



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Brisk Waterproofing Co., Inc.

File: B-256138.3

Date: June 30, 1994

Buel White, Esq., Dennis Adelson, Esq., and Brian Mizoguchi, Esq., Verner, Liipfert, Bernhard, McPherson and Hand, for the protester.

Lester Edelman, Esq., and Danielle M. Conway, Esq., Department of the Army, for the agency.

Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency's decision to effectively resolicit its requirement for renovation services after award is unobjectionable where initial solicitation overstated a minimum experience requirement; contracting agencies are responsible for defining their needs, and General Accounting Office will not review contention that agency's needs can only be met under specifications which are more restrictive than the agency believes necessary.

DECISION

Brisk Waterproofing Co., Inc. protests the corrective action taken by the Department of the Army, Corps of Engineers, in response to a previous protest filed by Brisk under request for proposals (RFP) No. DACA31-93-R-0110. The Army determined that, in awarding a contract to Chas. H. Tompkins Co., it had waived a solicitation experience requirement. The Army found further, however, that the particular requirement, as written, overstated its needs. The agency decided that the proper course of action was to amend the RFP to accurately reflect its needs and permit all offerors to submit new proposals in response to the amended RFP. Brisk objects, arguing that it is entitled to award under the original solicitation.

We deny the protest.

The RFP, issued on August 11, 1993, contemplated the award of a fixed-price contract for the renovation of the Memorial Amphitheater at Arlington National Cemetery, Arlington,

Virginia. The required services include marble repair and restoration, marble cleaning and stain removal, replication of marble trophy urns, and moisture barrier installation. The RFP required that the firm (i.e., subcontractor) proposed to perform the marble repair and restoration specialty work provide specific information requested in the RFP, such as a description of the firm's restoration experience and a work plan discussing "how you will proceed through the contract requirements. . . ." Those firms were also to list "three projects that you have completed commendably within the past five years" including "two projects each \$2,000,000 or more, together with copy of contract." Award was to be made to the offeror "whom the Government determines able to accomplish the necessary work and provide the required service to satisfy the objectives and requirements set forth in the [RFP] in a manner most advantageous to the Government."

The agency received six proposals, all of which were considered to be within the competitive range. Following discussions, the agency received best and final offers (BAFO) from the six firms. Brisk's proposal was highest rated technically and significantly higher priced than all the others. Tompkins's proposal received the second-highest technical rating and the agency considered the proposal to be technically comparable to Brisk's. The agency determined that Tompkins's lower-priced proposal was most advantageous to the government and awarded that firm the contract.

Brisk then filed a protest with our Office, arguing primarily that in awarding the contract to Tompkins the agency improperly waived the RFP's requirement that the firm proposed to perform the marble repair and restoration work must have performed two projects of \$2,000,000 or more. The Army determined that the protester was correct that the firm proposed by Tompkins did not appear to meet this requirement. The Army further determined that the solicitation overstated its needs in this regard, and advised our Office that it intended to revise certain solicitation terms and reopen negotiations with all firms which responded to the RFP. We subsequently dismissed the protest against the award decision as academic.

In its current protest, Brisk takes issue with the proposed corrective action, contending that it should receive the award under the original solicitation and that the agency should not be permitted to amend its requirement and seek new BAFOs. After the protest was filed, the Army amended the RFP to require that the firm performing the specialty work list "two projects totaling approximately \$2,000,000 each for the prime contract, and for which there was substantial marble work." The Army requested BAFOs by May 3.

Under the circumstances here, where an agency determines that it improperly accepted a nonconforming proposal and there exists another acceptable proposal submitted in response to the original solicitation, the agency is in effect canceling the RFP by proposing to resolicit the requirement. We will therefore determine the propriety of the agency action by applying the rules pertaining to cancellation of a solicitation. See HBD Indus., Inc., B-242010.2, Apr. 23, 1991, 91-1 CPD ¶ 400.

In a negotiated procurement, the contracting officer has broad discretion in deciding whether to cancel a solicitation; he need only have a reasonable basis as opposed to the cogent and compelling reason required for cancellation of a solicitation where sealed bids have been opened. Xactex Corp., B-247139, May 5, 1992, 92-1 CPD ¶ 423. A reasonable basis to cancel exists when a new solicitation presents the potential for increased competition or cost savings. Lucas Place, Ltd., B-235423, Aug. 30, 1989, 89-2 CPD ¶ 193. Therefore, an agency may cancel a solicitation if it materially overstates the agency's requirements and the agency desires to obtain enhanced competition by relaxing the requirements. HBD Indus. Inc., supra.

We find that the agency's decision to amend the solicitation to reflect its actual requirements and reopen the competition was reasonable. The protester and the agency agree that the Tompkins proposal did not conform to the solicitation requirements as initially set forth in the RFP. It follows that the requirement that the specialty work contractor have performed two contracts of \$2,000,000 clearly had a restrictive effect on competition, since it served to eliminate from consideration the proposal determined to be otherwise most advantageous to the government and comparable to Brisk's. In fact, the agency states that of the six offerors that submitted proposals, only Brisk submitted evidence of compliance with the stated minimum experience requirements. Thus, enforcing the RFP requirements actually would reduce the field of competition to one firm. Where, as here, an agency discovers that a solicitation overstates its minimum needs, the proper remedy generally is revision of the solicitation to reflect the agency's actual minimum needs, affording offerors an opportunity to respond to the revision and, if appropriate based on the recompetition, terminating any prior improperly

awarded contract. California Business Interiors, B-250963.2, Apr. 19, 1993, 93-1 CPD ¶ 331. This is precisely what the agency did here, and we find the action, which will result in increased competition, to be unobjectionable.¹

Brisk contends that the original solicitation did not overstate the agency's needs and that the agency has not adequately explained its position that the experience requirement was overstated. The protester states that the RFP's experience requirement was "well thought-out" and "rationally related to the Army's goal of obtaining only the most skillful marble restoration contractors." Brisk suggests that the new, relaxed requirement is therefore irrational and asserts that the Army's argument that its needs were overstated is "nothing more than a post facto rationalization for making the award it already made." Brisk also contends that the new requirement for "substantial" experience is "vague" and poses a "very real danger that this important work may be done poorly or improperly by a contractor without the requisite experience."

Brisk essentially expresses disagreement with the agency's statement of its needs; specifically, its view differs from the agency's about what experience requirements are necessary to ensure that the contract is awarded to a responsible contractor. This is not for our Office to decide. Without a showing that competition is restricted, agencies are permitted to determine how best to accommodate their needs, and are entitled to use relaxed specifications which they reasonably conclude can increase competition and meet the agency's needs at the same time. Simula, Inc., B-251749, Feb. 1, 1993, 93-1 CPD ¶ 86. The protester does not contend that it is unable to compete under the revised experience requirements, nor does it contend that competition will be restricted. On the contrary, Brisk is arguing that the original RFP containing the more restrictive terms should be the basis for award. Our role

¹The protester cites our decision Pro-Fab, Inc., B-243607, Aug. 5, 1991, 91-2 CPD ¶ 128, in support of its position. There, we sustained the protest on the ground that, while the agency cited relaxed material requirements as the basis for canceling, the record showed that no material requirements had been relaxed, and there was no reason to believe that competition had been restricted. Here, the protester itself asserts that the original requirement should serve to eliminate Tompkins's otherwise successful proposal. Thus, its argument that the removal of the restriction here is not material is without merit and its reliance on Pro-Fab, Inc. is misplaced.

in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, and we will not consider contentions that the needs of the agency can only be satisfied under more restrictive specifications than the agency believes necessary. See id.

Finally, the protester contends that the Army's protest position that the RFP overstated its needs is a "convenient excuse" designed to ensure that the original award decision will be undisturbed. Essentially, Brisk is alleging that the agency has acted in bad faith. We find no support for this allegation in the record. In this case, Brisk has presented nothing more than surmise and speculative comments suggesting that the agency has acted in bad faith. This simply does not provide a sufficient basis to find bad faith or improper conduct on the part of the agency. HBD Indus., Inc., supra.

The protest is denied.



for Robert F. Murphy
Acting General Counsel