



Comptroller General
of the United States

Washington, D.C. 20548

146898

Decision

Matter of: Norfolk Shipbuilding & Drydock Corporation

File: B-247053.5

Date: June 11, 1992

Daniel R. Weckstein, Esq., Vandeventer, Black, Meredith & Martin, for the protester,
Rhonda L. Russ, Esq., Department of the Navy, for the agency.

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DIGEST

Agency properly canceled request for proposals for phased ship maintenance services where, prior to the date set for receipt of best and final offers, the agency inadvertently disclosed to a competitor unredacted bid protest documents which contained protester's proprietary business information concerning its proposal. Agency reasonably determined that to proceed with the procurement would be prejudicial to the government and to the integrity of the competition.

DECISION

Norfolk Shipbuilding & Drydock Corporation (Norshipco) protests the cancellation of request for proposals (RFP) No. N00024-91-R-8535, issued by the Department of the Navy, Naval Sea Systems Command (NAVSEA), for the phased maintenance of the USS Austin, the USS Pensacola, and the USS Portland, three LSD/LPD class vessels homeported in Norfolk, Virginia. The protester contends that NAVSEA's decision to cancel the RFP was not reasonable.

We deny the protest.

BACKGROUND

The RFP, issued on March 20, 1991, contemplated the award of a cost-plus-award-fee contract for nine phased maintenance availabilities to be performed on the three ships over a 5-year period, including options. Section M of the RFP stated that award was to be made to the offeror submitting the proposal most advantageous to the government, cost and other factors considered. The RFP also explained that NAVSEA would evaluate proposed costs, including all option

quantities, for realism, reasonableness, and validity. The RFP further stated that cost, while not controlling, would be an important evaluation factor.

Of the seven firms solicited, five, including Worshipco, submitted offers by the June 4 extended closing date for receipt of initial proposals. The agency held discussions and received best and final offers (BAFO) from all five. In a December 10 letter, the agency announced that the contract had been awarded to Metro Machine Corporation for a total proposed cost of \$32,271,346.

On December 19, Moon Engineering Co., Inc. (MECO), the incumbent, protested the award to our Office, essentially arguing that NAVSEA had improperly evaluated technical and cost proposals, had failed to conduct meaningful discussions with MECO, and had created an improper auction.¹ Following its debriefing, another offeror, The Jonathan Corporation, also protested the award to our Office on virtually identical grounds.

While preparing its report on MECO's and Jonathan's protests, NAVSEA discovered that during negotiations, MECO and another offeror, the Bethlehem Steel Corporation, were given incorrect and misleading information regarding their proposed costs. Although the agency had correctly identified for those two offerors costs for certain contract line items (CLIN) that significantly deviated from the government's estimates, NAVSEA had reversed the direction of the deviation. Specifically, NAVSEA had indicated that some costs those two offerors proposed for certain CLINs were understated, when in fact they actually exceeded the government's estimate.

In a January 15, 1992, letter, the agency informed our Office that it had discovered the error, and requested that we dismiss MECO's and Jonathan's protests based upon the following proposed corrective action: 1) terminate for convenience the contract awarded to Metro, with the exception of the first availability on the USS Austin; 2) amend the RFP to reflect the reduction from nine to eight in the number of availabilities required; 3) reveal the proposed costs and fees all offerors submitted in response to BAFOs on the original nine availabilities; and 4) conduct

¹In accordance with Federal Acquisition Regulation (FAR) § 33.104(c)(2)(ii), the head of the procuring activity determined that urgent and compelling circumstances significantly affecting the interests of the United States did not permit suspending performance of the contract pending our decision on the protest, and directed Metro to continue performance of the first availability on the USS Austin.

another round of discussions with all offerors in the competition, including Metro, and request new BAFOs for the remaining eight availabilities. MECO subsequently withdrew its protest based upon NAVSEA's proposed corrective action, and we dismissed as academic Jonathan's protest.

On February 4, MECO protested to our Office the agency's implementation of the corrective action. MECO asserted that in connection with requesting second BAFOs, rather than disclosing total costs proposed for the initial nine availabilities, as MECO anticipated, NAVSEA disclosed all costs and fees all offerors proposed for each CLIN and sub-line item in their initial BAFOs.² In accordance with our Bid Protest Regulations, MECO furnished a copy of its protest to the contracting agency. See 4 C.F.R. § 21.1(d) (1992). Throughout its protest document, MECO expressly identified material which it considered proprietary and that should not be disclosed to any party except those admitted under the protective order issued by our Office in connection with MECO's protest. See 4 C.F.R. § 21.3(b).

Notwithstanding MECO's notice that its protest documents contained proprietary information that should be protected, NAVSEA inadvertently provided an unredacted copy of MECO's protest to Metro. NAVSEA immediately informed MECO and our Office of the disclosure. On February 7, MECO supplemented its earlier protest, this time objecting to the inadvertent disclosure of its protest document to Metro. On February 10, NAVSEA issued amendment No. 0017 canceling the RFP.³ This protest followed.

Norshipco does not dispute the facts recounted above. The protester nevertheless maintains that the cancellation is not warranted because Metro took precautions sufficient to assure NAVSEA that the inadvertent release of MECO's unredacted protest letter to Metro did not affect the integrity of the procurement. Norshipco also argues that

²MECO also alleged that disclosing all CLIN prices rendered defective various terms of the solicitation, including the government's revised work estimates and the RFP's evaluation scheme.

³On February 14, we dismissed MECO's protests (B-247053.3 and B-247053.4) as academic. On February 27, Jonathan filed a protest in our Office challenging the cancellation and requesting that we reinstate its earlier protest of the original award to Metro. In a separate decision, The Jonathan Corp., B-247053.7, May 15, 1992, 92-1 CPD ¶ 446, we dismissed Jonathan's protest as untimely because it was filed more than 10 working days after Jonathan learned of the cancellation. See 4 C.F.R. § 21.2(a)(2).

since the agency had amended the RFP to reflect the reduced number of required availabilities, the information disclosed to Metro was irrelevant to the second BAFO request.

DISCUSSION

In a negotiated procurement, an agency need only have a reasonable basis to cancel a solicitation after receipt of proposals, as opposed to the cogent and compelling reason required for canceling an invitation for bids (IFB) after opening sealed bids. FAR § 14.404-1; Logics, Inc., B-237411, Feb. 1, 1990, 90-1 CPD ¶ 140. The reason for this distinction is that bids in response to an IFB are public and to reject them and seek new bids would discourage competition. See, e.g., GAF Corp.; Minnesota Mining and Mfg. Co., 53 Comp. Gen. 586 (1974), 74-1 CPD ¶ 68. The same governmental interest in achieving full and open competition is present, and the same justification for canceling an RFP is applicable, where, as here, the cancellation occurs after prices have been disclosed during bid protest proceedings. See Carson Optical Instruments, Inc., B-228040, Oct. 19, 1987, 87-2 CPD ¶ 373. Under these circumstances, cancellation of an RFP is proper where the record contains plausible evidence or a reasonable possibility that not to do so would be prejudicial to the government or the integrity of the procurement system. See General Projection Sys., 70 Comp. Gen. 345 (1991), 91-1 CPD ¶ 308.

We find that the cancellation here was warranted. It is fundamental to the competitive system that an offeror's price must not be disclosed, and such disclosure is specifically prohibited by regulation. See FAR § 15.610(e)(2)(iii); Wylie Mechanical, B-228695.4, Aug. 4, 1989, 89-2 CPD ¶ 107. Disclosure of one offeror's price is inconsistent with the principle that offerors must be allowed to compete on an equal basis. See generally MicroSim Inc.--Recon., B-234035.2; B-234035.3, Oct. 11, 1989, 89-2 CPD ¶ 336 (agency's failure to assure that offerors were competing on a common basis clearly could have affected outcome of competition); Carson Optical Instruments, Inc., supra (termination and resolicitation was proper where, as a result of defects in procurement, offerors were not competing on a common basis, and agency therefore did not enjoy the full benefits of competition). Here, the agency reasonably determined that due to the inadvertent disclosure to Metro of MECO's unredacted protest documents, offerors would not be competing on an equal basis.

NAVSEA provided Metro the unredacted copy of MECO's protest letter on February 6, 5 days prior to the February 11 extended closing date set for receipt of new BAFOs for the remaining eight availabilities. Norshipco does not deny

that MECO's protest documents contained confidential information and proprietary cost data that should not have been disclosed to Metro. The protester contends, however, that the disclosure did not actually provide Metro with any new information that had not already been provided by NAVSEA in its earlier release of all costs and fees proposed by all offerors.⁴ Norshipco also argues that, in light of the amended RFP, the disclosed information was irrelevant to the second BAFO request, and that NAVSEA has not shown that Metro could have used to its advantage any information disclosed to the firm in MECO's protected protest documents.

We disagree with the protester's conclusions since MECO's protected documents provided Metro with new and additional information that had not been previously disclosed to all offerors. Enclosure No. 1 to MECO's protest, for example, was a document titled "Second (BAFO) Questions," in which NAVSEA specifically identified several work items which the agency considered MECO to have significantly underestimated or overestimated when compared with updated government estimates. By comparing that document with the costs MECO proposed in its BAFO, which NAVSEA had previously released to all offerors, Metro could specifically identify those areas in which MECO could be expected to adjust its proposed costs in its new BAFO; Metro could predict with a high degree of certainty the direction of those adjustments; and Metro could reasonably approximate the amount of those adjustments based on the proposed costs and fees for those items.

MECO's protest letter also contained a discussion of the initial and BAFO costs the firm proposed for work item No. 583-90-001, which represented the highest cost estimate of all work items in the RFP. That work item was included in the RFP's notional specification package, for which offerors were required to propose BAFO costs, notwithstanding the reduction in the total number of

⁴As noted above, in connection with requesting second BAFOs, NAVSEA disclosed all costs and fees offerors proposed in their initial BAFOs. MECO's protest challenging that disclosure was dismissed as academic once NAVSEA decided to cancel the RFP. In any case, it appears that by making that disclosure after partially terminating Metro's initial award, and prior to requesting another round of BAFOs on the remaining eight availabilities, NAVSEA placed all competing firms on an equal footing. See, e.g., Ford Aerospace and Comm. Corp. et al., B-224421.2 et al., Nov. 18, 1986, 86-2 CPD ¶ 582.

availabilities required,⁹ Norshipco's argument, therefore, that in view of the amended RFP, the cost information in MECO's protest letter was irrelevant to its new BAFO, has no merit.

The disclosure to Metro of MECO's protest documents--which included MECO's proposed costs on one of the major work items in the RFP's notional specification package and the results of the agency's comparisons of MECO's proposed costs with the government's estimates for various CLINs--would clearly be prejudicial to MECO and to the integrity of the competition, since Metro could use that information to its competitive advantage in preparing its own BAFO. We therefore find that the agency reasonably determined that the disclosure to Metro of MECO's proprietary information undermined the integrity of the competitive system and that cancellation was appropriate. See Information Ventures, Inc., B-241441.4; B-241441.6, Dec. 27, 1991, 91-2 CPD ¶ 583.

We find unpersuasive Norshipco's argument that in light of Metro's precautionary steps in safeguarding MECO's protest documents, canceling the solicitation is not warranted. In this connection, Norshipco states that upon learning of the disclosure, Metro sealed its already completed BAFO, and offered to provide the agency with an affidavit attesting that Metro did not alter or otherwise change its BAFO based on information contained in MECO's protest documents. Norshipco also states that Metro collected "all copies" of MECO's proprietary documents, and either destroyed or returned them to NAVSEA.

The agency explains, however, that although Metro had initially indicated that only one photocopied set of MECO's protest documents existed, NAVSEA learned that Metro had apparently made and distributed several copies of the documents. Given the inconsistent information Metro provided NAVSEA regarding the distribution of MECO's protected documents, and given the sensitive nature of the information contained in those documents, we think that the agency reasonably concluded that Metro's proffered assurances did not adequately remove all doubts that the integrity of the procurement would not be compromised.

⁹NAVSEA states that due to the unpredictable nature of the phased maintenance program, the specific work that will be performed during a given availability is generally unknown at the time a solicitation is issued. The agency thus uses a "notional specification package" for purposes of soliciting and evaluating proposals. Offerors were required to submit proposed costs for each availability based upon the complete notional specification package.

Further, contrary to the protester's suggestions, the legal standards discussed above require only that the record contain a reasonable possibility of prejudice to the integrity of the competition. While Metro in fact may not have altered its second BAFO based on information in MECO's protected documents, it is not possible to confirm that Metro was not influenced by disclosure of that information. Accordingly, we find that under these circumstances, the record contains a reasonable possibility that the integrity of the competition was undermined, warranting cancellation and resolicitation of the remaining availabilities.⁶ Id.

Finally, Norshipco requests reimbursement of all costs and attorneys' fees it has incurred as a result of NAVSEA's alleged mishandling of this procurement, including costs incurred in pursuit of this protest. In this connection, Norshipco argues that the firm will be at a competitive disadvantage in any subsequent resolicitation of the remaining availabilities due to NAVSEA's restructuring of the procurement, which will afford smaller shipyards the opportunity to submit more competitive proposals. Our Regulations permit the recovery of costs only where a protest is found to have merit. 4 C.F.R. § 21.6(d). Since the cancellation here was proper, there is no legal basis for recovery of protest costs. See Technical and Mgmt. Servs. Corp., B-242836.3, July 30, 1991, 91-2 CPD ¶ 101. Whether Norshipco successfully competes in any resolicitation of the remaining availabilities has no bearing on the propriety of the cancellation here.

The protest and the claim for costs are denied.


for James F. Hinchman
General Counsel

⁶The agency states that canceling the RFP and resoliciting the requirements will likely mitigate or completely eliminate any possible prejudice caused by the release of the unredacted copy of MECO's protest documents. Rather than a single solicitation for all the remaining availabilities, NAVSEA plans to issue separate solicitations for different portions of the work. NAVSEA issued an RFP on March 11, for the first of the remaining eight availabilities, which is scheduled to commence on the USS Pensacola on June 1. The agency states that it plans to issue an IFB in July for the second availability scheduled for the USS Portland, and anticipates issuing an RFP for the remaining availabilities in August.