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Decision

Matter of: Consolidated Engineering Services, Inc.

File: B-293864.2

Date: October 25, 2004

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Benjamin N. Thompson, Esq., and Jennifer M. Miller, Esq., Wyrick Robbins Yates & Ponton, and Frank M. Rapoport, Esq., McKenna Long & Aldridge, for LB&B Associates, Inc., an intervenor.
Stephani L. Abramson, Esq., and Gary L. Brooks, Esq., National Archives & Records Administration, for the agency.
Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In taking corrective action in response to bid protest, agency acted within its discretion in limiting proposal revisions to updating key personnel/subcontractor information, and precluding price revisions, where agency reasonably concluded that only this information was needed, and that price revisions would undermine integrity of procurement due to disclosure of awardee's price after original award.
2. Where solicitation for facility management services called for offerors' proposals to take into account work to be performed in areas undergoing construction and renovation and provided for post-award adjustments, completion of that work during delay occasioned by bid protest does not represent material change requiring agency to amend solicitation to obtain revised price proposals.
3. Protest that new collective bargaining agreements (CBA) and wage determination require agency to allow price revisions under reopened competition in response to bid protest is denied where protester fails to demonstrate that changes under new CBAs and wage determination were significant such that price revisions based on those changes could materially improve its competitive position.

DECISION

Consolidated Engineering Services, Inc. (CESI) protests the actions of the National Archives and Records Administration (NARA) in its implementation of corrective action in response to CESI's protest of NARA's award of a contract to LB&B Associates, Inc., under request for proposals (RFP) No. NAMA-03-R-0009, for consolidated facility management services.

We deny the protest.

BACKGROUND

The RFP sought proposals to provide all program management, engineering, and services required to operate and maintain the agency's facilities in Washington, D.C. (Archives I) and College Park, Maryland (Archives II). The RFP contemplated the award of a fixed-price contract for a base year, with 4 option years. Proposals were to be evaluated under four factors—management approach, technical understanding, relative past performance, and price. The three non-price factors were of equal value and, combined, were of significantly greater value than price. Award was to be made on a “best value” basis.

Five offerors, including LB&B, and the incumbent contractor, CESI, submitted proposals by the June 9, 2003 closing time. The proposals were evaluated by the technical evaluation panel (TEP). While no formal discussions were held, offerors were invited to submit revised proposals after the RFP was amended to delete a requirement. The TEP concluded that the proposals of CESI, LB&B, and a third offeror were technically equivalent and, since LB&B's proposal offered the lowest price of the three, recommended it for the award. The contracting officer agreed and awarded LB&B the contract on February 27, 2004. After a debriefing, CESI filed its initial protest, on March 19, challenging various aspects of the evaluation, the conduct of discussions, and the source selection. Some of these issues centered around the propriety of LB&B's post-award plan to substitute some of its key personnel. NARA filed an agency report and both CESI and LB&B submitted comments.

On May 11, our Office conducted an “outcome prediction” alternative dispute resolution (ADR) telephone conference with the parties, during which our attorney advised the parties that the only issue with apparent merit was that concerning the past performance evaluation. In response, NARA proposed to take corrective action in the form of re-evaluating the offerors' past performance and making a new award determination. Based on this proposed corrective action, we dismissed the protest as academic (B-293864). In correspondence to the agency in June and July, CESI suggested to NARA that, in implementing its corrective action, it open discussions with the offerors to resolve other issues (such as LB&B's substitution of key personnel), and to allow the submission of revised proposals to address facility changes, upcoming collective bargaining agreements (CBA), a revised Department of

Labor wage determination, and matters CESI learned about the evaluation of its proposal during its debriefing. The contracting officer, after consultation with the TEP, determined that only updated information concerning key personnel and subcontractors was necessary. On July 29, the contracting officer notified the offerors (in relevant part) as follows:

In addition, because of the length of time since proposals were submitted, NARA has determined that it is necessary to hold limited discussions to obtain updated key personnel and key subcontractor information. To maintain the integrity of this solicitation and because NARA has determined that only limited discussions on the issue of key personnel and key subcontractors are necessary, NARA will only accept revisions of key personnel and key subcontractor information.

Offerors were given 7 calendar days to submit revised proposals. On August 2, CESI requested additional time to respond and reiterated its request that it be allowed to revise other aspects of its proposal. NARA denied the request. On August 5, the due date for proposal revisions, CESI filed this protest (and submitted its revised proposal). CESI asserts that the agency's limitation on revised proposals in implementing its corrective action is unreasonable for several reasons.

LIMITED PROPOSAL REVISIONS

CESI maintains that, since NARA's opening of discussions to allow revised key personnel and subcontractor information goes beyond the corrective action allegedly recommended by our Office, NARA must go further and allow offerors to revise all aspects of their technical and price proposals.¹

Generally, in responding to discussions, offerors may revise any aspect of their proposals as they see fit—including aspects that were not the subject of discussions. Rel-Tek Sys. & Design, Inc.—Modification of Remedy, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3. There may be circumstances, however, where an agency, in conducting discussions to implement a recommendation of our Office for corrective action, may reasonably decide to limit the revisions offerors may make to their proposals. *Id.* As a general matter, the details of implementing a recommendation for corrective action are within the sound discretion and judgment of the contracting

¹ In a related argument, CESI asserts that the time allotted by the agency for submitting revised key personnel and subcontractor information was insufficient. Protest at 23. We note, however, that the protester actually submitted its revisions on time. Despite CESI's complaints that its submission was based only on the information it could obtain by the deadline, there simply is no basis for us to conclude that 7 calendar days did not afford offerors—particularly CESI, as the incumbent—adequate time to submit the limited revised information called for.

agency. *Serv-Air, Inc.*, B-258243.4, Mar. 3, 1995, 95-1 CPD ¶ 125 at 2-3. 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 decision's recommendation. *Rel-Tek Sys. & Design, Inc.—Modification of Remedy*, *supra*.

The agency's decision to limit the scope of its corrective action was reasonable. While our Office had not issued a decision or recommended any corrective action, NARA took corrective action to remedy problems identified by our attorney in the ADR conference regarding the past performance evaluation and, at the same time, decided to obtain updated information in the single area where it appeared reasonably necessary. In this regard, LB&B had attempted to substitute some of its proposed key personnel after it received the original award, and CESI had protested this as a matter of "bait and switch." While this ground of protest did not appear meritorious, in view of the passage of time since the submission of the offerors' last proposal revisions, the contracting officer concluded that it would be beneficial to the agency and fair to all offerors to obtain, and to base the re-evaluation on, updated key personnel and subcontractor information. Agency Report (AR) at 4; Contracting Officer's Statement at 2. We find nothing unreasonable in this determination, since the apparent premises underlying it—that the delay resulting from the protest well may have affected the availability of the originally-proposed key personnel, and that the evaluation should be based on currently-available key personnel to the extent possible—appear valid. The same considerations do not appear to have applied to other areas of the proposals. In this regard, prior to deciding to limit the scope of the corrective action, the contracting officer consulted with the TEP and confirmed that no other aspects of the submitted proposals needed updating. AR at 4; Contracting Officer's Statement at 2.

The agency's approach to determining the appropriate corrective action here reflected its sensitivity to the fact that LB&B's prices had been revealed when the original award was made. While it may have been within the agency's broad discretion to permit price revisions without regard for creation of an auction, the agency was not precluded from taking this consideration into account; there was nothing improper in the agency's choosing a more limited approach to avoid creating a competitive advantage that unquestionably would inure to the benefit of the protester and other offerors if price revisions were allowed. See *Rel-Tek Sys. & Design, Inc.—Modification of Remedy*, *supra*, at 5.

DELAY IN PERFORMANCE

CESI asserts that price revisions also are necessary because there has been a several-month delay in the anticipated base and option year start dates, on which its key personnel and subcontractor compensation levels were based. This argument is without merit. The agency states that the base year was defined in the RFP as the first 12 months of performance—rather than as a period with specified start and end dates—in part, to eliminate the need for amendments in the event of a delay in awarding the contract. Supplemental AR at 3. The different start date for the base

year did not change the statement of work, the evaluation scheme, or the length of time for which the contractor would be obligated. The contracting officer also considered the lack of any change to the number of, or positions identified as, key personnel/subcontractors, in concluding that the requested revisions in those areas would not likely significantly affect price. AR at 4. We note that, although CESI's revised proposal included [deleted], CESI does not indicate that this change will have a significant effect on its original proposal cost.

DEBRIEFING INFORMATION

CESI asserts that the detailed proposal evaluation information disclosed at its debriefing was tantamount to discussions, and that it should be provided an opportunity to revise its proposal in response. This argument is without merit. Discussions are exchanges between the government and offerors that are undertaken prior to award with the intent of allowing offerors to revise their proposals. Federal Acquisition Regulation (FAR) § 15.306(d). The debriefing here, held after award, was conducted for the purpose of advising CESI of the reasons for its failure to receive the award, not to permit the firm to revise its proposal to improve its chances of being selected for award. The subsequent reopening of the competition did not transform the debriefing into discussions that entitled CESI to revise its proposal.

CHANGES IN REQUIREMENTS

CESI asserts that the RFP no longer reflects the agency's current needs, thus mandating both amendment of the RFP and an opportunity for offerors to submit revised proposals. Specifically, CESI asserts that the following will have a significant impact on offerors' price proposals: increases in work due to completion of construction of the Archives II parking lot and renovation of the Archives I building; new CBAs that effective for contract extensions after September 30, 2004; and the revised wage determination issued by the Department of Labor.

An agency must amend a solicitation to reflect a significant change in the government's requirements, even after the submission of final proposal revisions, up until the time of award. FAR § 15.206(a); see United Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 at 7-9, aff'd, Department of Energy et al., B-246977.2 et al., July 14, 1992, 92-2 CPD ¶ 20. The matters identified by CESI were contemplated by the RFP, and therefore did not constitute significant changes to the requirements.

Completion of Construction and Renovations

The RFP referred to the Archives II parking lot as an area that must be maintained by the contractor, even though it was incomplete when proposals were submitted. RFP at ¶¶ 1.3, 35, 38, 60. The RFP also noted that shuttle service provided by the contractor to off-site parking could be deleted in the base year. RFP at 146. With

regard to the Archives I building, prospective offerors had access to the building drawings, including the planned renovations, and were provided detailed information on major systems in both the pre- and post-renovation configurations. RFP, amend. 02; AR at 8. In addition, when an offeror questioned whether the RFP would be amended to phase in service at Archives I, the agency answered that offerors were “to propose 100% service on day one of the contract,” with adjustments to be negotiated upon award. RFP amend. 04. CESI acknowledges that the future construction and renovations were identified in the RFP, but maintains that offerors were required to speculate as to the costs. However, while some degree of speculation obviously was necessary, CESI has not shown that completion of the work on the Archives I building and the parking lot resulted in material changes to the assumptions on which offerors were to base their original proposals. Thus, since the original proposals were to be based on the ultimate completion of the work in question, the agency could reasonably conclude that there was no need to allow offerors to revise this aspect of their proposals.

New CBAs and Wage Determination

New CBAs and revised wage determinations may represent material changes such that amendment of the RFP is the proper course of action, unless the record shows that the revised wage determination (or CBA) would not affect the award decision. See Fred B. DeBra Co., B-250395.2, Dec. 3, 1992, 93-1 CPD ¶ 52 at 14-15. Stated another way, to the extent that the revised wage determinations could represent a significant change, there must be some showing that the protester would or could have materially improved its competitive position if the RFP were amended. Northrop Grumman Tech. Servs., Inc.; Raytheon Tech. Servs. Co., B-291506 et al., Jan. 14, 2003, 2003 CPD ¶ 25 at 35.

CESI broadly states that it would modify its proposal based on the new CBAs and wage determination but, despite its possessing the new labor rates, it provides nothing to indicate their impact on its proposed labor pricing, and no other specific information to support its general assertion. For example, CESI merely states that it “very well may make different [deleted] decisions, such as [deleted],” without suggesting the types or extent of any [deleted] changes. CESI Supplemental Comments at 12-13. Certainly, the protester has provided no argument or information that would warrant our concluding that any price revisions would be significant enough to overcome LB&B’s [deleted] price advantage. In short, CESI’s bare claim that it would change its proposal in response to the new CBAs and wage determination, without more, fails to meet its burden of demonstrating that it could materially improve its competitive position. Northrop Grumman Tech. Servs., Inc.; Raytheon Tech. Servs. Co., supra.

The protest is denied.

Anthony H. Gamboa
General Counsel