



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Fletcher Construction Company, Ltd.

File: B-248977

Date: October 15, 1992

Alan Brown for the protester,
Paul M. Sullivan, Esq., and Paul M. Fisher, Esq., Department
of the Navy, for the agency.
Aldo A. Benejam, Esq., and Andrew T. Pogany, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Allegation that contracting agency improperly failed to perform a "cost realism" type analysis on fixed prices offered in connection with proposals for a construction contract is denied where the agency requested and received two separate price breakdowns for the basic work; each offeror's price breakdown was evaluated and compared to the government's independent estimate, and to corresponding competitor's prices; protester's total price for the basic work and all options was less than 10 percent higher than awardee's total price; and the agency awarded the contract in accordance with the terms of the solicitation for the basic work and one option item at a price that was less than 3 percent lower than the protester's prices for the same items.

2. Where the period for acceptance of all proposals had expired by time of award, the contracting officer properly may allow the successful offeror to waive the expiration of its proposal acceptance period, without reopening negotiations, to make award on the basis of the offer as submitted, since such waiver does not confer any unfair competitive advantage on the awardee nor prejudice the protester.

3. Allegations that contracting agency improperly disseminated protester's cost savings ideas to competitor by incorporating into the solicitation changes to the scope of work based upon those cost savings ideas are dismissed where offerors were informed during negotiations that cost savings ideas would be incorporated by amendment to the solicitation and that offerors would be afforded an opportunity to submit revised proposals based upon those changes; cost savings ideas were in fact incorporated into the solicitation by

amendment; and this protest was not filed until well after the time set for receipt of best and final offers--offerors may not participate in a procurement and wait until after they are not selected for award to protest alleged improprieties fully disclosed and incorporated by amendment into the solicitation.

DECISION

The Fletcher Construction Company, Ltd. protests the award of a contract to the Kitano Construction Corporation under request for proposals (RFP) No. N62742-92-R-0511, issued by the Department of the Navy, Naval Facilities Engineering Command, for the construction of the Parliament Building in Honiara, Guadalcanal, in the Solomon Islands. The protester contends that the Navy improperly failed to perform a "cost realism" analysis of the awardee's prices; that award was improper because the period for acceptance of Kitano's offer had expired prior to the award; and otherwise objects to the agency's negotiation method.

We deny the protest in part and dismiss it in part.

The RFP, issued on October 7, 1991, contemplated the award of a firm, fixed-price contract. The RFP stated that award would be made to the responsible offeror whose proposal conforms to all requirements of the solicitation and was considered to be most advantageous to the government, price, and other factors considered. Offerors were required to submit separate prices for the basic construction work, contract line item (CLIN) 0001, and for six option items CLIN 0002 through CLIN 0007.¹ The RFP announced that the estimated price range for the required work was between one and five million dollars and stated that, for award purposes, the Navy would evaluate the total of prices submitted for CLINs 0001 through 0007, termed the "total package." The RFP further stated that "a determination may be made not to evaluate 'total package' proposals [if] the low 'total package' proposal exceed(ed) the amount of funds available." In that event, the proposal which enabled the government to purchase with the funds available CLIN 0001 and the greatest number of options would be determined the most advantageous proposal.

The RFP also stated that while price would be the predominant factor in contractor selection, "cost realism and the demonstrated capability of the contractor to complete the work on time and to a high level of quality will also be

¹These optional items included installation of finishes throughout various sections of the completed building, and grading with asphalt road, parking lots, and parade grounds.

considered." Finally, the RFP stated that the government reserved the right to award to other than the contractor submitting the lowest priced proposal if such award best served the interest of the government.

Of the 19 solicitations distributed, the protester and the awardee submitted the only 2 proposals by the December 27, 1991, extended closing date. Both firms' initial prices for the "total package" exceeded the agency's estimate for the project, and both included with their proposals various terms and conditions qualifying material terms of the solicitation which, according to the agency, rendered both initial proposals nonconforming to the RFP. By letters dated January 9, 1992, the Navy requested each offeror to submit a breakdown of prices for each of 16 major work divisions included in CLIN 0001, and for excavation work included in CLINs 0005 and 0006.

The letter to each offeror also explained that the inclusion of certain terms and conditions in their offers rendered proposals nonconforming with essential terms of the solicitation, and requested that each offeror submit revisions or additional information as needed to make their proposals conform to the terms of the RFP. The letter also warned each offeror that the Navy could not award a contract based on a nonconforming proposal nor at a price that exceeds the funds available for the project, and expressed the Navy's desire "to be sure that . . . all possibilities for [price] reduction[s] are explored" during negotiations.

Both firms responded with the requested price breakdown and with comments responding to each of the agency's areas of concern. The protester's response included 15 specific suggestions and the approximate amount of savings to the government if each were implemented; the awardee's response also included a list of approximately 20 areas where savings could be achieved. By letters dated January 24, the agency invited each offeror to meet with Navy officials in Hawaii for face-to-face negotiations, and included a list of specific items (primarily based on the 16 major work divisions of CLIN 0001) that would be discussed during negotiations. The agency conducted negotiations with both offerors during January 29 and 30.

On February 6, 1992, following negotiations, the agency issued amendment No. 0004 to the RFP, incorporating into the RFP several of the cost savings ideas proposed by Fletcher and Kitano, as well as ideas independently developed by the Navy. Subsequently, on March 6, the agency requested best

and final offers (BAFO) from both firms. BAFO prices were as follows:

	<u>Kitano</u>	<u>Fletcher</u>
CLIN 0001	\$3,932,072	\$3,928,665
CLIN 0002	69,290	189,485
CLIN 0003	65,385	105,077
CLIN 0004	44,888	84,090
CLIN 0005	72,221	217,319
CLIN 0006	53,386	96,923
CLIN 0007	42,758	81,160
Total	<u>\$4,280,000</u>	<u>\$4,702,719</u>

Following an evaluation of BAFOs, the agency determined that both offerors' proposals required further clarification of terms and conditions which apparently conflicted with material solicitation requirements, and for each offeror to explain or verify certain prices. By separate letter to each offeror, the agency requested further clarifications and confirmation of prices. Both offerors responded to the agency's request for clarifications, and both offerors confirmed their BAFOs without making any changes to their prices.

Based upon review of BAFOs, the agency found that Kitano's proposal was the most advantageous to the government and, after determining that the firm was responsible, awarded the contract to Kitano on April 24 for CLINs 0001 and 0002 only. The protester subsequently filed an agency-level protest on April 30, but before the agency responded to that protest, Fletcher filed this protest with our Office on June 8.² By letter dated June 18, addressing each of Fletcher's contentions, the agency denied the protest.

PRICE ANALYSIS

Fletcher asserts that the Navy did not perform a "cost realism" analysis³ of Kitano's price as required by the

²Contrary to the protester's contentions, since Fletcher did not file this protest in our Office within 10 days of the date of contract award, the Navy was not required under the Competition in Contracting Act of 1984, 31 U.S.C. 3553(d)(1) (1988), to suspend contract performance pending resolution of Fletcher's protest.

³Both the agency and the protester use the term "cost realism" and "price realism" interchangeably. Since the RFP contemplated fixed prices, the term "price realism" is appropriate. However, for purposes of our decision, the difference in terminology is not material.

solicitation, and that based on that analysis, the agency would have found Kitano's proposal "nonresponsive" because the awardee submitted unrealistic, "below cost" prices.

The record shows that, contrary to the protester's assertion, the agency did conduct a price realism analysis. Specifically, the record shows that the agency requested and received two price breakdowns from each offeror--one before the first round of discussions, and another following the submission of revised proposals. Each offeror's price breakdown was evaluated and compared against the government's estimate and competitor's prices; each price breakdown was accompanied by relevant clarifications and explanations as to how the work would be completed; and each offeror confirmed its BAFO prices. The record further shows that, in accordance with the basis for award announced in the RFP, the agency awarded Kitano a contract for CLINs 0001 and 0002 only, at a price (\$4,001,362) that was less than 3 percent lower than Fletcher's prices for those two items (\$4,118,150); Fletcher's total price was less than 10 percent higher than Kitano's total price.

In our view, based on its evaluation of each offeror's price breakdown and Kitano's explanations on how the work would be accomplished, the Navy reasonably concluded that Kitano's proposal was realistically priced. Moreover, since the total award price was within 3 percent of Fletcher's price for the same two items, we see no basis for the protester's assertion that Kitano submitted unrealistically low, below-cost prices.

ACCEPTANCE OF KITANO'S PROPOSAL

Fletcher next alleges that the Navy improperly awarded the contract after the period for acceptance of Kitano's offer had expired. In this regard, the protester asserts that although the closing date for receipt of BAFOs was March 11, 1992, the standard form (SF) 1442 on which BAFOs were to be submitted required that offers remain open for 60 days from

'Throughout its submissions, Fletcher alleges that Kitano's proposal was "nonresponsive" because it submitted unrealistic prices. The solicitation, however, is clearly identified as a "REQUEST FOR PROPOSALS," contemplating negotiations prior to award. Fletcher's reference, therefore, to Kitano's proposal as "nonresponsive" is inaccurate, since the concept of responsiveness is not applicable to negotiated procurements. See Merrick Eng'g, Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130. We interpret this aspect of Fletcher's protest as essentially contending that Kitano's proposal should have been rejected because the firm submitted unrealistically low prices.

the February 18 date set for receipt of initial proposals. According to the protester's calculations, therefore, since the period for acceptance of Kitano's offer expired 60 days after February 18, or on April 18, award to Kitano on April 24 was improper.

Even assuming that protester's interpretation of the acceptance period clause on the SF 1442 on which BAFOs were submitted is correct, and that all offers including the protester's had expired by the time of award, it is not improper for an agency to accept an expired offer for a proposed award without reopening negotiations. Protective Materials Co., Inc., B-225495, Mar. 18, 1987, 87-1 CPD ¶ 303. Where the acceptance period has expired on all offers, the contracting officer may allow the successful offeror to waive the expiration of its proposal acceptance period without reopening negotiations to make an award on the basis of the offer as submitted, since waiver under these circumstances is not prejudicial to the competitive system. Sublette Elec., Inc., B-232586, Nov. 30, 1988, 88-2 CPD ¶ 540. In our view, even assuming that Kitano's period for acceptance expired on April 18, as the protester contends, award to the firm was unobjectionable where the period for acceptance of Fletcher's proposal had also expired, and waiver of the expiration period for Kitano's offer did not confer an unfair competitive advantage on the awardee nor prejudice the protester.

COST SAVINGS IDEAS

The protester next contends that its cost savings ideas were improperly disseminated to Kitano in amendment No. 0004 to the RFP, thereby reducing Fletcher's ability to submit the most advantageous proposal. This aspect of Fletcher's protest is untimely and will not be considered because it concerns an alleged impropriety incorporated into the RFP that was apparent on the face of the amendment. To be timely under our Bid Protest Regulations, such a protest must be filed not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1992).

Here, the record shows that after receipt of initial proposals on December 27, 1991, the Navy notified Fletcher that the prices offered exceeded the funds available for the project and that the agency would be exploring areas of potential cost savings. On January 29 and 30, 1992, during the initial round of discussions with the protester, the Navy determined that the RFP required major changes to the scope of work if it was to award a contract within the amount of funds available. The record shows that during those discussions the Navy requested ideas for cost reductions from Fletcher as well as from Kitano, informed

Fletcher that any changes to the scope of work resulting from the firm's suggestions would be incorporated into the RFP by amendment, and that offerors would be given an opportunity to submit revised proposals based on those changes.

The Navy subsequently issued amendment No. 0004 on February 6, incorporating into the RFP various changes to the scope of work--including some reflecting the cost savings ideas Fletcher proposed during negotiations--and requesting revised proposals by February 18. By letter dated February 24, the agency requested Fletcher to clarify certain aspects of its revised proposal, and subsequently requested BAFOs by March 11.

Although the record shows that Fletcher apparently expressed some disagreement to Navy officials over the "wisdom" of volunteering any cost savings suggestions, Fletcher participated fully in this process. The protester submitted cost savings ideas to the Navy, submitted a revised proposal, responded to the agency's request for clarifications based on the changed scope of work, and submitted a BAFO. If the protester had any objections to the incorporation of any of its cost savings ideas into the RFP, at the latest, Fletcher was required to raise those objections prior to the time set on March 11 for receipt of BAFOs. See 4 C.F.R. § 21.2(a)(1). Fletcher may not participate in a procurement by volunteering cost savings ideas to the Navy, explaining and clarifying its revised proposal based upon those ideas, and submitting a BAFO--and then wait to complain about the process only after the firm was not selected for award. See Don's Wheelchair & Ambulance Serv., Inc., B-216790, Jan. 22, 1985, 85-1 CPD ¶ 82. Since Fletcher did not file its agency-level protest until April 30, and did not file the instant protest until June 8--both well after the March 11 closing date set for receipt of BAFOs--any allegation concerning the Navy's incorporation of its cost savings ideas into the RFP by amendment No. 0004 are untimely and will not be considered.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel