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**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

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Decision

Matter of: Joint Venture Penaullie Italia S.p.A.; Cofathec S.p.A.; SEB.CO S.a.s.; CO.PEL.S.a.s.

File: B-298865; B-298865.2

Date: January 3, 2007

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Reed L. von Maur, Esq., for Team BOS/Naples--Gemmo S.p.A./DelJen, an intervenor.
Damon Martin, Esq., and Richard G. Welch, Esq., Naval Facilities Engineering Command, for the agency.

Jonathan L. Kang, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's rejection of protester's proposal as incomplete is denied where the proposal lacked required information regarding option year pricing, and the agency was not legally required to allow the protester to revise its proposal.

DECISION

Joint Venture Penaullie Italia S.p.A., Cofathec S.p.A., SEB.CO S.a.s., and CO.PEL.S.a.s. (JVP) protests the award of a contract to Team BOS/Naples--Gemmo S.p.A./DelJen (BOS/Naples) under request for proposals (RFP) No. N33191-06-R-0001, issued by the Department of the Navy, Naval Facilities Engineering Command, for base operations. The protester contends that the agency improperly determined that its proposal was incomplete, and therefore ineligible for award.

We deny the protest.

BACKGROUND

The RFP sought proposals to provide base operations services for the Navy in the Naples, Italy area. Offerors were required to propose janitorial, grounds maintenance, refuse collection and disposal, building maintenance, elevator maintenance, alarm system maintenance, and maintenance construction. The RFP anticipated the award of a fixed-price contract with indefinite-delivery orders, with a

1-year base performance period and nine 1-year option periods, and advised offerors that proposals would be evaluated on the basis of the following factors: experience/past performance; management plan; staffing plan and resources; and price. The three non-price factors were of equal weight and, combined, were “slightly more important than price.” RFP § M-1, ¶ 1.

As relevant here, the RFP evaluation criteria stated that the agency would examine offerors’ price proposals based on the “total price of the base period and all option periods,” and that price proposals would be evaluated on the basis of realism, completeness, balance and reasonableness. RFP § M, ¶ M-2. Offerors were instructed to submit “unit prices and amounts (in EURO) for contract line items (CLINS) contract subline items (SLINS), and exhibit line items (ELINS) as indicated in the schedules and accompanying exhibits.” RFP § B, ¶ B.2. With regard to these price items, offerors were required to submit price proposals that contained “Completed Section J, Attachment 1, Exhibits A thru K, ELINs.” RFP § L-8, ¶ b.1.C.

The solicitation also specifically cautioned offerors to include schedules for ELIN prices for the base period and all nine of the option periods. In this regard, the agency highlighted the fact that, although the RFP provided an ELIN schedule for only the base year, offerors were required to submit schedules for ELIN prices for the option years as well, stating:

CAUTIONS TO OFFERORS . . .

THE BASE PERIOD OF THE CONTRACT IS FOR 12 Months

THE CONTRACT HAS FOUR OPTION Periods and the possibility of earning 5 additional award option periods

BIDDERS SHALL OFFER THEIR PRICE FOR BASE PERIOD AND ALL 9 OPTION PERIODS.

Please note that the ELIN schedule provided is only for the Base Period and it is the responsibility of the Offeror to develop and submit an ELIN schedule for each of the Option Periods including the Award Option Periods. See Section J, Attachment A.

RFP § B, Additional Data for § B.

The RFP required offerors to submit proposals via e-mail. On or before the April 4, 2006 closing date, the agency received proposals from 11 offerors, including JVP and BOS. In this regard, the agency received nine e-mails from JVP, each of which

contained a single “zip” file¹ comprised of individual proposal files, such as JVP’s schedule J and ELIN files. Agency Report (AR), attachs. 8-16. The proposal files received by the agency from JVP contained total CLIN prices for the base and all option years, but only contained ELIN prices for the base year.

After receipt of proposals, the agency realized that the original RFP had not provided spaces for offerors to include their total proposed prices, that is, the total of CLINs for all of the base and option years. The agency explains that although it could have calculated offerors’ total proposed contract prices based on the information submitted in their proposals, it decided for the sake of “certainty” to request that each offeror “confirm the sum of the prices previously submitted in its original price proposal.” Contracting Officer’s Statement at 5. The agency sent offerors an e-mail instructing them to submit the total contract prices for CLINS 0001-0021, but advised offerors that “these prices must match ELIN totals in Section J.” AR, attach. 20, e-mail from Agency Contracting Specialist to offerors, Apr. 21, 2006. The agency then issued an extension of time for submission of the price totals, and further reminded offerors that the agency was requesting that offerors provide the total of prices already submitted, but that price revisions were not allowed, stating:

Should the government decide to enter “discussions” you may have the opportunity to modify your price proposal. However, during [these] “clarifications” changes/modifications to prices will not be accepted. . . .

AR, attach. 22, e-mail from Agency Contracting Specialist to offerors, Apr. 25, 2006.

The protester submitted its total contract price as required, and also resubmitted its ELIN schedule. Again, however, JVP only submitted ELIN pricing for the base year, and not the option years. AR, attachs. 23-24, JVP e-mail responses, Apr. 26, 2006.

The agency determined that JVP had not submitted the required ELIN prices for the option years, and that its proposal therefore suffered from a “material failure which the government considers a deficiency.” AR, attach. 26, Price Analysis Report, at 2; see also attach. 27, Source Selection Board Report, at 7. The agency’s source selection decision confirmed this determination, stating that JVP’s failure to submit ELIN prices for the option years was a “material omission,” and that JVP’s proposal was “not eligible for further consideration.” AR, attach. 28, Source Selection Decision, at 1, 3.

After the agency had completed its review of JVP’s proposal and selected BOS/Naples’ proposal for award, but prior to the agency’s issuance of the notice of

¹ “Zip” refers to a file format used for data storage and compression. A zip file contains other files which have been compressed to reduce their size. A user can access the zip file to retrieve the individual compressed files contained within.

contract award, JVP submitted an unsolicited proposal revision. AR, attachs. 30-37, JVP Proposal Pevisions, Sept. 14, 2006. The protester stated that it was resubmitting its price proposal, based on its belief that the proposal files it had originally submitted were damaged, explaining as follows:

We have performed an additional detailed analysis of all of our documentation and, as a result of your amendment, we have notice[d] that our file including ELIN schedule of all Option Periods was damaged and may not have been received by your office and or was impossible to view. Therefore, as per section L-5 52.215-1, instructions to the Offerors para. (6) if you have experienced the same difficulty we are submitting an additional non-damaged copy of the file that includes the ELIN schedule from the 1st Option period through 5th Award Option Period. We would like to remind you that all Option Period Totals remain the same to those indicated in the file "JV Penauille Cofathec Seb.Co Co.Pel Section B total amount" submitted on April 4th, 2006 and certainly in your possession.

AR, attach. 35, Letter from JVP to Agency, Sept. 14, 2006.

Also on this date, JVP submitted a revised proposal price. AR, attach. 38, JVP Letter from JVP to Agency, Sept. 14, 2006. Although the revised proposal files submitted by JVP contained the full ELIN prices for the option years, the agency did not revise its determination that JVP's proposal was incomplete and ineligible for award. Contracting Officer's Statement at 8.

The agency awarded the contract to BOS/Naples on September 15, 2006. Following a debriefing by the agency, JVP filed this protest.

DISCUSSION

Incomplete Proposal Submission

JVP argues that the agency improperly determined that its proposal was unacceptable based on JVP's omission of ELIN prices for the option years, maintaining that its proposal did, in fact, contain the required information.² An

² It its protest submissions, JVP also challenged the evaluation of offerors' technical proposals and the agency's source selection decision. Because we conclude that the agency reasonably determined that JVP's proposal was unacceptable and could not be further considered, and that discussions were not conducted, we need not address issues concerning the evaluation of other offerors' proposals, as JVP is not an interested party to challenge those evaluations. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2006). JVP has also raised other protest grounds that we do not discuss

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offeror bears the burden of submitting an adequately written proposal that contains all information required under a solicitation. Sam Facility Mgmt., Inc., B-292237, July 22, 2003, 2003 CPD ¶ 147 at 5. As discussed above, the RFP stated that offerors were required to submit ELINs for the base and all option years, and that the agency would evaluate offerors' price proposals, including ELINs, for realism, completeness, balance and reasonableness.

In its report on the protest, the agency produced copies of the e-mails in which JVP transmitted its proposal. The JVP proposal files contained in the e-mails clearly lack the required option year ELINs. Although the protester acknowledges that the proposal files produced by the agency lack the required ELINs, JVP nonetheless contends that its proposal included a file containing those ELINs that is not now reflected in the agency-produced record. The protester effectively concedes, however, that it is unable to prove this assertion. In this regard, JVP states that it no longer has copies of the e-mails it submitted, nor does it have copies of its proposal files in the format in which they were submitted to the agency, that is, the zip files that contained the individual proposal files.³ The protester explains its inability to produce its proposal as follows:

Unfortunately, JVP no longer has in its possession, nor can it obtain, the only direct evidence of the information that was contained in the e-mails that JVP sent with the different elements of its proposal attached. That direct evidence is the actual electronic version of the e-mails themselves. [Deleted]

Protester's Comments on the Agency Report, Nov. 9, 2006, at 4-5.

Accordingly, the protester acknowledges that the only available copies of the e-mails that contained its proposal are those produced by the agency. See Protester's Comments on the Agency Report, Nov. 9, 2006, at 5.

The agency states that it did not experience any difficulties in receiving or handling JVP's proposal e-mails. Contracting Officer's Statement at 4. In fact, the only suggestion of an error in the transmission or receipt of JVP's proposal is JVP's own statement that "we have noticed that our file including ELIN schedule of all Option

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here; we have reviewed all of JVP's arguments and find no basis for sustaining the protest.

³ The protester submitted with its comments a compact disc (CD) containing the proposal files it asserts were submitted in the e-mails to the agency, including a file that contains ELINs for the option years. This CD, however, is simply a collection of JVP's files, and is not a copy of what was submitted to the agency, that is, the zip files or the e-mails that transmitted the zip files.

Periods was damaged and may not have been received by your office and or was impossible to view.” AR, attach. 35, Letter from JVP to Agency, Sept. 14, 2006.

Nonetheless, the protester maintains that the agency may have altered or modified the protester’s proposal after receipt, and contends that some of the zip files produced in the agency report show evidence of modification after the time that the protester transmitted those files via e-mail. The protester suggests that the ELINs for the option years may have been deleted by the agency after receipt of the e-mails.

During a conference call held to discuss this matter, the agency contracting specialist who was responsible for the receipt and distribution of proposals unambiguously stated that she had not modified any of the protester’s proposal e-mails or files. She further stated that she followed routine procedures for receiving and handling all offerors’ proposals, did not recall any difficulties with JVP’s proposal, and did not recall taking any actions that could have resulted in the deletion of any proposal files.

As discussed above, the protester has not provided evidence that establishes the contents of the e-mails it submitted or the zip files that the e-mails contained. In this situation, even assuming the record indicated that the agency had mishandled JVP’s submission, which it does not, JVP would not likely be entitled to relief. In this regard, agencies have a fundamental obligation to have procedures in place to receive submissions from competitors under a solicitation, to reasonably safeguard submissions received, and to fairly consider all submissions. As a practical matter, however, even with appropriate procedures in place, an agency may occasionally lose or misplace a submission and such occasional loss does not generally entitle an aggrieved competitor to relief. Shubhada, Inc., B-292437, Sept. 18, 2003, 2003 CPD ¶ 161 at 3-4; American Material Handling, Inc., B-281556, Feb. 24, 1999, 99-1 CPD ¶ 46 at 3. This result obtains because the only means generally available to establish the content of allegedly lost information is for an offeror to reconstruct that information. However, allowing an offeror to establish the content of its “lost” proposal after the closing date has passed is inconsistent with maintaining a fair competitive system. Shubhada, Inc., supra, at 4.

In any event, in light of the contracting specialist’s explanation that she followed routine procedures to handle the receipt of proposals, the contracting specialist’s statement that she did not knowingly modify the protester’s proposal, and does not recall any actions that would have resulted in modification, and the protester’s inability to provide evidence regarding its proposal, we find no basis to sustain the protest based on these allegations. On the record here, we believe the agency reasonably determined that JVP’s proposal was incomplete and that its proposal was, therefore, ineligible for award. There simply is no evidence of agency mishandling of JVP’s proposal. To the contrary, it appears likely that, as JVP essentially acknowledges, JVP’s file that included the mandatory option-year pricing was damaged and not received by the agency, or was not otherwise viewable by the agency. See AR, attach 35, Letter from JVP to Agency, Sept. 14, 2006.

Discussions

The protester next argues that the agency was required to inform JVP of its proposal deficiency because, the protester contends, the agency conducted discussions during the course of the procurement. We disagree.

Federal Acquisition Regulation (FAR) § 15.306 describes a spectrum of exchanges that may take place between an agency and an offeror during negotiated procurements. Clarifications are “limited exchanges” between the agency and offerors that may allow offerors to clarify certain aspects of proposals or to resolve minor or clerical mistakes. FAR § 15.306(a)(2). Discussions, on the other hand, occur when an agency indicates to an offeror significant weaknesses, deficiencies, and other aspects of its proposal that could be altered or explained to materially enhance the proposal’s potential for award. FAR § 15.306(d)(3). When an agency conducts discussions with one offeror, it must conduct discussions with all other offerors in the competitive range. FAR § 15.305(d)(1). The “acid test” for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to modify its proposal. National Beef Packing Co., B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 11.

JVP argues that the agency’s request that offerors submit their total proposed costs constituted discussions. The agency, however, specifically stated that those total prices must be the same as the existing CLIN totals submitted with the original proposals. This exchange with offerors neither invited nor permitted offerors to submit proposal revisions, and thus did not constitute discussions.

The protester also argues that its own unsolicited submission of revised pricing constituted discussions in that “JVP actually submitted a small price revision, that apparently was accepted, or at least not rejected by the government.” Protester’s Comments on the Agency Report, Nov. 9, 2006, at 15. However, the record is clear that the agency neither sought nor accepted JVP’s proposal revision. An offeror cannot initiate “discussions,” with all of the attendant rights and obligations triggered by such exchanges, simply by submitting an unsolicited proposal revision.⁴

⁴ The protester also contends that the agency conducted discussions with another unsuccessful offeror, JV Pedus Services S.r.l. (Pedus). As evidence, the protester cites an e-mail disclosed in the record in which the agency contracting specialist requested that Pedus advise how many ELINs it submitted. Because Pedus’s proposal was not selected for award, and no discussions were conducted with the awardee, even if this exchange constituted discussions, which it did not, JVP was not prejudiced. Where an agency conducts discussions with one offeror, but does not conduct discussions with the protester or the awardee, the protester cannot demonstrate prejudice. See OMV Med., Inc.; Saratoga Med. Ctr., Inc., B-281387 *et al.*, (continued...)

Correction of Mistake

Finally, the protester argues that the agency was required to provide JVP with an opportunity to correct what JVP characterizes as a “mistake”—that is, the omission of the ELIN option year prices. In this regard, JVP argues that the agency was obligated to allow JVP to submit a correction to its “mistake,” through submission of its “non-damaged” ELIN prices for the option years.

An agency may allow an offeror to correct a clerical error in a cost or price proposal through clarifications, as opposed to discussions, where the existence of the mistake and the amount intended by the offeror is clear from the face of the proposal. Joint Threat Servs., B-278168, B-278168.2, Jan. 5, 1998, 98-1 CPD ¶ 18 at 12-13; see also FAR § 15.306. However, both the existence of an error and the intended pricing must be apparent from the face of the proposal. CIGNA Gov’t Servs., LLC, May 4, 2006, B-297915.2, 2006 CPD ¶ 74 at 9.

JVP argues that the failure to submit these prices was a mere “omission of pages.” Protester’s Comments on the Agency Report, Nov., 9, 2006, at 12. We disagree, as the RFP clearly stated that submission of ELIN prices was mandatory, and that they would be evaluated by the agency. Thus, any attempt to correct JVP’s supposed “mistake” would have resulted in the correction of a material proposal defect and, therefore, would have constituted discussions. See University of Dayton Research Institute, B-296946.6, June 15, 2006, 2006 CPD ¶ 102. Although the absence of the option year ELINs was obvious on the face of JVP’s proposal, it was not obvious what JVP intended to propose for those missing ELINs.

In sum, we do not believe that JVP’s incomplete proposal suffered from a minor, correctable error, nor do we believe that the agency was legally required to advise JVP of its error or allow correction of the error.

The protest is denied.

Gary L. Kepplinger
General Counsel

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Feb. 3, 1999, 99-1 CPD ¶ 52 at 7; McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).