



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Fisher-Cal Industries, Inc.

File: B-285150.2

Date: July 6, 2000

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GAO, participated in the preparation of the decision.

DIGEST

Protest of contracting agency's decision to terminate awardee's contract and resolicit the requirement is denied where the agency's decision--corrective action in response to a protest--is reasonable under the circumstances to protect the integrity of the procurement system.

DECISION

Fisher-Cal Industries, Inc. protests the Department of the Air Force's decision to terminate its contract under request for proposals (RFP) No. F28609-99-R0004 and to resolicit the requirement. The Air Force's decision is corrective action in response to a protest filed by a competitor, which argued that the Air Force had improperly evaluated Fisher-Cal's proposal.

The protest is denied.

The solicitation contemplated award of a fixed-price requirements contract for visual information services at McGuire Air Force Base, New Jersey. RFP at 1, 4, 7; Statement of Work (SOW) at 1. The agency planned to award the contract, without conducting discussions, to the firm whose offer was most advantageous to the government, considering technical capability, past performance, and price factors. RFP at 51, 48-49. Competing offerors' past and present performance history, and technical factors, would be significantly more important than price. RFP at 48.

The RFP explained its evaluation methodology as follows. First, offers were to be ranked according to price. Next, the technical evaluation team (TET) was to evaluate the lowest-priced technical proposals against four evaluation factors: contract management/staffing; equipment; product samples; and quality control. Finally, the contracting officer was to seek performance information on the lowest-priced, technically acceptable offers and make a risk assessment. If the lowest-priced technically acceptable offer was judged to have an exceptional performance rating, that offer would be deemed to represent the best value for the government and award was to be made to that offeror without further consideration of any other offers.¹ If the lowest-priced offeror had a performance risk rating of very good, the government could award the contract to another firm after making an “integrated assessment best value award decision.” RFP at 48-49.

The Air Force received five proposals in response to the solicitation and conducted its evaluation. The contracting officer determined that the proposal submitted by Fisher-Cal, the incumbent contractor, provided the best overall value to the government. She recommended award to the firm because they were the lowest-priced offeror; they had an exceptional present and past performance rating; and they had “demonstrated their superb technical capability during their past and present performance here at McGuire AFB as well as for other Government agencies.” Agency Report (AR), Tab 8, Integrated Best Value Assessment.

After its debriefing, an unsuccessful offeror filed a protest in our Office arguing that Fisher-Cal had failed to comply with the RFP’s requirements and the Air Force had improperly evaluated the firm’s proposal. The protest prompted the Air Force to review the procurement file. This review revealed what the Air Force believed to be serious flaws in the procurement. One week after the protest was filed, the Air Force advised this Office that, based upon these flaws, it had decided to terminate Fisher-Cal’s contract and resolicit the requirement from the initial offerors. The solicitation was to be revised to ensure that there were no ambiguities or misunderstandings as to the technical requirements. AR, Tab 9, E-Mail Analysis of Procurement. This Office dismissed the protest as academic on April 27, 2000.

On that same day, Fisher-Cal filed the instant protest of the decision to terminate its contract. The firm complained that its overall price had been exposed by being posted on the Electronic Posting System (EPS), giving other offerors an unfair

¹ While not raised here, this evaluation methodology appears to be inconsistent with the RFP’s statement that award was to be made to the firm whose offer was most advantageous to the government, and that past and present performance history and technical factors were significantly more important than price. RFP at 48.

advantage during the resolicitation. After receiving a copy of the prior protest, Fisher-Cal, on May 12, raised various additional arguments in support of its award.²

Generally, we decline to review the termination of contracts for the convenience of the government because such actions are matters of contract administration. We will review the propriety of the termination where the termination flows from a defect the contracting agency perceived in the award process. In such cases, we examine the award procedures that underlie the termination action for the limited purpose of determining whether the initial award may have been improper and, if so, whether the corrective action taken was appropriate to protect the integrity of the competitive procurement system. GAI, Inc., B-247962, B-247971, July 8, 1992, 92-2 CPD ¶ 10 at 3. We will not object to an agency's proposed corrective action where the agency concludes that the award, because of perceived flaws in the procurement process, was not necessarily made on the basis most advantageous to the government, so long as the corrective action taken is appropriate to remedy the impropriety. Rockville Mailing Serv., Inc., B-270161.2, Apr. 10, 1996, 96-1 CPD ¶ 184 at 4.

The record contains abundant evidence that this was a flawed procurement resulting in an award not necessarily made on the basis most advantageous to the government, and that the agency's corrective action is appropriate.

First, the solicitation is ambiguous with respect to the minimum staffing level the agency required. The SOW can be read to require as few as four staff in the inartfully worded "Employee Requirements" section, but the "Photographic Services and Products" section requires at least six staff. SOW at ¶¶ 1.1.1, 1.12.1. The offerors here did, in fact, proposed a range of staffing levels. AR, Tab 9, E-Mail Analysis of Procurement, at 2. Where, as here, the solicitation is ambiguous with the result that offerors responded to it based on different reasonable assumptions as to what was required, the competition has been conducted on an unequal basis and the government has been deprived of the full benefits of competition. Under these circumstances, the requirement should be resolicited.³ MLC Fed., Inc., B-254696, Jan. 10, 1994, 94-1 CPD ¶ 8 at 5. Moreover, while the solicitation did not set forth a

² In this May 12 filing, the protester also challenged the Air Force's issuance of a modification to its contract adding the termination for convenience clause. Such an allegation is an issue of contract administration over which this Office has no jurisdiction. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2000). In addition, since the record shows that the allegation was not raised until 15 days after the protester received the modification, the matter is untimely. 4 C.F.R. § 21.2(a)(2).

³ The record also shows that the TET evaluation form asked for the evaluation of several items not clearly required by the solicitation, such as the matter of sick and annual leave. At a minimum, this suggests that the solicitation might not have reflected the agency's minimum needs.

minimum staffing requirement, the TET used such a requirement in order to evaluate a proposal as technically acceptable. The minimum staffing requirement the TET used is inconsistent with at least one reasonable interpretation of the RFP's requirements.

In addition to problems with the solicitation itself, to the extent that the technical evaluation of proposals can be understood, it was seriously flawed. For example, the TET evaluated Fisher-Cal's proposal as technically acceptable despite the fact that it did not comply with the solicitation's requirement to submit the required organizational chart; the protester concedes that this was a mandatory requirement. Protester's Comments at 1. The TET acknowledged that Fisher-Cal did not submit the organizational chart, but believed the proposal's narrative provided the required information. While the narrative does address the required details, neither the Air Force nor this Office is persuaded that the narrative "clearly details the overall structure and manning necessary" to perform the requirements as called for by the RFP. RFP amend. 0002, at 46.

Even if the narrative in Fisher-Cal's proposal were sufficient to meet the RFP's requirements, the evaluation record is also filled with other serious problems. The Air Force correctly states that the individual evaluation records do not make sense. They contain various negative comments concerning the firm's proposal which indicate it was technically unacceptable, but the TET inexplicably evaluated the proposal as technically acceptable. Even the overall records of the technical evaluation are incomprehensible. The narrative points out at least one "unacceptable" component of the proposal, and the spreadsheet of all offeror technical ratings rates Fisher-Cal's proposal as "unacceptable" under several factors, but the proposal nevertheless is rated technically acceptable.⁴ There is nothing in the record to explain any of these anomalies. Finally, the source selection document not only fails to discuss the technical evaluation, but appears to place an undue emphasis on past performance. AR, Tab 8, Integrated Best Value Assessment.

Fisher-Cal argues that, since the agency posted its price on the EPS, all other competitors have the successful low price and can adjust their pricing, giving them an undue advantage.⁵

⁴ Since the flaws in the technical evaluation are more than sufficient to conclude that the agency's decision to terminate the contract and resolicit were appropriate, we need not reach the issues concerning the past performance evaluation.

⁵ While Fisher-Cal believes the release of its total price was improper, the disclosure of the total price of an awarded contract is generally required. See Federal Acquisition Regulation §§ 15.503(b)(1)(iv), 15.506(d)(2).

Where, as here, the corrective action proposed by the agency is not improper, the prior disclosure of information in an offeror's proposal does not preclude the corrective action, and the resolicitation of the same requirement is not improper. See SMS Data Prods. Group, Inc., B-280970.4, Jan. 29, 1999, 99-1 CPD ¶ 26 at 3-4. The possibility that the contract might not have been awarded based on a true determination of the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than the disclosure of the price of an improperly awarded contract. See Patriot Contract Servs., LLC, et al., B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 4.

The protest is denied.

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