



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Cooperativa Muratori Riuniti

File: B-294980.5

Date: July 27, 2005

Reed L. von Maur, Esq., for the protester.
Susan L. Schor, Esq., and Laurence Schor, Esq., McManus, Schor, Asmar & Darden, LLP, for Impresa Pizzarotti & C. S.p.A., an intervenor.
Damon Martin, Esq., Naval Facilities Engineering Command, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency did not act improperly by revising request for proposals and soliciting revised proposals prior to conducting reevaluation that Government Accountability Office recommended as corrective action in sustaining prior protest where solicitation revisions were reasonably based and offerors were given the opportunity to revise their proposals in response to them.
 2. Where agency amends request for proposals after closing and permits offerors to submit revised proposals, it should permit offerors to revise aspects of their proposals that were not the subject of the amendment absent evidence that the amendment could not reasonably have any effect on other aspects of proposals, or that allowing such revisions would have a detrimental impact on the competitive process.
-

DECISION

Cooperativa Muratori Riuniti (CMR) protests the Department of the Navy's revision of request for proposals (RFP) No. N33191-04-R-4004, for construction of two facilities at Aviano Air Force Base in Italy. The agency revised the solicitation after we sustained a prior CMR protest objecting to award under the RFP to Impresa Pizzarotti & C. S.p.A. Cooperativa Muratori Riuniti, B-294980, B-294980.2, Jan. 21, 2005, 2005 CPD ¶ 21. CMR argues that the agency's revisions to the RFP are restrictive of competition and contrary to the corrective action that we recommended in our earlier decision. The protester also objects to the agency decision not to permit it to revise its schedule in its revised proposal.

We sustain the protest in part and deny it in part.

BACKGROUND

The original RFP requested prices for seven line items: two for work associated with construction of a personnel alert holding area (line items 0001 and 0002) and five for work associated with construction of a heavy drop rigging facility (line items 0003-0007). The two facilities are to be constructed at separate sites approximately one-half mile apart, and work at the two sites is to be performed, at least in part, concurrently.

The RFP provided for award on a “best value” basis, taking into account three equally-weighted technical evaluation factors (organizational experience, organizational past performance, and schedule) and price (which was to be approximately equivalent in weight to the technical factors combined). Proposals were to be rated overall and with regard to each evaluation factor as excellent, good, satisfactory, marginal, or poor.

Six offerors, including CMR and Pizzarotti, responded to the RFP. The technical evaluation board (TEB) assigned Pizzarotti’s proposal ratings of excellent under the past performance and schedule evaluation factors, and a rating of good under the organizational experience factor; overall, the TEB rated the proposal as excellent. The TEB rated CMR’s proposal as good under the past performance and schedule factors, and satisfactory under the organizational experience factor, resulting in an overall technical rating of good. The other proposals received lower ratings. CMR’s price was lower than Pizzarotti’s, but the source selection board determined that the additional quality of Pizzarotti’s proposal outweighed the price difference and selected it for award. After receiving notice of the award to Pizzarotti and a written debriefing, CMR protested to our Office.

CMR’s previous protest took issue with its ratings under each of the evaluation factors. We sustained CMR’s protest, finding that the agency’s evaluation of its proposal under the organizational experience and organizational past performance factors was unreasonable. We denied CMR’s protest with regard to the evaluation of its proposal under the schedule factor, however. We recommended that the agency reevaluate the protester’s proposal with regard to the experience and past performance factors, and that the agency terminate the contract awarded to Pizzarotti and make award to CMR, if after reevaluation CMR’s proposal was found to represent the best value to the government.

By letter dated March 2, 2005, the contracting officer notified both CMR and Pizzarotti that in response to our decision, the agency was “clarifying” the section of the RFP describing the organizational experience and past performance evaluation factors, reevaluating past performance information, and requesting revised proposals for reevaluation of the organizational experience and past performance factors. The

contracting officer further notified offerors that because the agency was implementing our decision, “revisions to the proposal for Factor 3 [schedule] will not be accepted.” Letter from Contracting Officer (CO) to Protester, Mar. 2, 2005. The letter also advised offerors that “due to protest process delays,” language in the RFP pertaining to the time periods for exercise of options was being changed, and, as a result, price proposal revisions would also be allowed. Copies of the revised evaluation factors, a revised contractor information sheet, and an amended price schedule were attached to the contracting officer’s letter.

As revised, the RFP provided for consideration of the following criteria in the evaluation of the relevance of an offeror’s prior construction/renovation contracts:

- 1) work was physically completed within the past five years;
- 2) contract had a total value of 20 to 30 million euros (€ 20-30 M). (The value of individual prior contracts will not be combined during evaluations, regardless of whether such contracts were performed concurrently, or at multiple sites.)
- 3) contract was similar in construction features to the prospective contract, including facility use, and;
- 4) contract was similar in contract complexity, including, but not limited to, performance at multiple sites, traffic management, and security issues, to the prospective contract. (The contract complexity of individual prior contracts will not be combined during evaluations, regardless of whether such contracts were performed concurrently, or at multiple sites.)¹

Id., Enclosure 1 at 1. Consistent with the language of criterion 4 above, the revised contractor information sheet requested information regarding the number of contemporary construction sites under prior contracts, in addition to information regarding security constraints and traffic management. In addition, the amended price schedule made certain changes to the start and end dates for construction options. Specifically, the time period for the exercise of certain option items was changed to provide that the options would be exercised within a specified number of days from notice to proceed on contract line item 0001, rather than from the date of award. Id., encl. 3, at 1.

¹ Prior to revision, the RFP had defined relevant experience as new construction or renovation where the project was physically completed within the past 5 years, similar in magnitude (euro amount), similar in construction features, and similar in other project features such as, but not limited to, traffic management and security issues.

By letter dated March 8, the protester sought additional information regarding the terms of the revised RFP from the contracting officer, and on March 10, 1 day prior to the date specified for receipt of revised proposals, CMR protested the terms of the revised solicitation to our Office. By letter of March 10, the contracting officer responded to the protester's letter of March 8 and extended the due date for receipt of revised proposals to March 18. Attached to the letter were additional changes to the price schedule.² By letter dated March 15, the protester sought additional clarifying information from the contracting officer, and on March 17, CMR filed another protest with our Office. We dismissed both protests as premature on April 4, after the Navy represented that the RFP's terms were not yet final and that it had not set a closing date for receipt of final revised proposals.

By letter dated April 8, the Navy responded to the protester's letter of March 15 and set April 25 as the closing date for receipt of proposal revisions. CMR again protested to our Office on April 18. The agency issued a final clarification to the terms of the solicitation, resolving one of the protest issues, on April 19.³ This decision addresses the remaining issues raised by CMR.

ANALYSIS

CMR argues that the agency's decision to revise the RFP and solicit revised offers prior to reevaluating proposals is contrary to our recommendation for corrective action. The protester contends that our recommendation contemplated only that the agency would reevaluate CMR's originally submitted proposal under the original evaluation criteria, and argues that permitting proposal revisions is detrimental to its competitive position and favors Pizzarotti. In the alternative, CMR argues that if the agency does permit submission of revised proposals, it should not limit revisions as it currently plans. Specifically, as noted above, the agency advised offerors they could revise any part of their proposals, including their price, other than the portions responsive to the third evaluation factor, schedule. In CMR's view, barring any

² The price schedule, as further amended on March 10, provided for exercise of line items 0004-0007 within 365 calendar days after notice to proceed on line item 0001. Prior to amendment, the price schedule provided for exercise of these line items within 90 calendar days after exercise of line item 0003.

³ One of the complaints raised by CMR in its protest was that specification section 01140N pertaining to one of the buildings stated that "[t]he Government reserves rights to delay construction in this area up to 700 days," but failed to specify the date from which the 700 days would be measured. Protest at 16. In its letter of April 19, the agency clarified the language to provide that "[t]he Government reserves rights to delay construction in this area up to 700 calendar days from notice to proceed for CLIN [contract line item number] 0001."

revision of an offeror's proposed performance schedule is unreasonable under the circumstances here. In addition, CMR contends that the agency improperly held discussions with Pizzarotti, but not with CMR, and that there is a conflict in the amended solicitation between the time period for exercising options and the performance schedule that could have a material impact on pricing.

With respect to its argument that the agency should not have made changes to its requirements in this procurement, while the protester correctly observes that our recommendation contemplated a reevaluation of CMR's originally submitted proposal under the original evaluation criteria, the fact that the agency has implemented our corrective action in a different manner does not, in and of itself, compel a conclusion that the agency acted improperly. The details of implementing our recommendations for corrective action are within the sound discretion and judgment of the contracting agency, and we will not question an agency's ultimate manner of compliance so long as it remedies the procurement impropriety that was the basis for the recommendation. Rel-Tek Sys. & Design, Inc.--Modification of Remedy, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3.

The procurement impropriety that we identified in our earlier decision sustaining CMR's protest was that the agency lacked a reasonable basis for its rating of the protester's proposal under the organizational experience and past performance evaluation factors. We found that that the agency's evaluation of CMR's experience was unreasonable because the RFP did not advise offerors that only previous construction projects with values of 20-30 million euros would be considered relevant, and because the agency had failed to furnish a reasonable basis for distinguishing between offeror experience in performing projects at multiple sites concurrently under multiple contracts, and offeror experience in performing projects at multiple sites concurrently under a single contract. Cooperativa Muratori Riuniti, supra, at 5-6. We also found that the agency's evaluation of CMR's past performance was unreasonable because the record revealed that the evaluators had re-rated the protester's performance on a different scale, and in response to different questions than those posed to the references, and it was not clear that the new ratings were reasonably based.⁴ Id. at 7-10.

In answer to the protester's contention that no changes to the solicitation were needed here, the agency offers several reasons for its view that experience in performing single contracts of 20 to 30 million euros is a more accurate predictor of success in performing the effort solicited here than experience in performing multiple contracts with an aggregate value of 20 to 30 million euros concurrently.

⁴ The agency's implementation of our recommended corrective action with regard to the past performance evaluation factor, which was that the offerors' references be contacted again to ensure that they were asked to rate performance on the same basis, is not at issue in the current protest.

First, the agency advises that it thinks the administration and management of a single large contract differ from the administration and management of multiple smaller ones. In this regard, the agency points out that each contract, no matter what its size, has only one management team. The agency concludes that the management team of a large contract is farther removed from day-to-day operations than the management team of a small contract, and therefore must be more skilled at delegation and personnel management. The agency also advises that it is more confident of the financial capability of a contractor with experience performing single contracts in the 20 to 30 million euro range, than a contractor with experience performing multiple smaller contracts aggregating 20 to 30 million euros. The agency explains that multiple contracts, with separate invoicing schedules, provide for a more constant cash flow to the contractor than a single contract with a single invoicing schedule. Thus, in the agency's view, multiple smaller contracts may not impose the same sort of financing burden on a contractor that a single larger contract does. Affidavit of Chief Engineer, Mar. 2, 2005.

In view of the agency's explanation for its decision to amend its solicitation to provide additional guidance in the solicitation's evaluation scheme about the way in which past performance will be reviewed, we conclude that the agency's actions were reasonable.⁵ Contracting agencies have the discretion to revise the terms of a solicitation at any time prior to contract award so long as the revisions are reasonably based and offerors are provided an opportunity to revise their proposals in response to them. DynaLantic Corp., B-274944.5, Aug. 25, 1997, 97-2 CPD ¶ 75 at 4, 7. Since the agency had a reasonable basis for the changes it made during the course of implementing corrective action, we also conclude that the agency has not acted in a manner contrary to our recommendation in revising its solicitation and seeking revised proposals prior to conducting the recommended reevaluation.⁶

⁵ For the record, and in response to the protester's objections, we recognize that the agency is now raising arguments that it could have raised in responding to the earlier protest challenging the agency's evaluation of past performance. Nonetheless, we do not think that fact bars us from considering them now, since that they are now offered in response to a different protest, *i.e.*, one challenging the reasonableness of the agency's decision to revise the RFP.

⁶ We also find unpersuasive the protester's argument that the revisions to the solicitation here should be considered unreasonable because they may be detrimental to the protester's competitive position, given its apparent lack of experience with contracts in the 20 to 30 million euro range. The fact that an offeror's competitive position will be adversely affected by a particular solicitation provision does not bar the agency from including that provision so long as the provision is related to its needs. Computer Maint. Operations Servs., B-255530, Feb. 23, 1994, 94-1 CPD ¶ 170 at 2.

CMR next argues, in the alternative, that if the agency allows offerors to revise their prices, it should also allow them to revise their schedules because changes to an offeror's schedule could have an impact on its pricing. The Navy contends in response that it made no revisions to the RFP that would have an impact on scheduling, and thus there is no reason for it to permit offerors to revise their schedules.

An agency's discretion in the area of corrective action extends to deciding the scope of proposal revisions, and there are circumstances where an agency reasonably may decide to limit revisions offerors make to their proposals. See, e.g., Computer Assocs. Int'l, B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 5. Where, as here, an agency decides to amend a solicitation after closing and permit offerors to revise their proposals in response, however, we think that offerors should be permitted to revise any aspect of their proposals, including those that were not the subject of the amendment, unless the agency offers evidence that the amendment could not reasonably have any effect on other aspects of proposals, or that allowing such revisions would have a detrimental impact on the competitive process. Unlike in prior cases where we found that agencies could limit the extent to which proposals may be revised, see, e.g., Rel-Tek Sys. & Design, Inc.—Modification of Remedy, supra; ST Aerospace Engines Pte. Ltd., B-275725.3, Oct. 17, 1997, 97-2 CPD ¶ 106 at 4; System Planning Corp., B-244697.2, June 15, 1992, 92-1 CPD ¶ 516 at 4, the agency has not made such a showing here.

The record does not contain any argument from the Navy that allowing offerors to submit revised proposals would impair the competitive process in any way. With respect to the effect of the amendment on proposals, the Navy argues that it made no revisions to the RFP that would have an impact on scheduling, and thus there is no reason for it to permit offerors to revise their proposed schedules. We disagree. Clearly, amending the solicitation to permit exercise of the options for line items 0003-0007 for up to 365 days after notice to proceed for line item 0001 could have an impact on offerors' schedules, which were based on exercise of these options 8 months after contract award. Even to the extent that the delay in the performance period could not reasonably be expected to have an impact on the sequencing and duration of the various construction tasks, we agree with the protester that it could be expected to have an impact on schedule-related matters such as the availability of subcontractors and, depending on the time of year at which notice to proceed is issued, accounting for holiday periods.⁷ We are also persuaded that where, as here,

⁷ We recognize that the agency has argued that the due date for issuance of a decision on this protest will allow for award in early August 2005, which "roughly coincides with the period during which award was originally anticipated in 2004," and that, as a result, "performance periods should be rather similar to those originally anticipated by offerors in 2004." Agency Report at 15. Since we are

(continued...)

price revisions are permitted, offerors should be allowed to revise any portions of their technical proposals that could have an impact on their pricing, which clearly would include schedule. In sum, without some rational basis for denying offerors the ability to make revisions to all portions of their proposals, we think the Navy's decision to limit the scope of revisions to technical proposals was unreasonable. Accordingly, we sustain CMR's protest against the agency's failure to permit it to revise its schedule in its final offer.

Next, the protester argues that the agency conducted discussions with Pizzarotti regarding a weakness in Pizzarotti's proposal prior to requesting final offers, but did not conduct discussions with the protester regarding weaknesses in its proposal. The agency responds that there was no need to conduct discussions with CMR because the protester had obtained detailed information regarding the weaknesses in its own proposal through its debriefing and the protest process. We agree, and accordingly find no prejudice to CMR. Without a showing of prejudice, we will not sustain a protest allegation. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). The absence of prejudice is particularly clear here because, according to the agency, Pizzarotti did not make any changes to its proposal in response to the discussions.

Finally, CMR argues that there is a conflict between solicitation section 00202-4, which instructs offerors to base their schedules on the exercise of all Phase 1 options (*i.e.*, line items 0003-0007) 8 months after contract award, and the language of the March 10 revision to the price schedule, which provides for exercise of the phase 1 options within 365 calendar days after notice to proceed on line item 0001. The protester contends that the alleged conflict creates uncertainty regarding the potential performance period under the contract.⁸

In our view, CMR's argument in this area is untimely, since the same inconsistency existed in the original solicitation (*i.e.*, the RFP instructed offerors to base their schedules on exercise of the Phase 1 options 8 months after contract award, but provided for exercise of the option for line item 0003 within 365 calendar days after contract award and line items 0004-0007 within 90 calendar days after exercise of line item 0003), and the protester did not raise the matter prior to the initial closing

(...continued)

sustaining this protest in part, we do not think that an award date of early August can be presumed.

⁸ The protester also complains that the RFP still contains conflicting guidance regarding the overall period of performance. The agency responded to a very detailed question from the protester regarding this matter in its April 8 letter. The response makes clear that the agency intends a 36-month period of performance for each phase of the project.

time. Our Bid Protest Regulations require that protests based upon alleged improprieties in an RFP be filed period to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2005). Nonetheless, to the extent that the agency may otherwise be reviewing this solicitation prior to the submission of revised proposals, the agency may want to review this matter to determine whether there is any need for additional clarification in this area.

Because we find that the Navy has offered no reasonable basis for not permitting offerors to revise their proposed schedules in their final offers, we sustain the protest on this ground. We recommend that the agency request another round of final offers in which offerors are permitted to revise all aspects of their proposals. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest, including attorney's fees. Bid Protest Regulations, 4 C.F.R. §21.8(d)(1). In accordance with our section 21.8(f) of our Regulations, CMR's claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency with 60 days after receipt of the decision.

The protest is sustained in part and denied in part.

Anthony H. Gamboa
General Counsel