G A O
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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Ocean Services, LLC

File: B-292511.2

Date: November 6, 2003

Wayne A. Keup, Esq., Jonathan K. Waldron, Esq., and David A. Leib, Esq., Blank Rome, for the protester.
Richard Knutsen, Esq., and David Townsend, Esq., Department of the Navy, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Specifications in a solicitation for the time charter of an oceanographic research vessel to be used in performing hydrographic surveys in the Gulf of Mexico and near coastal areas of Alaska that mandate that the vessel meet certain enhanced safety-related requirements are not objectionable, given the environment in which the vessel will operate and the agency's desire to contract for a vessel that offers a greater level of safety for its crew than that advocated by the protester.

2. In taking corrective action in response to a protest of amending the solicitation, reopening discussions, and reevaluating proposals, agency did not act improperly in disclosing the offerors' total proposed prices (without disclosing the offerors by name or vessels proposed), given that the agency had disclosed one offeror's total price to certain of the other offerors during debriefings.

DECISION

Ocean Services, LLC protests request for proposals (RFP) No. N00033-02-R-2009, issued by the Department of the Navy, for the time charter of a vessel to support the National Oceanic and Atmospheric Administration's (NOAA) hydrographic survey program. Ocean argues that the terms of the RFP, as amended, are overly restrictive, and that the agency improperly disclosed the prices proposed by offerors during the competition.

We deny the protest.

The RFP provides for the award of a time charter contract for an oceanographic research vessel (ORV) vessel for a base period of 1 year, with three 1-year and one 11-month option periods, to the offeror submitting the proposal representing the best value to the government based upon the stated evaluation factors. NOAA will use the ORV in performing hydrographic surveys in the Gulf of Mexico and the near coastal areas of Alaska.[1] RFP § C2.2. The solicitation provides a number of minimum requirements with regard to the vessel, including, for example, a minimum range of 6,048 nautical miles, a minimum transit speed of 12 knots, and a minimum length overall of 150 feet. The solicitation also provides that "[t]he vessel shall . . . meet the requirements of Title 46 of the U.S. Code of Federal Regulations, Parts 188-196, Subchapter U, Oceanographic Research." The RFP states that "[t]he vessel shall meet all International Maritime Organization . . . Safety of Life at Sea (SOLAS) construction, equipment, and communication requirements for a vessel of its type, size, class, and service." RFP § C2.3.

Proposals were received and evaluated, discussions were conducted, and final proposal revisions (FPR) were requested, received, and evaluated. The agency determined that the proposal submitted by Alpha Marine Services, L.L.C., represented the best value to the agency and made award to that firm. After requesting and receiving a debriefing, Ocean filed a protest with our Office, arguing that the agency failed to conduct meaningful discussions, and failed to evaluate the proposals reasonably and in accordance with the terms of the RFP. In response to the protest, the agency informed our Office that it was taking the corrective action of amending the solicitation and reopening discussions with the offerors. Our Office then dismissed the protest as academic.

The agency, in considering precisely what corrective action to take, determined that "actions must be taken to 'level the playing field' with respect to Alpha Marine as well as with respect to the one offeror who had not been debriefed," given that the debriefed offerors were aware of Alpha Marine's proposed price. The record reflects that the agency "decided the best way to 'level the playing field' is to provide the 'bottom line' price of each proposal so all offerors including Alpha Marine could be aware of where they stood with respect to other offerors." The agency noted that the other options considered "of not releasing prices or freezing prices would limit competition and violate the spirit of the Competition in Contracting [Act of 1984]." Agency Report (AR), Tab I, Memorandum (Aug. 12, 2003), at 2.

The agency informed the offerors of its intended action, and only Ocean objected. However, according to the agency, Ocean failed to "provide guidance as to why [it] felt [it] would receive competitive harm in the market place from [the] release." The

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[1] The RFP provides that "hydrographic surveys are conducted to determine the configuration of the bottoms of bodies of water, especially as it pertains to navigation." RFP § C2.2.

record reflects that the agency researched the issue, and concluded based upon its research that the release of the offerors' bottom line pricing was not precluded by regulation, and that there was no "reasonable expectation that the release of the bottom line pricing in the procurement would result in competitive harm." The agency nevertheless decided that in order to minimize "even the possibility" of competitive harm, it would not identify either the offeror or ship by name, or provide any of the items comprising the offered prices (such as fuel costs) when providing the bottom line pricing to the offerors. AR, Tab I, Memorandum (Aug. 12, 2003), at 3. Accordingly, the agency provided the offerors with a spreadsheet listing the total evaluated prices proposed, and identifying the offerors by letter designations and the ships proposed by number designations.

Discussions were subsequently held, and during its session with the agency, Ocean's representatives informed the contracting officer that in the firm's view the agency's release of the spreadsheet was improper. According to the protester, the contracting officer responded that the release of the spreadsheet was proper. Protester's Supplemental Comments, at 2; exh., Declaration of Ocean Representative (Oct. 16, 2003), at 2.

The agency also amended the solicitation to clarify that any vessel proposed, regardless of size, must comply with the SOLAS requirements set forth in 41 C.F.R. Subchapter U (2003), and requested and received FPRs.

Ocean protests the amended RFP's provision that all vessels meet the SOLAS requirements set forth in Subchapter U. The protester argues that the Subchapter U requirements are only applicable to ORVs that exceed 300 gross registered tons, and that "the imposition of these requirements on vessels less than 300 gross tons represents a significant increase in requirements for vessels of this size in this application." Protest at 3. The protester points out in this regard that two of the four vessels it proposed are not fully compliant with the Subchapter U SOLAS requirements, and that modifying these two vessels to meet the Subchapter U requirements would be "cost-prohibitive." Protest at 3 n.1.

A contracting agency has the discretion to determine its needs and the best method to accommodate them. Parcel 47C LLC, B-286324, B-286324.2, Dec. 26, 2000, 2001 CPD ¶ 44 at 7. In preparing a solicitation, a contracting agency is required to specify its needs in a manner designed to achieve full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs. 10 U.S.C. § 2305(a)(1), B (2000). Where a protester challenges a specification as unduly restrictive, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. Chadwick-Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3. Where, as here, a requirement relates to national defense or human safety, an agency has the discretion to define solicitation

requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness. MCI WorldCom, B-291418 et al., Jan. 2, 2003, 2003 CPD ¶ 1 at 5; Military Agency Servs. Pty., Ltd., B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130 at 4-5.

NOAA, the user of the vessel, explains that the RFP requires that any vessel proposed, regardless of size, meet the Subchapter U requirements because these requirements "ensure that an acceptable level of review and verification has gone into the design and construction of the vessel and that vital ship systems, in addition to more comprehensive safety, firefighting, and lifesaving capabilities, are in place and maintained." NOAA also states that "Subchapter U requires, by reference, marine engineering and electrical engineering standards for design, construction, materials, maintenance, and periodic testing of ship systems, including things like automation, alarm systems, means of access and egress, water tight and fire tight integrity, emergency power and lighting, fuel systems, emergency shut-offs and cut-outs, main and auxiliary engines, compressed air tanks, potable water systems and tanks, steering gear, tail shafts, shaft seals, hull penetrations, and hull plating." AR, Tab H, NOAA E-Mail (Apr. 9, 2003).

The protester does not dispute that the various requirements set forth in Subchapter U are related to safety, or that a vessel that is compliant with Subchapter U will be safer than a non-compliant vessel. Given the "unforgiving nature of the maritime environment," see AR at 7, including the Alaskan coastal waters in which the vessel will operate, we find that the agency's desire to contract for a vessel that offers a greater level of safety for its crew than a vessel that is not compliant with all aspects of Subchapter U is reasonable.[2]

The protester also argues that the agency's release of the spreadsheet that disclosed the overall evaluated prices previously received was improper. The protester argues here that the agency's release of the spreadsheet violated the Procurement Integrity Act, 41 U.S.C. § 423 (2000), as well as its implementing regulation set forth at Federal Acquisition Regulation (FAR) § 15.306(e), which generally prohibit agency personnel from disclosing information proprietary to an offeror, including its proposed price,

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[2] The protester complains that because the agency did not address the structural fire protection requirements set forth in Subchapter U, the agency's entire explanation as to why the solicitation requires that the proposed vessels meet the Subchapter U requirements is unreasonable. However, the agency report in fact references the structural fire protection requirements in Subchapter U in a chart it prepared that compares the various safety-related requirements of Subchapter U to those set forth in another subchapter that is generally applicable to vessels of less than 300 gross tons. AR, Tab H, NOAA E-Mail (Apr. 9, 2003). As indicated in the report, a vessel that complies with the structural fire protection requirements is presumably safer than one that does not.

without the offeror's permission.[3] The protester asserts that the agency, in seeking FPRs, should have informed offerors that any revisions to their price proposals would be limited to only those "changes required as a result of discussions." Protest at 5. The protester explains that in its view this action would have mitigated the competitive harm caused to it through the disclosure of the prices previously received by the agency and prevented an improper auction. The protester points out that an agency's limitation of proposal revisions in a somewhat similar situation was found reasonable by our Office in Rel-Tek Sys. & Design, Inc.--Modification of Remedy, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1.

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that the action is necessary to ensure fair and impartial competition, and our Office will not object to the corrective action taken so long as it is appropriate to remedy the impropriety. Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3; Pacific Island Movers, B-287643.2, July 19, 2001, 2001 CPD ¶ 126 at 3.

As found in DGS Contract Serv., Inc. v. United States, 43 Fed. Cl. 227 (1999), neither the Procurement Integrity Act nor the FAR contemplates the absolute prohibition of the release of an offeror's pricing information as asserted by the protester here, but rather, "make clear that the [contracting officer] is authorized to disclose [pricing] information under certain circumstances." DGS Contract Serv., Inc. , 43 Fed. Cl. at 236. In reaching this conclusion, the court noted that the Procurement Integrity Act provides in relevant part that "[t]his section does not . . . restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information." 41 U.S.C. § 423(h)(1). Citing a number of decisions issued by our Office involving situations similar to that here, the court concluded that where "an unsuccessful offeror lawfully obtains [proprietary] information, such as a competitor's prices and technical scores, and the agency subsequently properly reopens negotiations, the agency may disclose similar information to all competitors to eliminate any competitive advantage obtained."[4] DGS Contract Service, Inc.,

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[3] Both our Bid Protest Regulations and the Procurement Integrity Act require--as a condition precedent to our considering the matter--that a protester have reported the alleged violation of the Act to the contracting agency within 14 days after becoming aware of the information or facts giving rise to the alleged violation. 41 U.S.C. § 423(g); 4 C.F.R. § 21.5(d). Ocean complied with this requirement by advising the contracting officer during discussions that it believed the agency's release of the spreadsheet was improper. See SRS Techs., B-277366, July 30, 1997, 97-2 CPD ¶ 42 at 1-2.

[4] The court cited our decisions in Sperry Corp., B-222317, July 9, 1986, 86-2 CPD ¶ 48; The Cowperwood Co., B-274140.2, Dec. 26, 1996, 96-2 CPD ¶ 240; and Unisys Corp., B-230019.2, July 12, 1988, 88-2 CPD ¶ 35.

43 Fed. Cl. at 237-38. The court found that this view was consistent with the FAR § 1.602-2(b) requirement that contracting officers "[e]nsure that contractors receive impartial, fair, and equitable treatment," as well as the "bastion of federal procurement policy that all offerors must possess the equal knowledge of the same information to have a valid procurement." DGS Contract Serv., Inc., 43 Fed. Cl. at 238 (quoting LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1555 (Fed. Cir. 1995)). Given that the release of certain pricing information by an agency may be permissible, the question becomes whether the action taken by the contracting officer here was reasonable under the circumstances. DGS Contract Serv., Inc., 43 Fed. Cl. at 238; Networks Elec. Corp., supra, at 3-4.

As discussed previously, the record reflects that the agency carefully considered the possible courses of action available to it to remedy the competitive advantage held by Ocean and the other offeror who were aware of Alpha Marine's proposed price, and the relative "disadvantage" of Alpha Marine due to the disclosure of its pricing, and the disadvantage of another offeror who had not been debriefed and thus lacked the information regarding Alpha Marine's pricing. The action that the agency eventually took--the disclosure of only the total prices proposed, without identifying by name either the offeror, the vessel proposed, or any of the items that comprised the total prices--was, in our view, carefully crafted to equalize the competition while providing no more information than necessary to do so. Given the discretion afforded to contracting agencies in determining the corrective action to be taken, and that the disclosure of information to equalize competition is appropriate to remedy a potentially unfair (even if not improperly obtained) competitive advantage, the agency's actions here were reasonable. Networks Elec. Corp., supra; KPMG Peat Marwick, B-251902.3, Nov. 8, 1993, 93-2 CPD ¶ 272 at 8-9; Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 at 8, aff'd, Brown Assocs. Mgmt. Servs., Inc., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299; see Honeywell Info. Sys., B-186313, Apr. 13, 1977, 77-1 CPD ¶ 256 at 8-9 (as a condition to competing on a resolicitation, the offeror had to agree to disclosure of substantially comparable information from its proposal to a competing offeror whose pricing information was properly disclosed after previous award had been made). Although the protester continues to assert that any price revisions be limited to only those "changes required as a result of discussions," as in Rel-Tek Sys. & Design, Inc.--Modification of Remedy, supra, the protester's disagreement and the fact that we found the agency's approach in Rel-Tek of limiting proposal responses to be reasonable do not require that another agency's differing approach of disclosing prices to equalize the competition be found

objectionable, given the agency's broad discretion in deciding on the appropriate corrective action.[5] See DGS Contract Serv., 43 Fed. Cl. at 238 n.37; Calvin Corp., B-245768, Jan. 22, 1992, 92-1 CPD ¶ 98 at 5.

The protest is denied.

Anthony H. Gamboa
General Counsel

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[5] The protester complains that the disclosure of the offerors' total prices followed by the offerors' submission, without restriction, of FPRs, will result in an impermissible auction. However, we think that the statutory requirements for fair and equal competition take priority over any possible constraints on auction techniques. See Networks Elec. Corp., supra, at 4.