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Decision

Matter of: Metro Machine Corporation--Reconsideration and Modification of Recommendation

File: B-311245.5

Date: August 4, 2008

Michael R. Katchmark, Esq., Willcox & Savage, for the requester.
Mary G. Curcio, Esq., and Linda S. Lebowitz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration and modification of recommendation for corrective action--tailored to address prejudicial flaws in the agency's conduct of the procurement--is denied where the awardee/requester showed no error in, but simply disagreed with, our recommendation that the agency conduct meaningful discussions (1) with the protester concerning the inconsistent allocation of labor hours between its cost and technical proposals and (2) with the awardee/requester concerning its unrealistically low capped indirect rates and the effect of its proposed cost cap in terms of performance risk which, while not set forth in the solicitation as a separate evaluation factor, was nevertheless reasonably related to, and encompassed by, the solicitation's cost realism evaluation requirement and the solicitation's caution to offerors that the agency had concerns with the potential for post-award performance problems if an offeror proposed unrealistically low costs.

DECISION

Metro Machine Corporation requests that we reconsider and modify our recommendation for corrective action as reflected in our decision, MCT JV, B-311245.2, B-311245.4, May 16, 2008, 2008 CPD ¶ 121, in which we sustained the protest of MCT JV¹ against the award of a contract to Metro under request for proposals (RFP) No. N00024-07-R-4006, issued by the Department of the Navy for maintenance and modernization work on Navy amphibious assault ships.

¹ MCT JV is a joint venture comprised of Marine Hydraulics International, Inc. (MHI), Colonna's Shipyard, Inc., and Tecnico Corporation.

We deny the request for reconsideration and modification of our recommendation for corrective action.²

MCT JV's Labor Hour Allocation

The RFP provided for the award of a cost-plus-award-fee contract on a best-value basis; the contract was awarded to Metro, which submitted a higher technically rated, higher proposed and evaluated cost proposal (as compared to MCT JV's proposal). As relevant here, in their technical proposals, offerors were required to describe "manpower" and workload estimates, specifically providing current and projected workload estimates for all team members and/or significant subcontractors. In their cost proposals, offerors were required to submit proposed estimated data based upon a sampling of specific work items expected to be performed under the contract, as well as a non-specific work item consisting of a specified number of labor hours for "other work." RFP at 127. With respect to this latter item, offerors were advised to ensure that their cost proposals were in accordance with their proposed technical approaches, including any current or proposed work sharing agreements. Further, offerors were advised that the agency would evaluate the realism of an offeror's proposed estimated costs; offerors were warned not to propose unrealistically low estimated costs.

With respect to MCT JV's proposal, during discussions, the agency questioned MCT JV's distribution of work among the members of the joint venture and asked MCT JV to explain why it did not allocate work among the joint venture members in accordance with a resource agreement submitted by MHI as a prime contractor as part of a separate proposal.³ In its revised proposal, among other things, MCT JV explained, and the cost evaluators agreed, that the resource agreement did not apply to the joint venture as this agreement was part of MHI's separately submitted proposal as a prime contractor. In evaluating MCT JV's final revised proposal, the agency reallocated the labor hours in MCT JV's cost proposal in a manner that produced a result more closely aligned with how those hours were allocated in the offeror's joint venture agreement, and the agency took into account MCT JV's response to discussions regarding work percentages provided by the joint venture, all of which resulted in a [DELETED] increase to MCT JV's proposed costs.

In the decision sustaining MCT JV's protest, we concluded that the agency failed to conduct meaningful discussions with MCT JV where it questioned MCT JV about the

² Only Metro, not the agency, requested reconsideration and modification of our recommendation for corrective action.

³ MHI, as a prime contractor, submitted a separate proposal, with Colonna's and Tecnico as proposed subcontractors. The resource agreement was submitted with MHI's proposal, not with MCT JV's proposal.

allocation of labor hours in its cost proposal solely by reference to an inapplicable resource agreement, without conveying the agency's actual concern that the labor hour allocation in MCT JV's cost proposal did not appear to be consistent with the labor hour allocation in its technical proposal and joint venture agreement. We recommended that the agency hold meaningful discussions with MCT JV concerning its allocation of labor hours in its cost proposal.

Metro requests that we reconsider and modify our recommendation for corrective action. Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a) (2008). The repetition of arguments made during our consideration of the original protest and mere disagreement with our decision do not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. Moreover, in determining the appropriate recommendation in cases where we find a violation of procurement laws or regulations or the failure of the agency to follow the stated evaluation criteria, we consider all of the circumstances surrounding the procurement. 4 C.F.R. § 21.8(b).

Metro agrees with our conclusion that the costs proposed by MCT JV could not have been accepted by the agency because of the inconsistency in the allocation of labor hours between MCT JV's cost and technical proposals and, without correcting this matter through discussions, MCT JV could not have been awarded the contract. Metro asserts, however, that even if MCT JV's lower proposed costs had been accepted by the agency, these lower costs would not outweigh the technical superiority of Metro's proposal. Accordingly, Metro argues that there is no reason for the agency to reopen discussions with all offerors and evaluate another round of revised proposals when, "in all likelihood," the result will be the same--Metro's technical superiority will outweigh any cost benefit associated with MCT JV's proposal and the award will remain with Metro. In other words, Metro contends that reopening discussions should only occur if there is a possibility that the selection decision will change. Request for Reconsideration and Modification of Recommendation at 8.

Here, it is impossible to predict what changes MCT JV might make to its proposal if it, in fact, is given meaningful discussions regarding the labor allocation issue.⁴ Metro's mere disagreement with our recommendation for corrective action--that the agency hold meaningful discussions with MCT JV with respect to this issue--and Metro's speculation as to the outcome of the competition following the agency's conduct of meaningful discussions does not demonstrate that our decision contains

⁴ We note that Metro also will have an opportunity to make changes to its proposal (for example, involving its proposed cap on its indirect rates, as discussed below) as a result of the agency conducting meaningful discussions with the offerors.

factual or legal errors. On this record, we conclude that Metro has not provided a valid basis warranting reconsideration and modification of our recommendation.

Metro's Indirect Rate Cap

In the decision sustaining MCT JV's protest, we also concluded that where Metro capped its indirect rates at levels the agency found [DELETED] below Metro's costs, the agency failed to consider the performance risk associated with how Metro capped its indirect rates in determining that the firm's proposal represented the best value to the government. In this regard, prior to the submission of final revised proposals, the agency amended the RFP to require offerors to cap their indirect rates for at least the first 3 years of contract performance at the rates in their cost proposals. The RFP provided that the agency would evaluate proposals for cost realism and warned that, because unrealistically low costs may cause problems for the agency and the contractor during contract performance, if the agency, "in the exercise of its judgment," determined that a cost proposal was unrealistically low, the agency "may" reject the proposal, regardless of the proposal's technical merit and/or evaluated costs. RFP at 138.

In its final revised proposal, Metro capped its indirect rates [DELETED]. The cost evaluators found that Metro's rates were [DELETED] lower than its current rates; however, because the rates were capped, the cost evaluators limited the adjustments to those years where Metro's rates were not capped (using Metro's higher forward pricing rate agreement rates). The cost evaluators specifically noted that Metro may experience greater indirect cost rates than projected, with a resulting operating loss, and that this was a risk that the agency may have to deal with after award, assuming Metro was the successful offeror. In addition, the Defense Contract Audit Agency (DCAA) determined that Metro's financial condition was [DELETED]. There was no information in the record, however, that the agency considered, in making its best-value selection decision, the performance risks associated with Metro's unrealistically low capped indirect rates.

In light of the RFP's explicit direction to offerors not to propose unrealistically low costs due to the agency's concern with potential performance problems, we concluded that the agency was required to consider in its selection decision the performance risks associated with Metro's unrealistically low capped indirect rates. We recommended that the agency hold discussions with Metro to more accurately gauge the impact of its capped rates on its ability to perform the contract.

Metro requests that we reconsider and modify our recommendation for corrective action. According to Metro, under the RFP, if the agency determined that an offeror's proposed costs were unrealistically low, the agency's only available option

was to reject the proposal in its entirety.⁵ Metro contends that since the agency awarded it the contract, the agency, in essence, rejected this option; therefore, Metro argues that our recommendation is contrary to the terms of the RFP where we recommended that the agency consider, in making a new selection decision following the conduct of meaningful discussions with the offerors, the performance risks associated with Metro's cost proposal. Request for Reconsideration and Modification of Recommendation at 4-6.⁶

Again, Metro has not demonstrated that our decision contains factual or legal errors. In this regard, we view Metro's argument as a contention that we recommended that the agency use an unstated evaluation factor—performance risk—in determining that Metro's proposal, even with unrealistically low capped indirect rates, represented the best value. However, an agency may consider the performance risk arising from an offeror's proposed cost cap. See, e.g., Veda Inc., B-278516.2, Mar. 19, 1998, 1998 U.S. Comp. Gen. LEXIS 153, * 31. Here, while "performance risk" may not have been set forth in the RFP as a separate evaluation factor, we believe, and Metro has not shown otherwise, that performance risk was reasonably related to, and encompassed by, the RFP's cost realism evaluation requirement and in the RFP's caution to offerors that the agency had concerns with the potential for post-award performance problems if an offeror proposed unrealistically low costs. Even when performance risk is not specifically listed in the solicitation as an evaluation factor, an agency may always consider risk intrinsic to the stated evaluation factors. See, e.g., Ridoc Enter., Inc., B-292962.4, July 6, 2004, 2004 CPD ¶ 169 at 4.

⁵ Where a dispute exists as to the actual meaning of a solicitation requirement, we resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Atlantic Research Corp., B-247650, June 26, 1992, 92-1 CPD ¶ 543 at 6. An interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Id. In the context of the provisions of this RFP, and contrary to Metro's apparent position, we think the RFP's use of the term "may," as referenced above, is reasonably interpreted as permissive, rather than mandatory. Accordingly, the agency had the discretion, but was not required, to reject an unrealistically low cost proposal.

⁶ Metro further complains that we did not recommend that the agency consider the performance risks associated with MCT JV's cost proposal, where the offeror's proposed costs were [DELETED] adjusted upward. Id. at 5-6. However, the record shows that the agency took into account the performance risks in MCT JV's cost proposal by making [DELETED] upward adjustments to its proposed costs; yet, for Metro, [DELETED] the agency limited its adjustments to the years where Metro did not cap its rates, thereby resulting in a substantially smaller upward adjustment to Metro's proposed costs. Accordingly, we believe the agency must assess the performance risks associated with Metro's cost proposal in some other way in determining whether its proposal represents the best value.

Given the RFP's stated concern with post-award performance problems as a result of an offeror proposing unrealistically low costs--to the point that the agency reserved for itself the option of rejecting a proposal if an offeror's proposed costs were unrealistically low (regardless of the proposal's technical merit)--we believe it is reasonable for the agency to weigh the risks associated with Metro's unrealistically low capped indirect rates since such risks are reasonably related to, and encompassed by, the agency's cost realism evaluation, including DCAA's assessment, and the ability of Metro to successfully perform the contract. We think that the risk of performance problems, as a result of an offeror's unrealistically low proposed cost cap, is a legitimate concern and should be considered in the evaluation and selection process in terms of, for example, the effectiveness of an offeror's proposed approach and its ability to successfully perform the contract. In recommending that the agency conduct meaningful discussions with Metro on this issue, as opposed to recommending that the agency simply reject its proposal, we point out that Metro will have an opportunity to address the agency's concerns and to remain in the competition. On this record, Metro has not provided a valid basis warranting reconsideration and modification of our recommendation.

In sum, where Metro has shown no error in, but simply disagrees with, our recommendation for corrective action, we decline to reconsider and modify our recommendation, which was tailored to address prejudicial flaws in the agency's conduct of the procurement.

The request for reconsideration and modification of our recommendation for corrective action is denied.

Gary L. Kepplinger
General Counsel