J. Sklarew 145154

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: GraphicData, Inc.

File: B-244677

Date: October 30, 1991

Kenneth Margulies for the protester.
Burton A. Schwalb, Esq., Schwalb, Donnenfeld, Bray & Silbert, for International Computaprint, an interested party.
Mark Langstein, Esq., and James K. White, Esq., Department of Commerce, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency's decision to shorten the time allotted for offerors to perform test that will count as part of technical evaluation is proper where actual contract performance will involve meeting strict deadlines and test reasonably allows offerors to demonstrate their technical ability to perform the work required under the contract.

DECISION

GraphicData, Inc. protests amendments No. A006 and A007 to the Department of Commerce's request for proposals (RFP) No. 52-PAPT-0-00027. The solicitation is for the acquisition of photocomposition products necessary for publication of patent information for the agency's Patent and Trademark Office (PTO). The amendments concern the performance of a test that was incorporated into the solicitation's proposal evaluation scheme. We dismiss the protest in part and deny the protest in part.

The RFP contemplated the award of a fixed-price requirements contract for 1 base year plus 4 option years. Under the contract, the successful offeror will take original patent applications and transform the written information within the applications into products identified in the solicitation. The primary end products of the contractor's efforts are photocomposition driver tapes and database library

tapes. The photocomposition driver tapes are used by the Government Printing Office (GPO) to print the Official Gazette and patent grant documents. GPO distributes the Official Gazette, on a weekly basis, to subscribers and PTO distributes the patent grant documents to the requesting public.

The RFP advised that technical proposals would be evaluated in accordance with four evaluation factors: technical approach; capability, relevant corporate experience, and qualifications; proposed project management plan; and qualifications and experience of key project staff. The second of these factors, capability, was identified as the most important, and included two subfactors, the significantly more important of which was the offeror's "capability as demonstrated in the Pilot Patent Production Demonstration (PPPD)."

The solicitation explained that offerors would be required to demonstrate their capabilities pertinent to the requirement by producing a small sample of the products required in the solicitation. The PPPD required offerors to produce sample products similar to those required in the RFP's statement of work, using copies of patent files provided by the government as a part of the RFP. Offerors were required to prepare a set of magnetic tapes for 25 patent applications, extracting the relevant information from the photocopies of these previously published patent files. These products would then be processed by GPO and PTO, and the output would be evaluated for style and format consistent with those specified in the statement of work. If the product was found unacceptable, the offeror was given 5 working days to submit another tape product for evaluation.

When the RFP was originally issued on January 25, 1991, the closing date set for receipt of initial proposals was March 12. The solicitation required offerors to submit their completed PPPDs 3 weeks after the submission of their initial offers. The agency indicates in its protest report that it anticipated, under this schedule, that offerors would use the time between the issuance of the RFP and the closing date to develop whatever systems and complete whatever programming development was necessary to produce the PPPD products, and would spend the following 3 weeks performing the PPPD.

Amendment No. A001 extended the RFP's closing date to May 15. The next two amendments responded to offerors' questions and did not change the closing date. GraphicData was among the firms that submitted initial proposals by the May 15 deadline. Amendment No. A004, issued June 3, increased the time allotted for the PPPD by 1 week,

requiring its submission 4 weeks after the closing date. It also provided responses to questions received by the agency. Amendment No. A005 extended this period by an additional 2 weeks. Amendment No. A006, issued on June 21, advised offerors that the deadline for the PPPD was extended indefinitely and provided more information through more questions and answers.

GraphicData's initial protest, filed July 1, objected to this amendment. The protester contended that the open-ended test period created "an environment of uncertainty, unrest, and indefiniteness" that was unfair to offerors and rendered the PPPD "totally useless and ineffective." GraphicData asserted that any offeror could eventually meet the PPPD requirements if given enough time. The protester requested that the PPPD be eliminated completely from the technical evaluation factors, since it allegedly would no longer measure an offeror's ability to perform the contract.

Amendment No. A007, issued July 3, advised offerors that the agency would release a new set of 25 photocopied patent files on July 22. Using these files, offerors were to perform the PPPD and submit the required tape products 3 weeks later, on August 12. Offerors were given 7 working days to submit another tape product, if the first tape product were found unacceptable.

The Department of Commerce argues that GraphicData's first protest is rendered academic by amendment A007. We agree. Since this protest was directed against the indefinite extension of the due date for the PPPD, a condition that no longer exists, it would serve no purpose for us to determine whether that indefinite extension was proper. We therefore dismiss that portion of the protest.

GraphicData filed the second portion of its protest, directed against the last amendment, on July 9. The protester contends that the 3-week period allowed for performing the PPPD is as inappropriate as the previous indefinite deadline.[1] GraphicData contends that an offeror of 500 or fewer employees would not have in place, prior to award, the expensive and complex system required to produce the products outlined in the solicitation, and that the incumbent contractor has a considerable competitive

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[1]On August 1, while this protest was pending, GraphicData requested that the agency extend the due date for the PPPD by 3 weeks. The agency refused, and GraphicData cites this refusal as an additional basis of its protest. We do not consider the refusal to extend the test period to be a protest basis that is separate from the protest against amendment A007.

advantage in this regard. GraphicData complains that the PPPD is unreasonable, because it will not assist the agency in evaluating proposals in any meaningful way; this assertion is based on the protester's allegation that the second-generation, photocopied patent files supplied for use in the PPPD severely affect the use of computer scanning techniques (which techniques would, however, be effective on original source documents), and that the methodology used to perform the PPPD and that used after contract award are therefore "totally incongruous." Moreover, the protester claims that the incumbent contractor can retrieve much of the required information from its own library files without recapturing the data and that this advantage is so substantial that it would virtually eliminate any competition. This competitive advantage is additionally enhanced, according to GraphicData, by the fact that the current set of PPPD files is more voluminous than the initial set was. Finally, the protester repeats its assertion that the PPPD should be eliminated from the technical evaluation factors.

The agency argues that portions of the second protest are untimely, since they concern the basic PPPD requirement first established by the unamended RFP, but were not filed prior to the closing date for receipt of initial proposals. We agree. Our Bid Protest Regulations require that protests based on alleged improprieties that are apparent on the face of the solicitation be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). This requirement is intended to enable the procuring agency to decide on an issue while it is most practicable to take effective corrective action where the circumstances warrant. The Ratcliffe Corp.--Recon., B-220060.2, Oct. 8, 1985, 85-2 CPD ¶ 395. In this case, it was apparent from the initial RFP that a significant part of the technical evaluation would be based on the offeror's performance of the PPPD. Although the closing date for receipt of proposals was finally set for May 15, GraphicData did not file its initial protest, which challenged the PPPD as an evaluation factor, until after the 6th amendment was issued on June 21. Therefore, to the extent the protest is directed against the agency's use of the PPPD as an evaluation factor, it is dismissed as untimely. However, the remaining issues raised by amendment No. A007, concerning whether the 3-week period provided for performing the PPPD was insufficient for all offerors other than the incumbent, and whether any increase in the volume of the PPPD files or changes in the type of files that were supplied pursuant to that amendment were unduly burdensome, are timely since they were filed prior to the next closing date.

The agency states in its report that it views the test as an indicator of whether an offeror either has in place, or has the capability to have in place, systems and processes to properly interpret the raw patent application documents and to produce accurate, finished photocomposition products. The agency asserts that the test period that was originally established under the RFP included time to analyze solicitation requirements and prepare and put in place systems and processes that would allow offerors to complete the PPPD, and that the time period that was envisioned for completion of the demonstration has always been 3 weeks. Commerce points out that offerors have had many months since the RFP was issued to prepare for the PPPD, and that the amendment at issue gave offerors advance notice of almost 3 weeks before the new test period began.

Regarding the sufficiency of the 3-week period, the agency points out that the successful offeror will be required to process approximately 2,000 patent applications per week under the contract, and argues that while the PPPD's primary purpose is not to have offerors demonstrate that they can meet the 2,000 patent weekly volume, a test requiring prospective contractors to process 25 such applications in the course of 3 weeks cannot be considered unduly burdensome and reasonably relates to its needs under the contract.

A contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing necessary to ensure product compliance with the solicitation's specifications. We will not object to such a determination where it is reasonable. Constantine N. Polites & Co., B-240186, Oct. 25, 1990, 90-2 CPD ¶ 330.

Regarding the protester's argument that the shortened performance period is particularly burdensome because the PPPD uses more time-consuming types of documents than will be supplied under the contract, we do not find support for this allegation in the record. The protester refers to the use of second-generation documents, which contain stray marks that inhibit scanning for the PPPD, since these documents require more time-consuming manual intervention to process. The agency report indicates that the patent application documents that the contractor is required to process under the contract include not only the original application as filed by the inventor, but also amendments and PTO patent examiner actions entered during the prosecution of the patent application case, which would offer the same types of scanning problems. We note, also, that the incumbent contractor, in an interested party statement, asserts that second-generation manuscripts also appear in the course of weekly production and therefore are not the total anomaly to contract performance that the protester alleges.

The protester also argues that the current PPPD package is approximately 25 percent larger than the initial PPPD, and that this is unduly burdensome. While the record indicates that the number of manuscript pages did increase in the second PPPD, the agency argues that the current samples are more representative of the contract's actual requirements. The agency points out that the critical factor in determining the effort needed to produce the various PPPD products is not the number of pages, but rather the data included in the PPPD. The agency explains that the data to be processed is not limited to typical text. Much of the patent data consists of chemical formulas and structures, mathematical equations, drawings and tabular data, which are identified as complex work units because this data is the most difficult to process. The agency advises, and it is not rebutted by the protester, that the number of complex work units is roughly the same in the current PPPD as in the initial PPPD. Thus, the revised PPPD, although involving more pages, has not changed with regard to difficulty compared to the documents which the protester did not challenge under the initial PPPD. We find no basis to object to the increased number of pages in the second PPPD.

The protester also alleges that only the incumbent contractor could perform the PPPD in the 3-week period because it can retrieve the information from its own library files. The agency asserts that it has taken steps to negate any incumbent advantage--the PPPD documents do not contain actual patent or serial numbers, and were drawn at random from an extended time period, so that the incumbent could not easily locate the samples being used. In addition, it is unrebutted that the specifications for the required PPPD products are not the same as the products that the incumbent is required to produce under its existing contract, and thus even if it were able to reference its library files, the incumbent would still have to take steps to meet the current specifications for the PPPD. Also, the agency states that it reasonably could detect the incumbent's submission of the work product done under the current contract. We find no competitive advantage that has unfairly been given to the incumbent in this circumstance. While the incumbent does enjoy the advantage of having its systems in place, this advantage is not an unfair one: the government is not required to equalize a competitive advantage of incumbency unless it results from unfair motives or actions by the contracting agency. See Dynamic Instruments, Inc., et al., 64 Comp. Gen. 553 (1985), 85-2 CPD ¶ 596.

We find the PPPD a reasonable means for offerors to demonstrate the basic understanding and technical expertise necessary to perform under the contract and to test an offeror's ability to meet stringent schedule requirements. While the processes may vary in certain ways between PPPD

performance and contract performance, we find that the 3 weeks (and 7 working days for resubmission of a product found unacceptable) provided to perform the PPPD is reasonable when viewed in conjunction with the much longer period that has been allowed for offerors to prepare for performance and when viewed in relation to the shorter time that will be permitted under the contract to process a much higher volume of patents.

The protest is denied.

James F. Hinchman
General Counsel