



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Global Engineering & Construction Joint Venture

File: B-275999.3

Date: February 19, 1997

Donald E. Barnhill, Esq. and Joan K. Fiorino, Esq., East & Barnhill, for the protester.

Steven W. Feldman, Esq., for the agency.

Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The law requires that a contracting officer make every effort to provide a prompt preaward debriefing upon a timely request by an offeror excluded from the competitive range, but may refuse the request if it is not in the "best interests of the Government" to conduct a debriefing at that time; in that case, the debriefing must be held no later than the time post-award debriefings are held. General Accounting Office (GAO) will not review an agency's decision in a particular procurement that, based on agency resource issues, it is in the government's best interests to delay the debriefing until after award, in response to a protest by an excluded offeror that claims to better know the agency's resources and needs in that regard. The excluded offeror will be entitled to a post-award debriefing, and will have the opportunity to file a bid protest at GAO (and obtain a stay of performance) if it so desires; it will not be relevant to GAO's review that the protest is filed after award.

DECISION

Global Engineering & Construction Joint Venture protests the exclusion of its proposal from the competitive range under Army Corps of Engineers request for proposals No. DACA87-96-R-0025.

We dismiss the protest.

The Corps advised Global that the firm's proposal was excluded from the competitive range by letter of January 2, 1997, and Global immediately requested a debriefing pursuant to 10 U.S.C. § 2305(b) (1994), as amended by section 4104 of the Clinger-Cohen Act of 1996, Pub. L. No. 104-106, 110 Stat. 186, 644 (1996), and implemented by Federal Acquisition Regulation (FAR) § 15.1005 (FAC 90-44, 61 Fed. Reg. 69288, 69290, Dec. 31, 1996). The statute requires that a contracting officer "make every effort" to provide an excluded offeror a timely requested preaward

debriefing "as soon as practicable," but permits the contracting officer to refuse the request if it is not in the "best interests of the Government" to conduct a debriefing at that time; in that case, the debriefing must be held no later than the time post-award debriefings are held.

The Corps denied Global's request, stating that preaward debriefings in the procurement would not be in the government's best interest, and adding that such debriefing would at a minimum require redirecting the agency's resources, "which would not best serve our customers' needs or be a wise expenditure of U.S. tax dollars."

Global disputes the Corps' conclusion about the government's best interests. Global states that after award the firm likely will protest its exclusion from the competitive range successfully on issues that could have been resolved before award, and that the agency therefore may well have to terminate any awarded contract or reimburse Global proposal preparation costs. Global argues:

"Accordingly, the Agency's denial of Global's request is really in the worst interest of the Government because there will likely be upheaval of a completed procurement process, a protest that will take 100 days to resolve and a remedy that will likely require the Agency to terminate the contract for convenience. Thus, it will cost the United States far more tax dollars to resolve this issue post-award than it will to resolve it preaward."

Global also argues that the best use of government resources would be to debrief Global now rather than allow the evaluation information "to become stale, proceed with a costly procurement process and then be required to re-conduct a procurement to include Global in the competitive range. Resources need not be redirected. . . ."

In Global's view, permitting the Corps to delay a debriefing would compromise the aim of much of the recent procurement reform effort to avoid unwarranted protests by promoting the early exchange of information between excluded offerors and contracting agencies.

The arguments Global makes all are valid reasons why preaward debriefings should be encouraged no matter what the procurement circumstances. For example, the honest exchange of information in a preaward debriefing may well obviate the need for, or discourage, a bid protest; competitive range evaluation results for excluded offerors always are "fresher" in the preaward than in the postaward timeframe; and since a protest potentially could result in a disruption to correct a procurement deficiency it generally would be better to correct the problem at an earlier time whenever possible.

Nevertheless, we will not review the Corps' determination that it is not in the government's best interest to provide preaward debriefings in this procurement. In adding the preaward debriefing requirement to 10 U.S.C. § 2305 through section 4104 of the Clinger-Cohen Act the Congress also expressly recognized that it may not be in the government's best interests to conduct a debriefing until after award. In other words, the Congress determined that despite the considerations that make preaward debriefings important elements of government procurements, agencies need to retain the discretion to decide that the government's interests may warrant delaying debriefings in certain circumstances.¹

Moreover, it is not relevant to our Office's evaluation and review of the procurement whether a bid protest in circumstances like these is filed before or after award, so that an agency's denial of a timely requested preaward debriefing does not prejudice an offeror for purposes of our bid protest forum. Global's debriefing request, coupled with the Army's denial, entitles the firm to a post-award debriefing, 10 U.S.C. § 2305(b)(6), supra; FAR § 15.1005(b), supra, and our Office will consider timely a protest filed within 10 days of the offered debriefing date with respect to any protest bases that are known or should be known either before or as a result of the debriefing. Bid Protest Regulations, § 21.2(a)(2), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(2)). Also, the law will require the Army to stay contract performance if the agency receives notice of a protest filing within 5 days after the offered debriefing date. 31 U.S.C. § 3553(d) (1994); FAR § 33.104(c). The Army's decision to delay engaging in an exchange with Global about potentially protestable issues until after award based on the agency's determination regarding the government's best interests (and the apparent belief that the agency violated no law or regulation in excluding Global's offer from further consideration) in itself has no legal effect on any subsequent bid protest proceeding. That the evaluation information may not be fresh by that time, or that the agency may find it difficult to marshal the resources to defend its earlier decision, simply may prejudice the agency in defending the bid protest.

Global also argues that the exclusion of its proposal must be unreasonable because, in Global's view, the proposal had no deficiencies or weaknesses. Our Bid Protest Regulations, §§ 21.1(c)(4) and (f), 61 Fed. Reg. supra (to be codified at 4 C.F.R.

¹The Corps, in explaining its decision, states that given the "extensive deficiencies and weaknesses" in Global's proposal, debriefing the firm at this time would take significant preparation and would require contracting personnel--who have other duties on many other activities--to redirect their efforts from working on what the agency characterizes as a highly complex and competitive acquisition. The Corps also states that one of its contract specialists will be on medical leave for 3-4 weeks. The agency advises that it therefore has decided "to treat all firms rejected from the competitive range equally by providing only post-award debriefings."

§§ 21.1(c)(4) and (f)), require that a protest include a detailed statement of the legal and factual grounds for protest, and that the grounds stated be legally sufficient. The requirement contemplates that a protester will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Robert Wall Edge--Recon., 68 Comp. Gen. 352 (1989), 89-1 CPD ¶ 335. An allegation of improper agency evaluation without any supporting explanation or documentation does not satisfy the requirement that a protester provide a detailed statement of legal and factual grounds, Federal Computer Int'l Corp.--Recon., B-257618.2, July 14, 1994, 94-2 CPD ¶ 24, which means that we will not accept for further development a protest by a firm that has yet to discover why its proposal has been rejected, but believes there simply can be no rational basis for no longer considering the offer. In such case, the firm must diligently pursue the reasons for the agency's action by, for example, requesting a debriefing as Global had done. Our Regulations do not permit pursuit of a basis for protest through our bid protest process. See Alascom, Inc.--Second Recon., B-250407.4, May 26, 1993, 93-1 CPD ¶ 411.

Assuming that Global still will be interested in a debriefing after contract award in this procurement, and the debriefing provides the firm with information that forms the basis for a valid bid protest, Global may file with our Office at that time consistent with the timeliness rules referenced above.

The protest is dismissed.

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