



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fisher Scientific Company; VWR Scientific

File: B-252418.4; B-252418.5; B-252418.6

Date: June 15, 1994

Ross L. Crown, Esq., and Patrick D. Allen, Esq., Civerolo, Wolf, Gralow & Hill, for Fisher Scientific Company; Philip J. Mause, Esq., Drinker Biddle & Reath, and J. Randolph MacPherson, Esq., Sullivan & Worcester, for VWR Scientific, the protesters.

Ronald E. Cone, Department of Energy, for the agency. Scott H. Riback, Esq., and M. Penny Ahearn, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that second round of best and final offers is prejudicial to protester because its price has been exposed is denied where, in fact, no award has been made and prices have not otherwise been exposed.
2. Protest bases relating to revised solicitation terms are dismissed as academic where objectionable provisions have been changed to satisfy protester's concerns.
3. Protest that one firm was afforded improper post best and final offer discussions is dismissed as academic where, because of changes to solicitation, procuring activity will necessarily be required to reopen acquisition and permit the submission of revised offers.

DECISION

Fisher Scientific Company and VWR Scientific protest the actions of the University of California under request for proposals (RFP) No. W-7405-ENG-38, issued for subcontractor services to operate the chemical and laboratory supplies in-plant store at the Department of Energy's (DOE) Los Alamos National Laboratory.¹ Fisher primarily objects to the

¹The University is subject to our bid protest jurisdiction as a maintenance and operations (M&O) contractor; DOE's regulations specifically provide for our Office to consider
(continued...)

University's decision to reopen the acquisition and amend the RFP after previously receiving best and final offers (BAFO). Fisher also objects to various changes to the RFP included in amendment No. 5, issued in connection with the University's decision to reopen the acquisition. VWR contends that the University improperly engaged in post-BAFO discussions with Fisher.

We deny Fisher's protest in part and dismiss it in part; we dismiss VWR's protest.

The solicitation was issued on March 16, 1992, and requested technical and price proposals for an indefinite quantity contract. For purposes of these protests, only certain aspects of the price proposal requirements of the RFP are relevant. Offerors were required to provide basic pricing information for a large number of items included in what the RFP described as a market basket of required supplies. In addition, offerors were required to provide information relating to adjustments to be made to the basic unit prices during contract performance. (For example, offerors were required to provide volume discount factors to be applied based on the amount of goods actually ordered during the contract.) The RFP provided that the basic unit prices for the market basket items would be adjusted by certain of the factors to arrive at what is referred to as the total final product cost. Those adjustment factors that were not used to arrive at the total final product cost were to be evaluated separately.

The University received offers from three firms. After initial evaluation, all three offerors were included in the competitive range. Discussions were then held with each firm, and BAFOs were solicited and received. After receiving BAFOs, however, the University determined that it would be necessary to amend certain portions of the RFP. The University therefore issued amendment No. 5 to the solicitation.

Fisher's primary objection is based on the University's decision to solicit a second round of BAFOs. Fisher contends that it is improper for the University to reopen

¹(...continued)
 protests involving such M&O contractors. 4 C.F.R. § 21.3(m)(10) (1994); Gelco Servs., Inc., B-253376, Sept. 14, 1993, 93-2 CPD ¶ 163. We review subcontract acquisitions by prime M&O contractors under the "federal norm" standard, i.e., to determine whether the procurements and subsequent awards are consistent with the policy objectives set forth in statutes and regulations which apply directly to federal agency procurements. Id.

the acquisition because obtaining a second round of BAFOs is not clearly in the government's interest. In support of its position, Fisher cites decisions of our Office to the effect that it is improper for an agency to solicit a second round of BAFOs after award where the awardee's price has been exposed and the only deficiencies in the procurement were technical in nature and not prejudicial to the offeror. See, e.g., BDM Int'l, Inc., 71 Comp. Gen. 363 (1992), 92-1 CPD ¶ 377. Fisher contends that a subcontract has already been awarded to it, and therefore that the University's actions will be prejudicial.

We find nothing objectionable in the decision to reopen the competition here. Contrary to Fisher's allegation, no subcontract has been awarded to it or any other offeror. Further, neither Fisher's price nor its relative standing among competing offerors has been revealed. Consequently, the University's decision to reopen the acquisition does not cause competitive prejudice to Fisher or any other offeror, and the line of cases cited by Fisher does not apply. Moreover, as discussed below, the changes to the market basket item descriptions, as well as the way in which unit prices will be evaluated, will have an effect on offerors' prices. A solicitation change which affects price is a material change, see generally Park Sys. Maintenance, Inc., B-252453.4; B-253373.3, Nov. 4, 1993, 93-2 CPD ¶ 265, which forms a proper basis for reopening an acquisition.

As for Fisher's concerns surrounding the terms of amendment No. 5, its first objection relates to the proposal preparation and evaluation procedures for the market basket items. Under the terms of amendment No. 5, offerors were required to calculate prices for each item listed in the market basket portion of the RFP. (The market basket portion of the RFP contains a large representative sample of the items to be stocked during performance.) However, where the market basket description of an item was inadequate, in the offeror's view, for it to identify the required product and specify a price, the offeror could submit a "no-bid" for the item in question; where a firm submitted such a "no-bid," the University would determine the firm's price by averaging the prices offered by all other firms.

Fisher objects to the market basket "no-bid" procedures as improperly favoring VWR, the incumbent contractor, in two ways: (1) VWR allegedly prepared the market basket item descriptions; and (2) the price averaging procedures would enable VWR to skew Fisher's price for an item that Fisher submits a "no-bid" on by offering a very low price for such an item. The first aspect of this argument is without merit. The record contains no evidence to support Fisher's contention that VWR prepared the market basket item descriptions. Rather, the record shows only that VWR

responded to two requests for product information from the University, and that the information solicited was used in preparing the market basket item descriptions.

As for the second aspect, the University states that it agrees with Fisher's concerns in this area, and proposes to address the matter in two ways: (1) it will provide all offerors an opportunity to request additional information about any of the market basket item descriptions which are found to be inadequate and, after receiving the information will include it in an amendment; and (2) in the event that "no-bids" then are received for any of the items, the University will use the highest price received from the other offerors for purposes of determining a firm's price for an item on which it submits a "no-bid." These actions are responsive to Fisher's objections and thus render its protest academic. Offerors will be afforded an opportunity to obtain additional information about item descriptions that are unclear, and the additional information will enhance the ability of all competing firms to prepare their offers on a relatively equal basis.² In addition, Fisher's concern about its prices for "no-bid" items being skewed downward is addressed by the University's decision instead to use the highest price received for purposes of evaluating "no-bid" items.³ Since the University's actions address Fisher's concerns, we dismiss this allegation as academic. Steel Circle Bldg. Co., B-233055; B-233056, Feb. 10, 1989, 89-1 CPD ¶ 139.

Fisher also objects to a change in the RFP's stated basis for calculating what is referred to as the service-level rebate. The RFP requires the successful contractor to keep all items on hand so that at least 95 percent of all orders placed with the in-house store will be filled with items in stock. The RFP also requires the contractor to pay a service-level rebate of a stated percentage of monthly sales where the contractor fails to meet the 95-percent

²To the extent that VWR enjoys some advantage in terms of its understanding of the market basket item descriptions by virtue of its incumbency, this is not improper. It is not unusual for a firm to enjoy some competitive advantage because of its incumbency, and contracting activities are not required to equalize or discount such an advantage, so long as it is not the result of preferential treatment or other unfair action. See generally Bara-King Photographic, Inc., B-253631, Sept. 15, 1993, 93-2 CPD ¶ 169.

³Fisher's concern that it will be unable to submit pricing for market basket items that are inadequately described highlights both the materiality of these RFP provisions and the need for the University to clarify them.

performance requirement. Under the RFP as originally written, the service-level rebate was to be considered in the evaluation of price, but not to arrive at the total product price being offered. Under the terms of amendment No. 5, the service-level rebate was to be calculated using an assumed dollar value of \$250,000 and was to be included in the calculation of the total product price. Fisher objects to the use of an assumed-dollar-value estimate, and also to the inclusion of the service-level rebate in the calculation of total product price.

The University states that it intends to amend the RFP to delete the \$250,000 figure which was to be used to calculate the service-level rebate. In addition, the service-level-rebate adjustment will not be used for purposes of calculating the offerors' total product price. Since these changes directly respond to Fisher's concerns, this aspect of Fisher's protest is also academic. Steel Circle Bldg. Co., supra.

Finally, Fisher objects to the University's solicitation of new BAFOs after its deletion of a cost element referred to as the facilities space tax (FST). The earlier version of the RFP included the FST (essentially a charge per square foot for the space to be occupied by the contractor) as a cost element for evaluation. As part of amendment No. 5, the University deleted the FST. Fisher's initial protest--which was filed before amendment No. 5 was issued but after the University announced that the FST would be deleted--objected to the solicitation of a new round of BAFOs based solely on the deletion of the FST. Fisher argued that a new round of BAFOs was unnecessary because deletion of the FST would affect all firms equally in terms of price.

The University's other solicitation changes--particularly its actions regarding the market basket item descriptions and the procedure to be used in evaluating "no-bid" pricing--potentially will affect each offeror's price differently. Thus, regardless of whether deletion of the FST would serve as a proper basis for the University's solicitation of another round of BAFOs, the appropriate course of action at this time is for the University to obtain revised offers based on the new market basket item descriptions and the new procedures for evaluating "no-bid" prices. We therefore need not decide whether the University's deletion of the FST--without any other change to the RFP--would serve as an adequate basis for soliciting revised BAFOs. Steel Circle Bldg. Co., supra.

As a final matter, VWR protests that the University improperly engaged in post-BAFO communications with Fisher; according to VWR, this communication constituted improper discussions. However, even if VWR were correct, the

appropriate remedy would be to reopen the acquisition so that all firms would be afforded adequate discussions. See generally SmithKline Beecham Pharmaceuticals, N.A., B-252226.2, Aug. 4, 1993, 93-2 CPD ¶ 79. Since, as already discussed, the University is reopening the acquisition in any event, VWR's protest is academic. Steel Circle Bldg. Co., supra.

Fisher's protest is denied in part and dismissed in part; VWR's protest is dismissed.



for Robert P. Murphy
Acting General Counsel