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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: System Studies & Simulation, Inc.

File: B-409375.2; B-409375.3

Date: May 12, 2014

Jon D. Levin, Esq., and Gary L. Rigney, Esq., J. Andrew Watson, III, Esq., and Allie C. Tucker, Esq., Maynard Cooper & Gale, PC, for the protester.
William A. Roberts, III, Esq., Richard B. O'Keeffe, Jr., Esq., and Samantha S. Lee, Esq., Wiley Rein LLP, for M1 Support Services, LP, an intervenor.
Maj. John R. Longley, III, Department of the Army, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly made award of a contract for its actual requirements that differed significantly from the requirements solicited is sustained, where record shows that agency's actual requirements are for less than 30 percent of the requirements solicited; agencies are required to accurately specify their requirements in a manner that affords offerors an opportunity to compete for the agency's actual requirements.

DECISION

Systems Studies & Simulation, Inc., (S3), of Huntsville, Alabama, protests the award of a contract to M1 Support Services, LP, of Denton, Texas, under request for proposals (RFP) No. W911SO-13-R-0003, issued by the Department of the Army for advanced instructor pilot support services. S3 argues that the Army materially changed its requirements after evaluation and award of the contract, such that it is required to solicit revised proposals on the basis of its revised requirements. S3 also maintains that the Army misevaluated M1's proposal.

We sustain the protest.

BACKGROUND

The RFP contemplates the award of a fixed-unit-price, indefinite-delivery, indefinite-quantity requirements type contract to provide instructor pilots to perform flight

training on a variety of helicopter airframe models. Award was to be made to the firm submitting the low-priced, technically acceptable proposal for a base year[1] and up to three 1-year options.

The RFP advised that the agency would rate proposals acceptable or unacceptable under two non-price factors, mission capability and past performance.[2] RFP at 92. The RFP further advised that the mission capability factor was comprised of four subfactors--staffing recruitment and retention, quality control, management, and technical approach--and a rating of unacceptable under any one of these would result in the proposal being rated unacceptable overall. Id. at 92-93.

The agency was to evaluate prices using one or more of the price analysis techniques outlined in Federal Acquisition Regulation (FAR) § 15.404-1(b) to determine whether proposed prices were reasonable, complete and balanced. RFP at 95. The agency could eliminate any proposal for offering unreasonably high/unrealistically low, unbalanced, inaccurate or incomplete prices. Id. at 92.

The RFP included a pricing matrix that offerors were required to complete. Agency Report (AR) exh. 4, RFP embedded files, at 1. In that matrix, offerors were required to calculate the fully burdened hourly rates for various labor categories (the labor categories were: program manager, alternate program manager, UH-60 instructor pilot, AH-60D instructor pilot, OH-58D instructor pilot, AH-64D maintenance examiner, UH-60M maintenance examiner, and UH-60A/L maintenance examiner). Offerors also were required to calculate extended prices for the contract based on quantity estimates included elsewhere in the RFP. Id. In this latter connection, the RFP included estimates of the number of students for each airframe that the successful contractor would be required to have the capacity to instruct on a daily basis, and advised that offerors should assume a student-to-instructor ratio of 2:1. RFP at 51.

In response to the RFP, the Army received [deleted] proposals. The agency evaluated proposals and determined that M1 and S3 were the only two firms that submitted acceptable proposals. Accordingly, the agency established a competitive range comprised of those two offerors for purposes of conducting minor discussions relating to their respective proposed pricing. AR, exh. 13, Competitive Range Determination, at 9. After receiving and evaluating the offerors' revised proposals, the agency made award to M1, finding that it had submitted the low-priced,

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[1] The base year contemplated a one-month phase-in period and an 11 month period of full performance.

[2] For the past performance factor, the RFP advised that, in the event an offeror did not have a record of relevant past performance, its proposal would receive a rating of unknown, which the agency would consider an acceptable rating. RFP at 95.

technically-acceptable proposal. AR, exh. 21, Original Source Selection Decision Document. By letter dated December 5, the agency advised S3 of its award decision.

S3 subsequently filed a protest in our Office alleging, among other things, that M1 had engaged in an improper bait and switch relating to its proposed key personnel (its program manager and alternate program manager), and that the agency had failed to evaluate M1's price for realism. In response to that protest, the Army advised our Office that it would take corrective action and we dismissed the protest as academic on January 15, 2014.

The record shows that the agency investigated S3's bait and switch allegation and also evaluated the proposals of S3 and M1 for price realism. Contracting Officer's Statement at 7. After these activities, the agency affirmed its selection of M1 on January 27, 2014. AR, exh. 27, Revised Source Selection Decision Document. The agency advised S3 of its selection decision that same date, noting that M1 had proposed the lowest-priced, technically acceptable proposal (M1 had proposed a price of $38,722,328, while S3 had proposed a price of $40,371,705). AR, exh. 29, Debriefing Letter to S3.

Also on January 27, the record shows that the agency's cognizant commanding officer sent a memorandum to the agency's administrative contracting officer directing him to partially terminate a significant portion of the agency's then-current contract for pilot instruction services. These services--being provided under a predecessor contract being performed by S3--were reduced due to a change in the agency's needs. AR, exh. 30, Memorandum from the Commanding Officer to the Installation Contracting Command.[3]

On January 28, S3 became aware of the agency's changed requirements because, as noted, it was the incumbent contractor for the requirement, and was sent a letter dated January 28 partially terminating its contract. AR, exh. 32, Letter to S3, Jan. 28, 2014. The record also shows that S3 inquired as to whether the change to the agency's requirements was confined to its predecessor contract, or represented the agency's needs going forward. S3 was advised that the revised requirements would remain in effect for the foreseeable future because of the availability of in-house Department of Defense personnel to perform the training in lieu of contractor personnel. S3 Letter of Protest, Jan. 31, 2014, exh. J; see also AR, exh. 31,

[3] The record includes two memoranda from the commanding officer to the cognizant contracting personnel, one dated January 27, and a second dated January 28. AR, exhs. 30, 31, Memoranda from the Commanding Officer to the Installation Contracting Command. These documents are identical in terms of the requirements being terminated. The second document includes a more comprehensive list of the services being retained or added.

Memorandum from the Commanding Officer to the Installation Contracting Command.

Finally, the record shows that, on January 31, the agency's administrative contracting officer sent an e-mail to the agency's procurement contracting officer (the individual actually conducting the current acquisition, and also serving as the source selection official here) advising her of the significant reduction in the agency's requirements. AR, exh. 33, E-mail to the Contracting Officer, Jan. 31, 2014. That same date, S3 filed the instant protest.

DISCUSSION

S3 argues that the Army altered its requirements after making award of the contract to M1. S3 asserts that the change to the agency's requirements is substantial, and that it would have altered its proposed staffing had it known about the agency's revised requirements. S3 therefore contends that it was prejudiced by the agency's failure to solicit its revised, actual, requirements once it became aware of those requirements.

The agency responds that the source selection authority/contracting officer (SSA) was unaware of the change to the agency's requirements at the time she made her source selection and did not learn of the change until several days later. The agency therefore takes the position that it did not make award with a view to substantially altering the contract after award. See Business Computer Applications, Inc., B-406230.3, May 16, 2012, 2012 CPD ¶ 159 at 3 n.2 (agency may not properly award a contract with the intent to materially alter it after award). In the alternative, the agency argues that, because this is a requirements contract, there was no obligation on the part of the government to order the estimated quantities included in the RFP. The agency therefore reasons that any reduction in its actual requirement--as compared to the RFP's estimates--was contemplated by the type of contract solicited.

As a general rule, agencies may not properly award a contract on a basis that is fundamentally different from the basis upon which the competition for the requirement was conducted. United Telephone Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 at 7-10, aff'd. Dept. of Energy--Recon.; Westinghouse Hanford Co.—Recon.; United Telephone Co. of the Northwest, B-246977.2, et al. July 14, 1992, 92-2 CPD ¶ 20. Where, for example, there is a significant change in the government's quantity requirements, the appropriate course of action is for the agency to apprise the offerors of its revised requirements, and afford them an opportunity to submit proposals responsive to those revised requirements, even where, as here, a source selection decision has been made. Id.

In addition, the fact that a requirements-type contract is being used does not relieve the agency of its fundamental obligation to conduct a competition on the basis of the

most accurate or realistic estimates of the total quantity of goods or services likely to be ordered. Federal Acquisition Regulation (FAR) § 16.503(a)(1); Hoechst Marion Roussel, Inc., B-279073, May 4, 1998, 98-1 CPD ¶ 127 at 3. This is because, without such realistic estimated quantities, firms cannot prepare offers that reflect the agency's actual, anticipated needs, and correspondingly, the agency cannot reasonably determine whether award to one firm versus another will result in the lowest possible cost to the government. Hoechst Marion Roussel, Inc., supra.

Here, the agency has determined that its actual requirements are significantly different from the requirements that it solicited, and for which the offerors competed. The record shows that agency's original requirements, and its revised requirements, are as follows:

Airframe	Original Number of Students	Original Number of Instructors	Revised Number of Students	Revised Number of Instructors
UH-60 (Instructor Pilots)	72	36	0	0
UH-60 A/L (Maintenance Examiners)	8	4	8	4
UH-60M (Maintenance Examiners)	4	2	4	2
AH-64D (Instructor Pilots)	32	16	22	11
AH-64D (Maintenance Examiners)	4	2	0	0
OH-58D (Instructor Pilots)	6	3	0	0
CH-47F (Maintenance Examiners)[4]	0	0	2	1
Total	**126**	**63**	**36**	**18**

RFP at 51; AR, exh. 31, Memorandum from the Commanding Officer to the Installation Contracting Command.

[4] The requirement for CH-47F maintenance examiners was a new requirement not previously included under either the predecessor contract or the RFP.

This change represents a reduction in the agency's overall anticipated requirements of more than 70 percent. It also reflects a significant change in the types of instructors and maintenance examiners required; of the originally-solicited six categories of instructors/examiners, the agency has eliminated three--or half--of all categories, and also has added a new category not contemplated under the original solicitation. The record therefore shows that the agency's current requirements bear little relationship to the requirements that it solicited, and for which the offerors competed. It follows that the agency can have no reasonable assurance, based on the earlier competition, that award to M1 versus S3 is proper.

In responding to the protest, the Army essentially relies on the temporal lack of knowledge on the part of its SSA concerning the agency's revised requirements. However, the agency's reliance is misplaced, since the record shows that the organization as a whole--and more particularly, the agency's cognizant commanding officer--had to have been aware of the Army's changed requirements prior to the agency's revised source selection decision.

We recognize--and the record reflects--that the SSA was contemporaneously unaware of the change to the agency's requirements at the time she made the agency's revised source selection decision. Contracting Officer's Statement at 11-12; AR, exh. 33, E-mail to the Contracting Officer, Jan. 31, 2014. Nonetheless, the record compels the conclusion that the commanding officer was aware of the change to the agency's requirements. As noted, the record includes his instruction to partially terminate the protester's predecessor contract, which was executed on January 27, the same date on which the revised source selection decision was made.[5] AR, exh. 30. As a practical matter, however, the agency's commanding officer likely was aware that the agency would have a substantially reduced

[5] The agency suggests that, when it originally awarded the contract to M1 on December 5, 2013, it was unaware of its revised requirements, and, therefore, could not have anticipated its actual requirements at the time of award. The agency therefore maintains that the original award was proper, and that the change to its requirements is a matter of contract administration. However, the time of the original award decision is irrelevant, because interceding litigation--S3's earlier protest--led the agency to take corrective action that effectively rendered that earlier source selection decision academic. In any event, where an agency's requirements change due to the passage of time occasioned by protest litigation, the agency is nonetheless still required to afford offerors an opportunity to submit proposals responsive to the agency's revised requirements. United Telephone Co. of the Northwest, supra. at 3-10 (protest sustained where agency's requirements changed due to the passage of time occasioned by protracted litigation, but agency improperly failed to amend RFP to reflect its revised requirements).

requirement for contractor-furnished flight instructors and examiners well before he issued his instruction to partially terminate S3's predecessor contract.

As reflected in the change to the agency's needs, the Army reduced its requirement by a total of 45 instructors/examiners. The record shows that these are highly skilled positions. For example, the RFP requires all of the instructor pilots to be qualified as instructor pilots for one or more of the airframes identified in the RFP; have a minimum of five years experience as an aviator on one or another of the specified airframes; and to have had their last flight within 24 months of being offered as a qualified instructor. RFP at 43. The maintenance examiner qualifications are even more stringent. For example, a maintenance examiner for an AH-64D helicopter (one of the maintenance examiner categories now being provided by in-house personnel) is required to have at least five years of experience as an aviator; to have had his or her last flight within 12 months of being offered as a qualified examiner; and to have logged at least 2,000 flight hours, 250 hours as a maintenance test pilot, and 200 hours as a maintenance examiner. Id.

It simply is not reasonable to suggest that 45 in-house Department of Defense personnel meeting these stringent qualifications simply materialized at the agency's facility ready and available to go to work on the same day the commanding officer issued his instruction to partially terminate S3's predecessor contract. Under the circumstances, the fact that the SSA was unaware of the agency's changed requirements does not provide a reasonable basis to conclude that the organization was unaware of its changed requirements. It follows that the agency was required to revise its solicited requirements and afford the offerors an opportunity to submit proposals responsive to the agency's actual requirements.

The agency also asserts, based on calculations it has performed, that S3 was not prejudiced by the agency's failure to solicit its revised requirements because its price still would not have been low. The agency's calculations are based on hourly rates proposed by the offerors in response to the earlier requirement. The protester maintains, however, that it would have changed its proposed staffing profile, as well as proposed personnel had it known of the agency's actual requirements. For example, S3 represents that it would have offered [deleted]. Letter of Protest, Jan. 31, 2014, at 25.

The agency's calculations provide no basis for our Office to conclude that the protester was not prejudiced. As correctly noted by the protester, those calculations are based on personnel that the offerors may, or may not, have proposed had the agency advised them of its actual requirements. In addition, the agency's revised requirements include one category of personnel not contemplated by the original solicitation (the revised requirements include maintenance examiners for the CH-47F airframe, a category of maintenance examiners not included under the original RFP, and one which the protester asserts is particularly difficult to fulfill). Accordingly, there is no basis for our Office to conclude that the protester was not

prejudiced by the agency's failure to apprise the competitors of its actual requirements. Piquette & Howard Elec. Serv., Inc., B-408435.3, Dec. 16, 2013, 2014 CPD ¶ 8 at 9 (protest sustained where record showed reasonable possibility of prejudice to protester).

In sum, we conclude that the agency made award of the contract to M1 based on what ultimately was a significantly different requirement than the requirement the agency actually solicited. This was improper because the offerors were not afforded an opportunity to compete for the agency's actual requirements, and there is no basis on the record before us to conclude how the competition would have ended had the offerors been aware of the agency's actual requirements. We therefore sustain S3's protest on this basis.[6]

RECOMMENDATION

We recommend that the agency either amend its current solicitation to reflect its actual requirements, or cancel the current RFP and issue a new solicitation that reflects its actual requirements. We further recommend that the agency solicit, obtain and evaluate proposals responsive to its actual requirements, and award a contract to the firm deemed eligible for award based on the evaluation criteria included in the agency's revised solicitation. Should M1 not be identified as the successful offeror, we further recommend that its contract be terminated for the convenience of the government, and that the agency make award to the firm identified as the successful concern, if otherwise proper. Finally, we recommend that the agency reimburse S3 the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d) (2013). The protester's certified claim for costs, detailing the time expanded and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Susan A. Poling
General Counsel

[6] S3 also raises a number of issues relating to the agency's evaluation of the M1 proposal. We dismiss these contentions as academic, because we recommend that the agency solicit revised proposals based on its actual requirements and, accordingly, the agency's earlier evaluation is immaterial.