



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Geonex Corporation

File: B-274390.2

Date: June 13, 1997

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John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester was not prejudiced by the agency's waiver of a requirement in an architect-engineer competition that each vendor's participants in a photointerpretation live test demonstration--one of the evaluation criteria--have been employed by the vendor prior to a specific date, where the protester would not be the most highly rated vendor, even if it achieved a perfect score on the demonstration.

DECISION

Geonex Corporation protests the award of a contract for architect-engineer (A-E) services to Greenhorne & O'Mara, Incorporated (G&O), by the Fish and Wildlife Service, Department of the Interior.

We deny the protest.

The agency placed an announcement in the Commerce Business Daily on May 16, 1995, seeking four "units" of services in support of the agency's effort to classify and map the nation's wetlands. The synopsis requested that interested firms submit

Standard Forms (SF) 254 and 255 by June 16, 1995.¹ Each unit was treated as a separate procurement. This protest concerns the selection of a vendor for unit one--photointerpretation services.

The agency received the requisite forms from four firms, and determined that three firms, including Geonex and G&O, were most qualified to perform the services. The agency provided each of these firms with a "statement of work" which further described the agency's requirements, "clarification questions" concerning certain aspects of the vendors' responses, and sample task orders to be completed by the vendors. The agency also scheduled site visits to the vendors' facilities, as well as photointerpretation live test demonstrations and oral presentations by the vendors.

After the site visits, live test demonstrations, and oral presentations were conducted, and the vendors' responses to the sample task orders and questions asked by the agency during its visits to the vendors' facilities were received, the agency rated the vendors under an evaluation scheme consisting of 18 evaluation criteria and 38 subcriteria. G&O was rated as the most highly qualified firm with [DELETED] out of 3,910 points. Geonex received the next highest technical ranking of [DELETED] points, and the third offeror received [DELETED] points. Accordingly, the agency selected G&O for negotiations, and on August 12, 1996, after the completion of price negotiations, awarded G&O a contract for the photointerpretation services.

On August 30, 1996, Geonex, the incumbent contractor for the photointerpretation services, protested the award of the contract to G&O. In that protest, Geonex challenged numerous aspects of the agency's evaluation and selection of G&O to perform the photointerpretation services, including the conduct and scoring of the photointerpretation live test demonstrations. The agency ultimately entered into a settlement agreement with Geonex, in which, among other things, the agency agreed to disregard the results of the sample task responses and photointerpretation live test demonstration, and to obtain new sample task responses and "[r]e-do all aspects of the photointerpretation live test demonstration." The agency also agreed that the total number of points allocated to the relevant evaluation criteria for the photointerpretation live test demonstration (1,200) and sample task responses (500) would remain the same. The agency further agreed that "[t]he photointerpretation live test demonstration will be limited to individuals listed in the parties' SF 254/255 forms originally submitted or in the employ of Geonex and G&O on March 1, 1996."

¹SF 254, Architect-Engineer and Related Services Questionnaire, is the statement of qualifications submitted annually by firms wishing to be considered for A-E contracts. SF 255, Architect-Engineer and Related Services for Specific Project, is a supplement to SF 254 and requires firms to furnish job-specific experience. See Geographic Resource Solutions, B-260402, June 19, 1995, 95-1 CPD ¶ 278 at 2.

Based on this agreement, Geonex withdrew its protest to our Office on November 16, 1996.

By letter dated January 15, 1997, the agency informed Geonex and G&O of the schedules for their respective photointerpretation live test demonstrations.² The letter included a list of materials that the agency would provide for the photointerpretation live test demonstration, and stated that the photointerpreters would "be required to identify, delineate, and classify wetlands within a specified work area." The letter added that the photointerpreters would "be required to answer several fill-in-the-blank questions about a specific work area and several essay questions about [the agency's] classification system," and that "[t]he essay portion of the demonstration would be conducted as a closed-book test." With regard to which vendor representatives could attend the photointerpretation live test demonstration, the letter specified:

"Attendance will be limited to two photointerpreters and one other person for each vendor. All vendor representatives in attendance shall be amongst those who are proposed by the vendor to work on the contract. ALTERNATES WILL AUTOMATICALLY BE ELIMINATED."

The agency issued a second letter concerning the photointerpretation live test demonstration "to respond to questions received as a result of the January 15, 1997 letter." With regard to the photointerpretation live test demonstration, the second letter stated:

"Regarding the Live Test:

1. What is the total duration of the live test?

Answer

Four hours for the photointerpretation portion and an additional two hours to complete the fill-in-the-blank questions and essay questions (one hour for each). There will be a one hour break following the photointerpretation portion prior to the two hour written test portion.

2. The instructions indicate that "All vendor representatives in attendance shall be amongst those who are proposed by the vendor to work on the contract." Please define the government's meaning of the word 'proposed' versus 'alternates' within the context of these written instructions?

²This protest does not concern the evaluation of the new sample task responses.

Answer

The photointerpretation Live Test Demonstration will be limited to individuals listed in the [parties'] SF 254/255 forms as originally submitted or in the employment of your firm on March 1, 1996. An alternate is a person who does not meet these criteria."

Geonex's and G&O's photointerpretation live test demonstrations were conducted at the agency's facility on February 4th and 5th, respectively. Each vendor's demonstration was attended by two photointerpreters and its proposed project manager.

The results of the live test demonstration were evaluated by the cognizant technical evaluation team (TET). Geonex's answers received [DELETED] out of 700 points with regard to the identification, delineation, and classification of wetlands, and [DELETED] out of 500 points with regard to the fill-in-the-blank and essay questions, for a total photointerpretation live test demonstration score of [DELETED] out of 1,200 points. This score was added to Geonex's score of [DELETED] points received under the other 17 evaluation criteria, for a total score of [DELETED] out of a possible 3,910 points. G&O's answers received [DELETED] points with regard to the identification, delineation, and classification of wetlands, and [DELETED] points with regard to the fill-in-the-blank and essay questions. G&O's total of [DELETED] points for the photointerpretation live test demonstration was added to its score of [DELETED] points received under the other evaluation criteria, for a total score of [DELETED] points.

Because G&O received the highest technical score, the agency affirmed its prior selection of G&O, rescinded the stop work order it had issued in response to Geonex's initial protest, and informed G&O that it could proceed with its contract.

Geonex protests the agency's conduct and evaluation of the photointerpretation live test demonstration. Specifically, Geonex argues that the agency improperly allowed G&O's proposed project manager, who was not listed in G&O's SF 254/255 forms as originally submitted or in the employ of G&O as of March 1, 1996, to attend and participate in the photointerpretation live test demonstration.

The agency responds that it believes the conduct of the test was consistent with the photointerpretation live test demonstration instructions implementing the parties' settlement agreement, and that in any case the protester was not prejudiced by G&O's project manager's participation in the demonstration.

Competitive prejudice is an essential element of every viable protest. Diverco, Inc., B-259734, Apr. 21, 1995, 95-1 CPD ¶ 209 at 3. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award.

McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3. See Statistica, Inc. v. Christopher, 102 F.3d. 1577, 1581 (Fed. Cir. 1996).

Here, the record evidences that the proposed G&O project manager's participation in the live test demonstration violated the clear instructions that prohibited the use of individuals employed on or after March 1, 1996, and that his participation may well have enhanced G&O's score. In other words, while the agency does not characterize it as such, it is apparent that the agency waived a solicitation requirement to the possible advantage of G&O. Nevertheless, we find that Geonex was not prejudiced by the agency's waiver of the stated demonstration instructions, given the significant difference between the vendors' final scores.

In cases such as this, where the protester argues that an agency waived a certain requirement, prejudice does not mean that, had the agency failed to waive the requirement, the awardee would have been unsuccessful. Brown & Root, Inc. and Perini Corp., a joint venture, B-270505.2; B-270505.3, Sept. 12, 1996, 96-2 CPD ¶ 143 at 11. Rather, the pertinent question is whether the protester would have submitted a different offer that would have had a reasonable possibility of being selected for award had it known that the requirement would be waived. Id.

Geonex states that, had it known that the agency would not enforce the limitation as to which vendor representatives could attend the live test demonstration, it would have, to some extent, selected other individuals to perform the test, which presumably would enable it to achieve a higher score. However, even if Geonex achieved a perfect 1,200 score for the photointerpretation live test demonstration, its total score of [DELETED] points ([DELETED] for the other criteria plus 1,200) would be less than G&O's total score ([DELETED] points); thus, Geonex was not prejudiced by the agency's waiver. See Square 537 Assocs. Ltd. Partnership, B-249403.2, Apr. 21, 1994, 94-1 CPD ¶ 272 at 6-7.

Geonex also argues that the agency's and G&O's actions here breached the settlement agreement of its prior protest, such that our Office should recommend that the agency "disqualify G&O from this procurement" or "that G&O be disqualified from evaluation criterion #18 (photointerpretation live test demonstration)" in order to protect the "integrity of the procurement system."

Our bid protest jurisdiction is limited to deciding protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C.A. § 3552 (West Supp. 1997). Thus, we will not consider a protest concerning the enforceability of a settlement agreement unless it alleges that the agreement, if followed or breached, would result in a prejudicial violation of procurement law or regulation. American Mktg. Assocs., Inc.--Recon., B-274454.4, May 14, 1997, 97-1 CPD ¶ 183.

As discussed above, there was no prejudice here, even assuming the settlement agreement was breached with respect to the participants in the photointerpretation

live test demonstration. Moreover, we find no basis to eliminate G&O from the competition, given that G&O's project manager readily identified himself to the agency representatives upon arriving at the agency's facility for the live test demonstration as a G&O employee who had not been employed by G&O prior to March 1, 1996, and the agency expressly allowed him to participate.³

The protest is denied.

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³Our Office has recommended that a vendor be barred from participating in a procurement only in instances where the vendor has committed a particularly egregious act that adversely affects the integrity of the competitive system, such as making a material misrepresentation to the agency during the conduct of the procurement, see Informatics, Inc., 57 Comp. Gen. 218, 225 (1978), 78-1 CPD ¶ 53 at 13, and has upheld an agency's determination to disqualify a vendor from a competition where, for example, a vendor attempted to improperly obtain a competitor's proprietary information, and the agency had concluded that the protection of the integrity of the procurement system mandated the disqualification of the offending vendor. See Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126 at 7, recon. denied, B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435. The protester has not shown, and the record does not evidence, that G&O's actions were such that the protection of the integrity of the procurement mandates G&O's disqualification from this competition.