history for the previous 12 months for each bus proposed to be used in the performance of the contract.” RFP at 37.

In response to the protest, the Army stated that it did not want to require any fixed number of buses, and based its finding of technical acceptability upon New Kyungdong’s pending contract for additional buses. However, the firm did not submit the required information for these additional buses. The solicitation here makes no provision for the submission of pending contracts or purchase orders for future buses in lieu of the concrete information requested.¹⁰ Thus, in our view, the agency in effect waived material solicitation requirements only for New Kyungdong, and its decision to do so resulted in an unfair and unequal evaluation. For Your Info., supra, at 4.

It is a fundamental principle of federal procurement that offerors be treated equally; that is, offerors must be provided with a common basis for the preparation of proposals, and award based upon the requirements stated in the solicitation, unless the offerors are notified of changes in (or relaxation of) the agency’s stated

¹⁰ For the record, on this issue we note that the Army contends that one of the subfactors under the equipment factor relied upon by Shindong-A is patently ambiguous, and Shindong-A should have raised the matter prior to submitting its proposal. The provision, quoted earlier in the decision, read (prior to its proposed modification on August 12, 2003):

Equipment utilization plan (owned and rented vehicle—provide a number of bus and plate number which is to be utilized is available).

RFP at 72 (emphasis added). This sentence is but one of several in the solicitation that required submission of information on the buses. While none is a model of clarity, all do ask for information that an offeror is likely to have only if the offeror already has access to the proposed buses prior to performance. Reading these provisions together, we cannot say that it was unreasonable for the protester to interpret the solicitation as requiring offerors to have control over all the buses they proposed using.

The Army asserts that the words “is available” in the sentence above were intended to read “if available,” and that, if the protester had a different interpretation, the sentence was ambiguous on its face and the issue had to be raised in a protest filed before proposals were due. We disagree. Without any language elsewhere in the solicitation indicating that the information requirements did not extend to all buses being proposed, there was no clear signal to offerors of what the Army now says was its intended meaning. Under these circumstances, we think the protester could timely protest on this ground once it became evident that the Army had applied an interpretation different from its own during the evaluation. See LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157 at 6-7.

requirements. Id.; Meridian Mgmt Corp.; Consolidated Eng'g Servs., Inc., B-271557 et al., July 29, 1996, 96-2 CPD ¶ 64 at 5. Here, since the protester was clearly prejudiced by the agency's waiver of solicitation requirements, award to New Kyungdong on the basis of its unacceptable proposal was improper.

RECOMMENDATION

Since Shindong-A's basis for complaint was clearly stated in its initial protest filing, and since we conclude that its initial protest provided ample information to permit the Army to conclude that the awardee's proposal was unacceptable under the solicitation's stated evaluation scheme, we find that the Army unduly delayed taking corrective action in the face of a clearly meritorious protest. As a result, we recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including the cost of pursuing this request, and including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2003). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The request for a recommendation that the protester be reimbursed the reasonable costs of filing and pursuing its protest is granted.

Anthony H. Gamboa
General Counsel