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Decision

Matter of: Pemco Aeroplex, Inc.—Reconsideration

File: B-310372.2

Date: February 1, 2008

David R. Hazelton, Esq., Roger S. Goldman, Esq., and Kyle R. Jefcoat, Esq., Latham & Watkins, LLP, for the protester.

Rand L. Allen, Esq., Paul F. Khoury, Esq., Scott M. McCaleb, Esq., and Kara M. Sacilotto, Esq., Wiley Rein, LLP, for The Boeing Company, an intervenor.

Brent G. Curtis, Esq., and Gerald L. Trepkowski, Esq., Department of the Air Force, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision sustaining protest of a contract award is denied where the request fails to show that the prior decision contains any errors of fact or law, and where the new argument offered in support of the request should have been advanced during the course of the protest.

DECISION

The Department of the Air Force requests reconsideration of our decision in Pemco Aeroplex, Inc., B-310372.2, Dec. 27, 2007, 2007 CPD ¶ ___, in which we sustained Pemco's protest against the award of a contract to Boeing Aerospace Operations under request for proposals (RFP) No. FA8105-05-R-0014, issued by the Air Force for programmed depot maintenance (PDM) for KC-135 aircraft.

We deny the request.

The solicitation, originally issued in August 2005 and amended several times, provided for award on a "best value" basis, stating that the agency intended to award to the offeror "who gives the Air Force the greatest confidence it will best meet our requirements affordably," and established the following evaluation factors: mission

capability, proposal risk, past performance, and cost/price.¹ RFP at 78-79. Under the mission capability evaluation factor, the solicitation established five subfactors: depot maintenance, supply chain management, transition, program management, and small business participation. Id. at 79. With regard to evaluation of proposal risk, which was evaluated at the subfactor level of mission capability, the solicitation provided that risk assessments of “low,” “moderate,” or “high” would be made for each of the mission capability subfactors, id. at 83, and stated:

The Proposal Risk assessment focuses on the risks and weaknesses associated with an Offeror’s proposed approach and includes an assessment of the potential for disruption of schedule, increased cost, degradation of performance, and the need for increased Government oversight, as well as the likelihood of unsuccessful contract performance.

Id. at 82.

Finally, with regard to cost/price, the solicitation contemplated award of a fixed-price contract. Nonetheless, the solicitation required offerors to submit data regarding “labor, fringe benefits, overhead and [general and administrative] rates by year for all labor categories anticipated for use in the performance of this effort,” RFP § L.5.1.1, and provided that “evaluation of [the required data] will be used to determine reasonableness and realism of the prices and labor rates proposed as they compare to labor standards, benefits and overhead rates in the marketplace relating to the recruitment and retention of employees.” RFP § M.2.7(d).

The source selection authority (SSA) concluded that Boeing’s proposal was superior with regard to mission capability, Pemco’s proposal was superior with regard to past performance, and proposal risk was not a significant discriminator. The SSA also concluded that Boeing’s proposal offered the lowest total evaluated price.

In our decision, we found that the evaluation record contained no meaningful documentation showing that the agency had considered the effect of [DELETED]. Without that documentation, we were unable to determine whether the agency reasonably concluded that Boeing’s proposed price was realistic or whether the agency’s assessment of “low risk” for Boeing’s proposal, under each of the mission capability subfactors, was reasonable, and we sustained the protest on those grounds.²

¹ Offerors were advised that mission capability, proposal risk, and past performance were of equal importance and that, when combined, these factors were “significantly more important” than cost/price. RFP at 79.

² The protest was denied on several other grounds not relevant to the request for reconsideration.

In requesting reconsideration, the agency asserts that: the price realism analysis it performed was sufficiently rigorous, especially considering that the solicitation did not specifically provide that the agency would [DELETED] proposed; issues associated with [DELETED] were not included in the RFP's scope of work, terms and conditions, or evaluation criteria; and the agency's evaluation of [DELETED] is adequately documented in the agency record, Boeing's proposal, and supporting testimony offered at the hearing.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must either show that our prior decision contains errors of fact or law, or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a) (2007); M&M Welding & Fabricators, Inc.–Recon., B-271750.2, Mar. 26, 1997, 97-1 CPD ¶ 124 at 3. The Air Force's request for reconsideration does not meet this standard.

Where, as here, an RFP contemplates the award of a fixed-price contract, the agency generally is not required to conduct a realism analysis; this is because a fixed-price (as opposed to a cost-type) contract places the risk and responsibility for loss on the contractor. WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 3; PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381 at 5. However, an agency may, as the agency did here, provide for the use of a price realism analysis for the limited purpose of measuring offerors' understanding of the requirements or to assess the risk inherent in an offeror's proposal. PHP Healthcare Corp., *supra*. The nature and extent of a price realism analysis ultimately are matters within the sound exercise of the agency's discretion, and our review of such an evaluation is limited to determining whether it was reasonable and consistent with the solicitation's evaluation criteria. Cortez, Inc., B-292178 *et al.*, July 17, 2003, 2003 CPD ¶ 184 at 3; Rodgers Travel, Inc., B-291785, Mar. 12, 2003, 2003 CPD ¶ 60 at 4.

Focusing on language in the solicitation regarding [DELETED], the Air Force argues that the RFP did not anticipate [DELETED] in the price realism analysis. As is evident from our prior decision, we think the terms of the RFP contemplated an evaluation of [DELETED] as part of the price realism analysis. The Air Force's argument to the contrary effectively reads out the RFP references (in sections M.1.3, and M.2.7(d) and (e)) to the realism of "price" or "prices," a different and broader term than [DELETED], which is also used in the RFP. In further support of its interpretation, the Air Force points to language in the RFP stating that the offerors' cost-related information would be used [DELETED]. In the Air Force's view, this language indicates that the price realism analysis was to be limited to [DELETED]. This interpretation, however, ignores other references in the RFP clearly indicating that a broader analysis of price realism was contemplated to determine whether the proposal reflected "an inherent lack of competence or failure to comprehend the complexity and risks of the program," RFP § M.1.3, or that the offeror "does not

understand the requirement or . . . has made [an] unrealistic proposal.” RFP § M.2.7(e).

Further, as Pemco points out, the RFP in fact called for offerors to submit detailed cost-related data, [DELETED]; Pemco’s Comments, Jan. 14, 2008, at 5. The offerors did so, and, as discussed below, the record shows that the agency reviewed [DELETED] proposed.³ The flaw in the record here, however, is the lack of contemporaneous evaluation of the effect of [DELETED]. It was therefore unreasonable for the agency not to document its conclusion that [DELETED] would not create proposal risk above the rating of “low risk” given to Boeing’s proposal for each of the five proposal risk subfactors, or create concerns as to the realism of Boeing’s price.

The agency also asserts that our analysis incorrectly assumed that the agency’s evaluation had to take into account [DELETED]. In its protest, Pemco raised the issue of [DELETED], alleging that [DELETED]. Protest at 33. The contracting officer responded that [DELETED]. Contracting Officer’s Statement of Facts at 20. In its comments on the agency report, Pemco again raised the issue, arguing that [DELETED]. Comments, Oct. 29, 2007, at 35. Despite the fact that Pemco twice raised (and the agency explicitly acknowledged) the [DELETED] issue, in its request for reconsideration the agency offers for the first time an assertion that the RFP actually assumes a [DELETED]. A party’s failure to make all arguments available during the course of the protest does not warrant reconsideration of our prior decision. See Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546 at 4. The argument that the RFP and associated documents in the agency report put offerors on notice that they should assume a [DELETED] should have been advanced by the Air Force during the initial protest; that argument, at this point, will not result in reconsideration of our decision.⁴ Id.

The agency next asserts that an evaluation of Boeing’s [DELETED] is in fact documented in the agency record, Boeing’s proposal, and supporting testimony offered at the hearing. We disagree. The agency sent Boeing an evaluation notice (EN) that stated:

³ To the extent that the Air Force argues that it properly considered [DELETED] only in the context of assessing proposal risk, not price realism, the Air Force’s argument ignores the fact that both areas (price realism and proposal risk) relate to the same consideration: assessing the degree of risk associated with an offeror’s performance of the contract as proposed in its offer.

⁴ In any event, we have reviewed the documents that the agency cites in support of its claim that the solicitation contemplates [DELETED], and we find unpersuasive the agency’s claim that any portion of the cited documents put offerors on notice that they should assume [DELETED].

[DELETED].

[DELETED]. The agency asserts that this EN is evidence of the agency's [DELETED]. Request for Reconsideration at 9. The mere posing of this question, which could have elicited one of a myriad of possible responses, in no way substitutes for an analysis of the response the agency actually received from Boeing, namely, [DELETED].⁵

Finally, the agency argues that the hearing testimony adequately documents the agency's evaluation. Post-protest explanations that provide a detailed rationale for contemporaneous conclusions simply fill in previously unrecorded details, and will generally be considered in our review of the rationality of selection decisions, so long as those explanations are credible and consistent with the contemporaneous record. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 12. Information relevant to a reduction in proposed prices, consistent with selection documents, may constitute further explanation of agency officials' contemporaneous thought processes. See ITT Fed. Servs. Int'l Corp., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 7. Here, however, there is nothing in the record to suggest that as part of its proposal risk analysis, or its price realism analysis, the agency considered the reasonableness [DELETED]. Consequently, we do not view the testimony offered at the hearing as simply "filling in" details of a "contemporaneous conclusion" regarding [DELETED].

The request for reconsideration is denied.

Gary L. Kepplinger
General Counsel

⁵ In its comments in support of the agency's reconsideration request, Boeing maintains that [DELETED] justifies its [DELETED] and that its [DELETED]. Boeing's own explanation of its [DELETED] does not substitute for the agency's documented evaluation of the claims inherent in Boeing's [DELETED], with respect to both the realism of Boeing's price and the proposal risk assumed by the agency.