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Decision

Matter of: Alatech Healthcare, LLC--Protest; Custom Services International, Inc.--Costs

File: B-289134.3; B-289134.4

Date: April 29, 2002

David B. Dempsey, Esq., and Kelly A. Sherrill, Esq., Holland & Knight, and Robert Sonenthal, Esq., Sonenthal & Overall, for the protester.

John S. Pachter, Esq., and Jonathan D. Shaffer, Esq., Smith Pachter McWhorter & Allen, and Ron Schlager, Custom Services International, Inc. for Custom Services International, Inc., an intervenor.

John K. Scales, Esq., Agency for International Development, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against agency's post-award corrective action that includes opportunity to revise cost proposals is denied where record shows that agency made change to requirements that will affect field of firms that may be able to meet agency's requirements.
2. Protest that agency was required under Federal Acquisition Regulation § 15.507 to provide original awardee with information relating to unsuccessful offeror proposal prior to obtaining revised proposals is denied; regulation requires only that agency provide a successful offeror information relating to its own proposal in situations where the agency reopens an acquisition as a consequence of a protest.
3. Request for protest costs is denied where record shows that agency did not unduly delay implementation of corrective action proposed prior to submission of agency report.

DECISION

Alatech Healthcare, LLC, protests the actions of the U.S. Agency for International Development (AID) in connection with request for proposals (RFP) No. M/OP-01-1283, issued to acquire a quantity of condoms. Alatech maintains that the agency has improperly sought price proposal revisions after its prices have been exposed.

Custom Services International (CSI) requests that we recommend that it be reimbursed the costs associated with an earlier protest filed in connection with this acquisition.

We deny Alatech's protest and CSI's request for costs.

BACKGROUND

The agency originally issued the subject solicitation on August 8, 2001, calling for fixed-price offers to provide an indefinite quantity of condoms for a base year, with two 1-year options.¹ The solicitation provided that the agency would evaluate proposals to determine technical acceptability and would make award to the firm submitting the low-priced, technically acceptable proposal. After receiving two proposals by the September 17 deadline, the agency made award to Alatech as the firm submitting the lowest-priced, technically acceptable proposal.

After the award, CSI (the current intervenor) protested to our Office, maintaining that Alatech was technically unacceptable for several reasons. Chief among its bases for protest was the assertion that Alatech did not meet the RFP's requirement for offerors to have, at the time of proposal submission, a particular U.S. Food and Drug Administration certification for the condoms to be supplied, as well as International Organization for Standardization (ISO) 9000 approval for each facility where the condoms would be manufactured.

Thereafter, AID advised our Office that it would take corrective action in response to CSI's protest. Specifically, the agency advised that it would relax the RFP's terms to require only that offerors provide an ISO 9000 certificate of registration as a general demonstration of the firm's adoption of quality systems in the manufacture of the condoms; thus, offerors now would not be required to furnish ISO 9000 certificates of registration for each facility to be used during contract performance when submitting their offers. Agency Letter, Jan. 23, 2002; RFP amend. No. 3. The agency advised that it would solicit revised technical and price proposals from Alatech and CSI.

ALATECH'S PROTEST

Revised Prices

Alatech objects to the agency's solicitation of revised price proposals. According to the protester, providing offerors an opportunity to submit revised pricing is

¹ The RFP provided that the agency could order a base quantity of up to 250 million condoms and an option quantity of up to 400 million during each of the 3 years of performance. RFP amend. No. 1 at 2.

prejudicial to it, and therefore improper, because its prices in response to the initial solicitation were revealed to CSI in an earlier post-award debriefing. Alatech maintains that obtaining revised pricing at this point creates an impermissible auction, and asserts that the agency can cure any deficiency that may have existed in the original acquisition without obtaining revised pricing.

Contracting agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure fair and impartial competition. RS Info. Sys., Inc., B-287185.2, B-287185.3, May 16, 2001, 2001 CPD ¶ 98 at 4. While agencies generally should not reopen a competition after award, where the agency determines that a solicitation has overstated its requirements, it is appropriate for the agency to revise the solicitation to accurately state its needs. See MTS Sys. Corp., B-238137, Apr. 27, 1990, 90-1 CPD ¶ 434 at 5. Where the change could have had a material effect on offerors' pricing, it also is reasonable for the agency to permit offerors to submit revised pricing that takes into account the change in the agency's requirement, id.; the prior disclosure of information in an offeror's proposal does not preclude such corrective action. RS Info. Sys., Inc., supra. (We note that there currently is no regulatory or statutory proscription against the use of auction techniques. See Federal Acquisition Regulation (FAR) § 15.306(e)(3).)

We have no basis to object to the agency's corrective action here. As noted, AID determined that the ISO 9000 certification requirement originally included in the RFP overstated its needs and, thus, it relaxed the requirement. The agency explains that it has requested revised pricing because this relaxation of the requirement amounts to a change in the solicitation's basis for determining technical acceptability that could have an effect on the competition. First, the agency notes that the offerors' differing interpretations of what was required to demonstrate technical acceptability could have influenced their pricing, noting by way of example that, if either offeror had thought the other incapable of demonstrating technical acceptability under the original RFP, their price positioning could have been affected. This concern on the part of the agency is affirmed by CSI's comments on the agency report. Those comments include an affidavit from CSI's vice president of quality assurance and regulatory compliance, in which she represents that, on the basis of reading the original solicitation, CSI concluded that Alatech could not timely meet the requirements of the RFP, and thus would not be able to compete; she states further that the conclusion that Alatech could not compete led directly to pricing decisions on the part of CSI which would not have been made had they thought Alatech would be a competitor for the requirement. CSI's Comments, Mar. 27, 2002, attach. 1. In light of the agency's change to the criteria relating to technical acceptability,² CSI's

² Alatech maintains that a recent decision from the Court of Federal Claims, MCII Generator & Elec., Inc. v. United States, COFC No. 02-85C (Mar. 13, 2002), in which the Court found that an agency improperly proposed to reopen an acquisition is controlling in this case. We disagree. MCII did not involve, as this case does, a

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assumptions regarding the competitive environment are now incorrect; in such a circumstance, it is reasonable to afford CSI an opportunity to prepare its proposal knowing the true nature of the competitive environment (which may also benefit the agency). MTS Sys. Corp., *supra.*; see also Power Connector, Inc., B-285395, Aug. 24, 2000, 2000 CPD ¶ 152 at 5-6 (protest sustained where record showed that offeror would have prepared its pricing differently if requirement had been solicited on an unrestricted basis rather than as a small business set aside).

The agency's decision to seek revised pricing is further supported by the fact that, as the agency notes, the original prices are now approximately 7 months old, and therefore may be stale. Such factors as the component cost of manufacturing and contracts with other organizations reportedly could have an effect on prices, and AID maintains that obtaining revised pricing will allow both firms to make adjustments to reflect the unanticipated delay in the final award. (We note that Alatech states in its comments responding to the agency report that its prices have gone down since it originally submitted its offer in September. Protester's Comments, Mar. 27, 2002, at 13.) We conclude that the agency has reasonably determined to solicit revised pricing.

CSI's Pricing Information

Alatech maintains that the agency improperly failed to provide it with information relating to CSI's proposal, including pricing information, as part of its corrective action. The record shows that Alatech's overall price, as well as some of its unit prices, have been disclosed in one manner or another (AID provided CSI Alatech's overall price during its debriefing and thereafter published some of Alatech's unit prices as part of a catalog that it distributes for use by agency field activities).³ Alatech maintains that the agency's disclosure of its pricing information was improper, and that FAR § 15.507 required the agency to disclose CSI's pricing information to Alatech when it resolicited the requirement in order to equalize the competition.

While it is possible that CSI's possession of Alatech's pricing information may provide it with a competitive advantage, the agency is not required to equalize such an advantage unless it is the result of preferential treatment or other improper action on the part of the agency. Norvar Health Servs.--Protest and Reconsideration,

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revision to the terms and conditions of the RFP; accordingly, there was no valid reason to reopen the competition in that case. See *id.* at 6.

³ The catalog includes Alatech's unit prices based on the agency's ordering 250 million condoms per year for each contract year. The catalog does not include Alatech's unit prices for quantities above or below 250 million units.

B-286253.2 et al., Dec. 8, 2000, 2000 CPD ¶ 204 at 4. Alatech has not directed our attention to any legal authority to support its assertion that the agency's disclosure of its pricing information in a post-award setting was improper, and we are aware of no such authority; in fact, the FAR expressly contemplates that the successful offeror's pricing information, including unit prices, will be provided during an ordinary debriefing. FAR § 15.506(d)(2). The protester also does not allege (and nothing in the record shows) that the agency's disclosure of its pricing information resulted from preferential treatment in favor of CSI. Accordingly, there is no basis for our Office to find that the agency is required to equalize any competitive advantage that may have been afforded to CSI as a result of Alatech's pricing being revealed. Norvar Health Servs.--Protest and Reconsideration, supra.

Further, the protester misinterprets the requirements of FAR § 15.507. Nothing in that provision requires an agency to provide information about an unsuccessful offeror's proposal to a successful offeror in circumstances where the agency determines that it is necessary to reopen an acquisition because of a protest. Rather, FAR § 15.507(c) states only that appropriate parties (in this case Alatech) shall be provided information regarding the successful offeror's--Alatech's--proposal, as well as other nonproprietary information that would have been provided to the other offerors in the course of a debriefing. Therefore, CSI's unit prices, the only information that has not been made available to Alatech (Alatech has been provided CSI's overall price), are not the type of information that must be disclosed under the terms of FAR § 15.507.⁴

Revised Price Risks

Alatech maintains that it cannot prepare a revised price proposal in light of the possibility that its prior contract with AID may be terminated for the convenience of the government. According to the protester, the possible costs associated with a termination of its contract, coupled with uncertainty as to the quantities it may be awarded under a subsequent solicitation should the agency choose to make multiple awards, make it all but impossible for it to prepare a revised price. In a related allegation, Alatech maintains that the RFP is ambiguous with respect to whether the agency will make its award decision based on lowest total price or lowest unit price.

We do not understand--and Alatech has not explained--why the termination of its contract for the convenience of the government will subject it to unacceptable risk in preparing a revised price proposal. In that circumstance, the firm ordinarily would be compensated for completed work, costs incurred for preparations taken in contemplation of performance of the contract and reasonable profit. See FAR

⁴ We note as well that Alatech has not explained--and it is not apparent--how having CSI's pricing information would advance its competitive position, given that Alatech, not CSI, was the low offeror during the original competition.

subpart 49.2. Accordingly, there is no basis for Alatech to anticipate absorbing costs associated with its performance to date in preparing its revised price proposal.

As for the possibility that the agency will make multiple awards under the revised price proposals (thereby reducing the quantity that Alatech previously was awarded), that possibility has always been present, since the RFP always permitted the agency to make more than one contract award. RFP § M.⁵ The risk associated with the award of less than the entire contract quantity therefore is one that has always been borne by the offerors in this acquisition. (Indeed, Alatech submitted alternate price proposals based on differing quantities during the first round of the competition. Alatech Proposal, Sept. 14, 2001, at 4-5.)

Finally, Alatech's assertion that the RFP is ambiguous with respect to how the agency will make its award determination is untimely. The record shows that the terms of the RFP relating to the evaluation of unit versus total prices have remained unchanged since the RFP was issued. Since Alatech did not raise its concern prior to the original deadline for submitting proposals, it is untimely and therefore not for consideration. 4 C.F.R. § 21.2(a)(1).⁶

CSI's REQUEST FOR COSTS

CSI requests that our Office recommend that it be reimbursed the costs associated with its earlier protest, which resulted in the agency's taking the corrective action to which Alatech objects. According to CSI, the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.

The record shows that the agency proposed its initial corrective action (obtaining proposal revisions without any amendment to the terms of the RFP) on

⁵ We note that Alatech's concern relating to the possibility that it will be awarded less than the entire quantity further highlights the reasonableness of the agency's solicitation of revised pricing since, apparently, the possibility that the firm might be awarded less than the entire quantity will lead the firm to change its proposed prices. We also note that, to the extent that Alatech is protesting the RFP provision relating to the possibility of multiple awards, its protest is untimely since it was not filed prior to the original deadline for submitting proposals. 4 C.F.R. § 21.2(a)(1) (2002).

⁶ Alatech maintains that the agency should find CSI nonresponsible for activities which allegedly occurred under a prior contract. However, since the agency has made no responsibility determination with respect to CSI, Alatech's assertion in this regard is, at best, premature. In any event, our Office does not generally consider challenges to an agency's affirmative determinations of responsibility. 4 C.F.R. § 21.5(c).

November 20, prior to submitting its agency report. In response to that proposal, CSI filed a supplemental protest, maintaining that the agency should instead simply terminate the contract awarded to Alatech and make award to CSI. CSI Supplemental Protest, Nov. 27, 2001, at 8-9. Thereafter, the agency pursued a course of negotiations with both CSI and Alatech in an effort to arrive at a course of corrective action that would be satisfactory to all parties and prevent additional protests. This effort culminated in the agency, CSI and Alatech engaging in alternative dispute resolution procedures with our Office in an attempt to either arrive at a suitable corrective action plan or otherwise settle the dispute. These efforts proved unsuccessful in the final analysis, and the agency advised our Office of its current corrective action plan by letter dated January 23, 2002. On the basis of that letter, our Office dismissed CSI's protests. (Alatech then filed the current protest.)

Under our Bid Protest Regulations, we may recommend that a protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees, where the contracting agency decides to take corrective action in response to a protest. 4 C.F.R. § 21.8(e). We will do so, however, only where the contracting agency unduly delayed taking corrective action in response to a clearly meritorious protest. Veda, Inc.—Entitlement to Costs, B-265809.2, July 19, 1996, 96-2 CPD ¶ 27 at 2. Generally, we consider agency corrective action prompt where it is announced before the agency's administrative report is due. Id.

We find that the agency proceeded sufficiently promptly here. The agency announced corrective action prior to submitting its report in response to CSI's initial protest. While there was some delay in the ultimate implementation of the corrective action, that delay was due entirely to the agency's good faith effort to arrive at a comprehensive solution to the apparent infirmities in the original acquisition, as well as the concerns of all parties; indeed, the initial delay in implementing the corrective action was occasioned by CSI's supplemental protest objecting to the agency's first proposal of corrective action. Given that the delay in AID's implementation of its corrective action arose as a consequence of the agency's efforts to arrive at a comprehensive solution that would satisfy all parties and advance the acquisition, we find that the agency's actions did not constitute undue delay.

The protest and request for costs are denied.

Anthony H. Gamboa
General Counsel