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**Comptroller General
of the United States**

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

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Decision

Matter of: Rice Services, Ltd.

File: B-284997.5

Date: March 12, 2002

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DIGEST

Agency's decision to cancel solicitation is reasonable where agency's detailed and documented solicitation evaluation identifies flaws and internal inconsistencies in the solicitation.

DECISION

Rice Services, Ltd. protests the Department of the Navy's decision to cancel solicitation No. N000600-99-R-1649, which sought proposals to provide food service activities at the U.S. Naval Academy in Annapolis, Maryland. Rice maintains that the decision to cancel the solicitation lacks a reasonable basis.

We deny the protest.

BACKGROUND

In May 1998, in conjunction with a previously announced commercial activities study to be conducted pursuant to Office of Management and Budget (OMB) Circular No. A-76, the Navy published the solicitation at issue here.¹ The solicitation sought

¹ Pursuant to OMB Circular No. A-76 and that Circular's Revised Supplemental Handbook (March 1996), agencies determine whether certain activities should be performed in-house or by a contractor.

proposals from private-sector offerors to provide full food service activities at the U.S. Naval Academy in Annapolis, Maryland.²

Section M of the solicitation identified various evaluation factors, and provided for a “best value” source selection decision based on a trade-off between price and non-price evaluation factors. Section C of the solicitation contained the applicable statement of work (SOW) which included the following provision:

Qualifying Corporate Experience Requirements.

The Service Provider shall have experience in managing and performing a large-scale, institutional, full food service operation, as described herein. This experience must have been gained as a result of the Service Provider being regularly engaged in the business of providing meal preparation, dining room service, accounting, and maintenance and repair services in an institutional food service facility. The minimum acceptable corporate experience is 24 months within the 36 months prior to submission of the offeror’s bid.

RFP, SOW, at 11.

Despite this explicit SOW requirement regarding corporate experience, the solicitation did not otherwise identify corporate experience as an evaluation factor for source selection purposes.³

In June 1999, proposals were submitted by three offerors, including Rice. Following oral presentations, the agency evaluated the proposals and, in performing that evaluation, concluded that none of the offerors complied with the stated requirements regarding corporate experience. Hearing Transcript (Tr.) at 314-16.⁴ Nevertheless, as compared to the other two proposals, Rice’s proposal was selected as representing the “best value” to the government.

² Specifically, the solicitation’s statement of work contemplated preparing the food, setting the tables, serving the food, cleaning the dining hall, catering special events, performing necessary procurements, warehousing, and managing accounts.

³ In addition to price, the solicitation stated that proposals would be evaluated on the basis of technical presentation, key personnel and the quality of an offeror’s past performance. RFP § M.4.

⁴ In resolving this protest, GAO conducted a hearing on the record at which testimony was obtained from the agency’s director of contracts, the contracting officer, the Naval Academy’s supply officer, and members of an evaluation panel convened to review the solicitation.

Thereafter, the agency undertook to perform a comparison of the level and quality of performance that would be obtained under the MEO and under Rice's proposal, concluding that the level and quality of performance would be the same under either. The agency then compared the costs associated with the MEO and Rice's proposal, concluding that the MEO costs were lower. Accordingly, the agency notified Rice that it intended to retain performance of the food service activities in-house.

Upon notification of the agency's intent to retain performance in-house, Rice filed an appeal with the agency's Administrative Appeal Authority; that appeal was denied. Rice then filed a protest with our Office challenging various aspects of the agency's decision. In June 2000, we sustained that protest based on the existence of flaws in the agency's determination that the level and quality of performance reflected in the MEO and Rice's proposal were equivalent. We recommended that the agency review the solicitation to ensure that it reflected the agency's actual requirements and, thereafter, to perform a reasonable and meaningful analysis of the level and quality of performance to be obtained under the MEO, to adjust the MEO as appropriate, and, finally, to perform another cost comparison. Rice Servs., Ltd., B-284997, June 29, 2000, 2000 CPD ¶ 113 at 11-12.

In September 2000, the agency advised us that, "[t]he Navy intends to comply with GAO's recommendation. It has reviewed the statement of work and determined that it accurately reflects the Navy's actual requirements." Letter from Department of the Navy to GAO (Sept. 25, 2000). Thereafter, the agency performed another evaluation of the level and quality of performance reflected in the MEO and Rice's proposal, made certain adjustments to the MEO, and performed a second cost comparison, again concluding that the costs associated with performance by the MEO were lower. Following notification of that determination, Rice again filed an appeal with the Navy's Administrative Appeal Authority. By decision dated September 6, 2001, the Appeal Authority sustained Rice's appeal, stating: "I find that the government compared bids not conformed to the same scope of work and so produced an invalid cost comparison." Administrative Appeal Authority Decision at 2. The Appeal Authority recommended that the Navy "[c]ommission an authoritative, exhaustive solicitation evaluation to determine explicitly whether the solicitation is correct, complete, objectively specific, internally and externally consistent, postures an objective source selection, and is otherwise fit to support valid technical leveling; and if not to detail and recommend needed corrections. Id. at 14.

In September 2001, the agency established an evaluation team to perform the type of solicitation review recommended by the Appeal Authority, and directed the evaluation team to document its analysis and submit a report containing its conclusions. That team issued its report on November 7, in which it identified and discussed multiple solicitation flaws. Among other things, the report identified the solicitation's failure to provide for evaluation of corporate experience; failure to distinguish between "core" and "non-core" functions; and internal inconsistencies regarding requirements for full-time or part-time employees. Agency Report, Tab 68,

Evaluation Team Report, Encl. 1, at 1-3. The report summarized the situation, stating that the solicitation “is not correct, complete, objectively specific, internally and externally consistent,” concluding that “the issues raised [are considered] to be so significant as to warrant cancellation of the solicitation.” Agency Report, Tab 68, Evaluation Team Report, at 2.

On November 20, the agency advised our Office that it had cancelled the solicitation. This protest followed.

DISCUSSION

Rice maintains that the agency’s decision to cancel the solicitation is arbitrary, capricious, and without a reasonable basis. We disagree.

Where an agency determines that a solicitation does not accurately reflect its needs, cancellation is appropriate. Digicon Corp., B-256620, July 7, 1994, 94-2 CPD ¶ 12 at 2. Further, in a negotiated procurement, an agency has broad authority to decide whether cancellation is appropriate, and this authority extends to the cancellation of solicitations used to conduct A-76 cost comparisons. Lackland 21st Century Servs. Consol., B-285938.7, B-285938.8, Dec. 4, 2001, 2002 CPD ¶ 197 at 5. Finally, provided an agency has a reasonable basis for doing so, it may cancel a solicitation regardless of when the information precipitating the cancellation first surfaces. Id.

At the hearing conducted in connection with this protest, the Navy Captain currently serving as the Naval Academy’s supply officer, who is responsible for operation of the dining facility, testified that he believed the corporate experience requirement contained in the SOW was, and is, a “critical” and “absolute minimum” Navy requirement.⁵ Tr. at 487, 489.

Rice first complains that the perceived solicitation flaw regarding corporate experience properly relates only to the agency’s prior evaluation of proposals and, thus, does not reflect a solicitation flaw. In this regard, Rice asserts that “[if] the evaluators [had] actually evaluated corporate experience, inclusive of key personnel, Rice would have been found to possess the requisite food service experience,” concluding, “[t]hus, any reliance on the corporate experience requirement as a basis for cancellation is wholly unwarranted.” Rice’s Post-Hearing Brief at 16.

We first address the portion of Rice’s argument relating to whether Rice was properly evaluated as lacking the corporate experience described in the solicitation’s SOW. Rice’s assertion that, in fact, it should have been evaluated as possessing the

⁵ The Captain was appointed to this position, and became responsible for operation of the dining facility, in July 2001; he had not been involved in this procurement prior to that time. Tr. at 486-87.

appropriate corporate experience is based on the premise that the agency must impute to Rice, as an organization, the individual experience of Rice's proposed key personnel. Contrary to this premise, our Office has held that, while an agency may properly consider the experience of key personnel in evaluating an entity's corporate experience, Technical Resources, Inc., B-253506, Sept. 16, 1993, 93-2 CPD ¶ 176 at 5, absent solicitation provisions mandating such consideration, there is no legal requirement that such experience must be imputed to an otherwise inexperienced corporate entity. The Project Mgmt. Group, Inc., B-284455, Apr. 14, 2000, 2000 CPD ¶ 66 at 4; Hard Bodies, Inc., B-279543, June 23, 1998, 98-1 CPD ¶ 172 at 4.

Accordingly, since any evaluation of corporate experience would depend on the manner in which the solicitation established that evaluation factor, we cannot express an opinion as to how Rice's or any other proposal would be properly evaluated unless and until the agency revises its RFP to properly identify corporate experience as an evaluation factor and advises offerors of the manner in which that evaluation factor will be considered. In short, since the RFP did not unambiguously identify corporate experience as an evaluation factor, we reject Rice's assertion that the agency's concern regarding corporate experience does not reflect a solicitation defect.

Rice next questions the validity of the current supply officer's position that corporate experience is a critical requirement that should have been identified as an evaluation factor, asserting that prior Naval Academy supply officers and their subordinates did not view the matter in the same light.

At the hearing GAO conducted in connection with this protest, the Navy Captain currently serving as the Naval Academy supply officer testified as follows:

I'll refer you to the first subparagraph A where you discuss the corporate experience requirement issue. Could you please clarify the concerns or comments you raise there?

- A. . . . I just wanted to highlight those issues of the [Evaluation Team] report that raised the concern of the Naval Academy. The first one being that we've got a very serious responsibility charged with the feeding the midshipmen. It is no small task[,] and the fact that the vehicle under which this is proceeding could allow someone who doesn't meet the experience requirements was amazing to me. I just – I found that shocking that you could conceivably have some . . . allow somebody who doesn't have the experience to do the job[,] end up doing the job[,] and that was the stress point here. Clearly, I cannot go up to the [Naval Academy] [S]uperintendent and endorse something that says[,] well, someone may not have the experience to do the job.

* * * * *

- Q. . . . I would like to clarify the point that[,] from the customer perspective[,] you view the 24 months of relevant background experience within the last three years as a critical requirement?
- A. Absolutely. . . . [I]n fact[,] it ought to be more but it is a large involved process.
- Q. Now, when you say it is a large involved process, if you could, just briefly explain why you think it[']s critical?
- A. I can cook soup at home but I can't chop up the meat and vegetables that you need to cook 750 gallons of soup at one time and make it come out good. We're talking about massive quantities. We're talking about timing. It's not just a culinary art; there is also a very large logistical aspect of this because it all has to be hot, if it[']s meant to be hot, [or] cold if it[']s meant to be cold. It needs to be served at the same time to 4200 young men and women who have 35 minutes to consume it. It's not like the restaurant down here where they come in and out all day long. They come in after they form up, do some military things. They sit down, the contractor has a few minutes to get the food on the table; it has to be there.
- Q. So[,] 4200 folks are eating at the same point in time within about a 35 minute window?
- A. Yes, sir. . . . Even onboard a carrier, which is the largest thing the Navy has, they run all day long – all day all night long[;] they don't do it all in one sitting.

Tr. at 484-89.

A contracting agency has the primary responsibility for determining its needs and, in doing so, is properly afforded considerable discretion in determining the best method for meeting its needs. See, e.g., Parcel 47C LLC, B-286324, B-286324.2, Dec. 26, 2000, 2001 CPD ¶ 44 at 7. Based on the record here, including the Naval Academy supply officer's testimony, it is clear that the agency currently considers the corporate experience requirement enunciated in the SOW — which was neither identified as an evaluation factor nor applied in evaluating proposals — to be a critical element in identifying the entity that will best meet the agency's needs. We find this position to be reasonably supported and well within the scope of discretion properly afforded to the agency. Accordingly, we find no merit in Rice's assertion

that the corporate experience described in the SOW is not necessary to meet the agency's actual requirements.⁶

Additionally, as noted above, the agency evaluation team identified other solicitation flaws, including a failure to distinguish between what the agency refers to as "core" and "non-core" functions, and internal inconsistencies regarding requirements for full-time employees. Specifically, with regard to "core" and "non-core" functions, the evaluation team report stated: "It is apparent that the [agency's] intention was that non-core functions such as procurement, warehousing, pot washing, janitorial and maintenance would not be evaluated. Yet, the solicitation did not draw a distinction between the evaluation of core and non-core functions." Agency Report, Tab 68, Evaluation Team Report, Encl. 1, at 1. Regarding inconsistent requirements for employees, the report noted that one section of the solicitation stated that "[a]ll key personnel positions shall be working on-site a minimum of eight (8) hours each workday," RFP, SOW, at 11; yet another section of the solicitation provided that the ice cream production leader, a position identified as "key personnel," could be staffed as either "full or part-time." *Id.* at 13.

Rice asserts that these additional matters are not so significant as to, in and of themselves, warrant cancellation. Our decision today does not address the individual significance of each of the factors discussed. Rather, we have reviewed the entire record and, with regard to the issues discussed in this decision, considered the cumulative impact of those matters.

As noted above, a contracting agency has the primary responsibility for determining its needs and the best method for accommodating those needs, and where an agency reasonably determines that continuation of an ongoing procurement under a particular solicitation will not achieve its requirements due to flaws and inconsistencies in the solicitation, cancellation of the solicitation is appropriate. Lackland 21st Century Servs. Consol., *supra*; Digicon Corp., *supra*. Here, we have reviewed the record, including the testimony of agency personnel responsible for accomplishing the tasks at issue here. Based on this record, we conclude that the solicitation flaws related to evaluation of corporate experience, evaluation of "core" and "non-core" functions, and the inconsistencies regarding full-time and part-time requirements provide a reasonable basis for cancellation of the solicitation.

Finally, in various submissions challenging the agency's actions in this procurement, Rice criticizes the length of time taken by the agency to determine that cancellation was appropriate. As discussed above, the solicitation was first published in May 1998, nearly four years ago. Since that time, Rice has filed various protests and

⁶ In passing, we note that, accepting, arguendo, Rice's assertion that corporate experience is not a valid requirement, all potential offerors should have been advised of this material fact, thereby increasing the potential field of competition.

administrative appeals. In responding to these challenges, the agency never raised any issue regarding solicitation defects until directed by the Navy's Administrative Appeal Authority, in September 2002, to perform an "authoritative, exhaustive solicitation evaluation." Administrative Appeal Authority Decision at 14.

We are troubled by the length of time preceding the Navy's ultimate determination that the solicitation should be cancelled. In light of that cancellation, Rice's substantial expenditure of resources preparing a proposal may well have no value. See COBRO Corp., B-287578.2, Oct. 15, 2001, 2001 CPD ¶ ____ at 8-9. Nonetheless, our concern with the tardiness of the Navy's ultimate determination does not alter the overriding principle in this matter — that is, that an agency should not proceed with a procurement when it reasonably believes that the resulting contract will fail to meet the agency's requirements. See Lackland 21st Century Servs. Consol., supra. As discussed above, we believe the record reasonably supports the Navy's conclusion that proceeding with the procurement under the solicitation here would result in a contract that does not meet the Navy's requirements. Accordingly, we cannot sustain the protest.

The protest is denied.

Anthony H. Gamboa
General Counsel