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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Pacific Island Movers

File: B-287643.2

Date: July 19, 2001

Wayson W.S. Wong, Esq., Lee, Kim, Wong, Yee & Lau, for the protester.
Marjorie A. Stender, Esq., Luce, Forward, Hamilton & Scripps, for Dewitt
Transportation Services of Guam, an intervenor.
Elizabeth Rivera, Esq., Department of the Navy, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement which provided for a reverse auction, an agency reasonably determined to request revised price proposals after the end of the auction, in response to a protest which raised reasonable concerns that there were errors in the conduct of the reverse auction.

DECISION

Pacific Island Movers protests the agency's decision to obtain revised proposals under request for proposals (RFP) No. N00604-01-R-A006, issued by the Department of the Navy, for packing and crating services. Pacific contends that it was entitled to award on the basis of its low price under a reverse auction conducted by the agency prior to the request for revised proposals.

We deny the protest.

The RFP, issued as a total small business set-aside under the commercial item acquisition procedures of Federal Acquisition Regulation (FAR) Part 12, provided for the award of a fixed-price, requirements contract to perform packing and crating services on Guam for a 6-month base period with 4 option years. The RFP contained 173 contract line items (CLIN), each of which stated an estimated quantity of services. The RFP also listed an "EST MIN AMOUNT," presumably meaning an estimated minimum amount, for each CLIN.

As originally issued, the RFP identified technical acceptability, past performance, and price as the evaluation factors, and stated that technical acceptability and past performance together were significantly more important than price. RFP at 155. Notwithstanding this indication that award would be made on the basis of a cost/technical tradeoff, the contracting officer informed offerors at a pre-proposal conference that the basis for award would be “low cost technically acceptable.” Agency Report, Tab 8, Pre-Proposal Conference Slides (Mar. 26, 2001), at 3. Subsequently, on April 3, the Navy amended the RFP evaluation criteria to state that proposals would be evaluated under the following factors: “technical acceptable (Interstate Commerce Commission certificate to perform drayage services), past performance (References shall be used as responsibility checks), and price.” The RFP, as amended, also stated that the “technical acceptable” and past performance factors were together approximately equal to price (which again suggested that award would be based on a cost/technical tradeoff, contrary to the contracting officer’s pre-proposal conference statement). RFP amend. No. 2 at 181.

The RFP also provided for a reverse auction price competition after submission of proposals. Detailed instructions were provided for the conduct of the reverse auction. RFP, attach. 2, Reverse Auction Instructions. Among other things, offerors were informed that price revisions could only be made during the reverse auction, and that submission of a proposal in response to the RFP was considered consent to participate in the reverse auction and to reveal the offeror’s prices (although the identity of the offeror would remain anonymous). The RFP allowed for revisions to any or all of the 173 CLINs during the reverse auction, and promised to provide during the auction a real-time software analysis showing the offerors’ relative position in the competition. The RFP also provided that the reverse auction would be conducted for 60 minutes, but that offers submitted within 5 minutes before expiration of the auction would extend the auction for an additional 15 minutes. Id. at 3-4.

In response to the RFP, the Navy received offers from Pacific and Dewitt Transportation Services of Guam. Agency Report at 3. Both were found technically acceptable. The reverse auction began on April 18 and continued on April 19. The reverse auction took far longer than the 60 minutes provided for by the RFP apparently because of the provision that the auction would be extended if offers were submitted in the last 5 minutes of the auction. On April 19, at 2 p.m. (Hawaii Standard Time (HST)), the Navy issued RFP amendment No. 4, which provided that the reverse auction would end that day at 3 p.m. HST, notwithstanding the provision that offers submitted within 5 minutes of the expiration of the auction would extend the auction. At the conclusion of the auction, Pacific was found to have submitted the lowest overall priced proposal.

On April 26, Dewitt protested to our Office, challenging the conduct of the reverse auction. Among other things, Dewitt complained that, because of a malfunction, offerors did not have access to promised real-time analysis showing the offerors’ relative position in the competition and that amendment No. 4 arbitrarily established

an end to the auction, which did not allow offerors to actively or fairly compete with each other as was contemplated by the reverse auction procedures. Dewitt also alleged that although Pacific had ostensibly submitted a lower-priced proposal, Dewitt might be entitled to award on the basis of a higher past performance rating. Dewitt also protested that Pacific's proposal was materially unbalanced.

Prior to the submission of its report on the protest, the Navy informed our Office that it would not defend the reverse auction, but would take corrective action by amending the RFP and requesting "final price revisions." The Navy also proposed to amend the RFP to delete the reference to minimum amounts for each line item and to clarify that award would be based on the low-priced, technically acceptable proposal. The Navy asserted that by reverting to a traditional negotiated competition and requesting final proposal revisions, the agency was addressing all of Dewitt's protest challenges.

On May 14, we dismissed Dewitt's protest, based upon the Navy's corrective action, which had effectively canceled the reverse auction. On May 15, the Navy issued amendment No. 5 to the RFP, which requested that "final proposal revisions" be submitted by May 17, and amended the evaluation criteria to clearly state that award would be based on the low-priced, technically acceptable proposal, and to specifically provide that past performance would only be considered as a matter of responsibility.

Pacific timely protests amendment No. 5 and the Navy's request for "final price revisions," complaining that it was entitled to award based on the reverse auction. Specifically, Pacific asserts that Dewitt acted in bad faith by subverting and unreasonably extending the reverse auction, that Dewitt's protest of the reverse auction lacked merit, and that the Navy should have accepted the reverse auction results. Pacific also challenges as unreasonable the Navy's stated bases for amending the RFP and requesting price revisions.

An agency has broad discretion in a negotiated procurement to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Rockville Mailing Serv., Inc., B-270161.2, Apr. 10, 1996, 96-1 CPD ¶ 184 at 4. Where an agency has reasonable concerns that there were errors in a procurement, the agency may take corrective action, even if it is not certain that a protest of the procurement would be sustained. Main Bldg. Maintenance, Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3. We will not object to the specific proposed corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Id.

Here, Dewitt's protest raised colorable challenges to the conduct of the reverse auction and the award selection thereunder. That is, the undisputed software malfunctions and the arbitrary cut-off of the bidding with only an hour's notice called into question the fairness of the competition. The Navy and Pacific do not dispute Dewitt's specific challenges to the reverse auction. Moreover, Pacific itself

expresses concern with the conduct of the reverse auction, alleging that Dewitt acted in “bad faith” and manipulated the auction by employing delaying tactics that subverted and extended the auction. Pacific’s Comments at 3-4. Given these concerns, we think the agency reasonably concluded it should take corrective action by requesting final price revisions from Dewitt and Pacific. This had the effect of canceling the reverse auction and placing the two firms in an equally competitive position with undisputedly sufficient time to prepare their final price submissions.¹

Pacific complains, however, that requesting final price revisions is unfair because the firm’s proposed price had been disclosed. See Protester’s Comments at 6-7 (arguing that the Navy should be required to have a cogent and compelling reason to cancel the reverse auction because offerors’ prices have been revealed). Under the unique circumstances of a reverse auction, we fail to see how the disclosure of the offerors’ prices was unfair. Pacific and Dewitt expressly agreed to the disclosure of their proposed prices by participating in the reverse auction. Because both Pacific’s and Dewitt’s prices were disclosed through the reverse auction, the firms were in an equal competitive position at the time revised price proposals were requested under RFP amendment No. 5.

In sum, we find reasonable the Navy’s corrective action of canceling the apparently flawed reverse auction and obtaining revised price proposals from the offerors.

Once the agency determined to reopen the competition by requesting revised price proposals from the offerors, it was appropriate to amend the solicitation to clarify the basis for award and remove the reference to estimated minimum amounts. Specifically, the record establishes that the Navy intended that award would be based upon the low-priced, technically acceptable proposal, but its earlier (April 3) amendment had not stated this clearly. While Pacific disagrees that amendment No. 5 is necessary to ensure that award will be based upon low-priced proposal, it does not show that it was prejudiced by this clarification.² The deletion of the

¹ Pacific likens the Navy’s mid-auction establishment of an ending time to a request for a best and final offer that cured any procedural defects in the auction. In our view, the issue is not that clear, and we believe that reasonable concerns could be raised about whether providing offerors with an hour’s notice of the end of the auction was an appropriate means of correcting the asserted errors in the reverse auction, particularly given the allegations of the continuing software malfunctions that apparently did not provide offerors with the promised information regarding their relative price standing.

² Pacific also complains that RFP amendment No. 5 provides that past performance will only be considered as part of the agency’s responsibility determination. Here, however, in accordance with FAR § 15.304(c)(3)(iv), which provides that past performance need not be evaluated if the contracting officer documents the reason that past performance is not an appropriate evaluation factor for the acquisition, the
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minimum estimated amount language from the schedule of supplies and services was also reasonable. Given that the RFP provided for the award of a requirements contract under which there is generally no guaranteed minimum amount, its deletion, which the protester does not challenge, is unobjectionable.

The protest is denied.

Anthony H. Gamboa
General Counsel

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contracting officer did so. Agency Report, Tab 23, Memorandum of Contracting Officer (June 6, 2001). Pacific does not assert or show that the contracting officer's determination is unreasonable here.