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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

# Decision

**Matter of:** Alfa Consult S.A.

**File:** B-298164.2; B-298288

**Date:** August 3, 2006

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Paul F. Khoury, Esq., and William J. Grimaldi, Esq., Wiley Rein & Fielding LLP, for the protester.

Parag J. Rawal, Esq., U.S. Army Corps of Engineers, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

Protest that agency's proposed corrective action--terminating protester's contract, amending solicitation and accepting revised offers--in response to protest from unsuccessful offeror is unnecessary and improper, is denied where agency reasonably concluded that solicitation was unclear regarding whether award would be based on "best value" or low cost/technical acceptability, and that this deficiency could have affected outcome of original competition.

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## **DECISION**

Alfa Consult S.A. protests the decision of the U.S. Army Corps of Engineers to take corrective action in response to a protest filed by ALMCO, Ltd. in connection with request for proposals (RFP) No. W917BG-06-R-0045 (RFP-0045).

We deny the protest.

The RFP, issued on January 21, 2006, contemplated the award of "approximately" three fixed-price, indefinite-delivery/indefinite-quantity (ID/IQ) contracts to perform construction, renovation, and related projects in Iraq. The RFP included technical and price factors, and provided that awards would be made pursuant to Federal Acquisition Regulation (FAR) § 15.101-2--which describes the process for awarding a contract on the basis of low cost/technical acceptability--to the offerors who present the "best value" considering technical acceptability, price, and risk. RFP at 12. However, the RFP also listed the relative importance of the technical factors and price, and provided for an adjectival rating of proposals under the technical factors,

RFP at 10-11, both of which evaluation elements are relevant only where a cost/technical tradeoff is contemplated.

On March 23, the Corps awarded contracts to Alfa and two other offerors on the basis of low cost/technical acceptability. ALMCO challenged the award decision in a protest filed in our Office on April 3, arguing that the Corps's failure to perform a cost/technical tradeoff among the proposals was inconsistent with the solicitation's weighted evaluation criteria. On April 12, the Corps notified our Office that it planned to take corrective action with respect to ALMCO's protest by amending the solicitation to make it clear that award was to be based on low cost/technical acceptability, permitting offerors to submit revised proposals, and conducting a new source selection. We therefore dismissed ALMCO's protest on April 17 (B-298164). On April 29, the Corps notified Alfa that it was terminating its contract for the convenience of the government, and of the intended corrective action.

Alfa protests the Corps's decision to take corrective action in response to the ALMCO protest. Alfa argues that, since the solicitation incorporated FAR § 15.101-2, which explained that the award would be made on a low cost/technical acceptability basis, with no mention of a cost/technical tradeoff, the basis for award was clear. Alfa concludes that there is no basis for now terminating its properly awarded contract.

Contracting agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure a fair and impartial competition. It is not necessary for an agency to conclude that the protest is certain to be sustained before it may take corrective action; where the agency has reasonable concern that there were errors in the procurement, even if the protest could be denied, we view it as within the agency's discretion to take corrective action. Patriot Contract Servs., LLC et al., B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 4. An agency may amend a solicitation and request and evaluate another round of proposals where the record shows that the agency's decision to take this action was made in good faith, without the specific intent to change a particular offeror's technical ranking or to avoid making award to a particular offeror. Federal Sec. Sys., Inc., B-281745.2, Apr. 29, 1999, 99-1 CPD ¶ 86 at 5.

Here, there is no evidence suggesting that the corrective action was unreasonable or that the agency acted other than in good faith. The Corps states that it was concerned that the basis of award in the original solicitation may not have been understood. In this regard, the RFP only incorporated FAR § 15.101-2 by reference--rather than actually describing the process for awarding a contract on a low cost/technically acceptable basis--and, at the same time, listed the relative importance of the technical factors and price, and stated both that technical factors would be rated adjectivally (RFP at 10-11) and that award would be made, pursuant to FAR § 15.101-2, "to the Offerors whose total proposal packages represent the best value to the Government in the areas of technical acceptability, and price." RFP at 12. The Corps believed the combined references to technical acceptability and

best value may have been confusing to offerors. We agree that the solicitation seemed to indicate two conflicting bases for award, and therefore find that the agency's concerns were reasonable. Given the lack of evidence that the agency acted other than in good faith, there is no basis for us to question the Corps's decision to take corrective action.<sup>1</sup>

Alfa argues that corrective action was unwarranted because there is no indication in the record that ALMCO was prejudiced by the conflicting evaluation information, that is, that ALMCO's higher price reflected a more expensive, superior technical approach. This argument is untimely. In order for our Office to meaningfully consider protest allegations, our Bid Protest Regulations require that arguments such as this be presented within 10 days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (2006). Here, although lack of prejudice could have been raised in its original protest as a basis for challenging the corrective action, Alfa did not argue prejudice until it filed its comments on the agency report. Accordingly, the argument is untimely.<sup>2</sup> In any case, the argument is without merit. While Alfa may be correct that there is no evidence that ALMCO's higher-priced proposal was based on a superior technical approach, this is because—due to the low cost/technically acceptable evaluation approach followed by the agency—the technical evaluation and best value analysis necessary to make this prejudice determination were never performed. Under these circumstances, given the nature of the deficiency, we think the agency could reasonably conclude that ALMCO or other potential offerors were prejudiced by the ambiguity in the RFP.

Alfa argues that the Corps should have considered awarding a fourth contract to ALMCO, rather than terminating the three awards already made and reopening the competition. However, procuring agencies are required to evaluate proposals and award contracts in accordance with the criteria stated in the solicitation. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 4. Since the agency

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<sup>1</sup> Alfa argues that the agency should not have taken corrective action because, under our Regulations, ALMCO's protest was an untimely challenge to a solicitation defect, and would not have been considered. However, when a contracting agency recognizes the validity of a protest and proposes to take corrective action, it is irrelevant whether the protest was timely or otherwise complied with our Regulations. Computing Devices Int'l, B-258554.3, Oct. 25, 1994, 94-2 CPD ¶ 162 at 2 n.2.

<sup>2</sup> Alfa also asserts for the first time in its comments that ALMCO unfairly benefited from a sample task revision in the reopened solicitation. This, too, is an untimely piecemeal argument, and will not be considered. Our protest process does not contemplate consideration of a protester's piecemeal presentation of arguments that could have been raised earlier in the protest process. See Comprehensive Health Servs., Inc., B-292858.3 et al., Apr. 27, 2004, 2004 CPD ¶ 165 at 8 n.4.

reasonably determined that the award criteria were unclear, it was reasonable not to make a new award under those criteria.

Alfa complains that its competitive position has been harmed because, during the debriefing with ALMCO that followed the initial competition, the Corps told ALMCO that its price under the original competition was too high. However, it is our view that no improper competitive advantage accrues to an offeror by virtue of its obtaining proposal information, as here, pursuant to the FAR § 15.506 debriefing requirements. See SYMVIONICS, Inc., B-293824.2, Oct. 8, 2004, 2004 CPD ¶ 204 at 6.

Finally, Alfa asserts that, if the Corps's corrective action under RFP-0045 was proper, the Corps should be required to implement the same corrective action under RFP No. W917BG-06-R-0055 (RFP-0055), since the evaluation schemes under the two RFPs were virtually identical. However, since neither Alfa nor any other firm protested the terms of RFP-0055 (or the propriety of the awards), there is no basis for us to address the propriety of the evaluation scheme or to recommend corrective action. In any case, each procurement is a separate transaction, and an agency's actions under one procurement do not affect the propriety of its actions under another. Luis E. Garcia, Inc., B-254846.2, Mar. 21, 1994, 94-1 CPD ¶ 203 at 3-4. Thus, the fact that the Corps took corrective action in connection with a protest under RFP-0045 would not obligate it to take similar action under RFP-0055.

The protest is denied.

Gary L. Kepplinger  
General Counsel