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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-216634

May 16, 1985

FILE:

DATE:

Coflexip & Services, Inc.

MATTER OF:

DIGEST:

1. An allegation that the procuring agency incorrectly rated the awardee's proposal technically superior to the protester's is denied where the record shows that the agency's determination was reasonable and consistent with the stated evaluation criteria.
2. Protest is sustained where the agency relaxed a performance requirement and the delivery schedule for the awardee without informing the protester of these changes, which could have had a material impact on the protester's proposed cost.
3. Maritime Administration's own statutory exemption from competitive procurement requirements does not excuse improprieties where there is no indication that it was impracticable to comply with competitive requirements.
4. Protester is entitled to recover its proposal preparation costs where the agency failed to assure that the protester and the awardee were competing on an equal basis and the protester had a colorable chance at receiving the award.

Coflexip & Services, Inc. (Coflexip), protests the award of a contract to Simplex Wire & Cable Company (Simplex) under request for proposals (RFP) No. SER-046-RBS, issued by the Department of Transportation, Maritime

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Administration (MARAD), on behalf of the Department of the Navy.^{1/} We deny the protest in part and sustain it in part.

The RFP, issued March 2, 1984, called for proposals to furnish all or any portion of an Offshore POL (petroleum, oil and lubricants) Delivery System, which would enable the Navy to pump petroleum products from a tanker to shore. The delivery system consists of three components: a tanker; a single-point mooring for the tanker; and a flexible pipe conduit system to connect the tanker to the beachhead manifold. The Navy designated a tanker for the project and also decided to procure the single-point mooring by separate procurement. This protest therefore concerns only the flexible pipe conduit component.

The RFP did not contain detailed design specifications, but instead set forth minimum performance standards and called on offerors to propose their best approach for a state-of-the-art system meeting these standards. The RFP's cover page stated that "schedule is of the essence," and that delivery must be such that installation and initial checkout could be performed prior to the start of testing already scheduled for August 1984; MARAD also emphasized at a March 14 preproposal conference that time was of the essence. Proposals were to be evaluated under several criteria: benefits and credibility of the proposal; understanding the challenge; experience; life cycle cost; ability to meet the installation time; timeframe for delivery and demonstration and cost of demonstration; and adaptability for follow-on procurements. Technical proposals were due March 19, and a budgetary cost proposal showing the system's life cycle costs was due by March 23.

^{1/} The RFP actually was issued by AMETEK, a company acting as subagent for Watters Marine Inc. (Watters), MARAD's general ship operating agent. The Navy asked MARAD to conduct the procurement for this Navy requirement because a commercial system was being procured, and MARAD is more familiar with commercial (as opposed to military) standards.

Six technical proposals were received and initially were forwarded to four industry experts to verify generally that the proposed systems could meet the performance requirements. Two proposals were rejected as a result of this preliminary review. The Simplex and Coflexip proposals were rated equally acceptable and received the two highest total scores. These and the other two remaining proposals (along with the cost proposals) then were forwarded to MARAD which, together with the Navy, evaluated the proposals against the RFP evaluation criteria. At this point, the other two proposals were rejected as involving excessive technical risk, leaving only Simplex and Coflexip in the competition.

The evaluators determined that, compared to the Simplex system, Coflexip's approach presented several operational limitations. Coflexip offered a system based on a single-basket concept: the flexible pipeline would be carried in, and be deployed from, a single large basket container mounted on the deck of the tanker. The evaluators found this configuration disadvantageous because the tanker deck would have to be extensively reinforced to support the 1-million-pound system, and the dimensions and weight of the basket, as a practical matter, would prevent the system from being transported across land or transferred to other ships. As additional limitations, the evaluators determined that retrieval of the deployed system would be difficult due to the proposed use of anchoring devices; that damaged conduit could not easily be repaired; and that additional booster pumps were needed due to the 5-mile pipeline length (presented by Coflexip as necessary to span the 4-mile distance specified in the RFP). These limitations were considered to bear negatively on the "credibility of the proposal" and "understanding the challenge" evaluation criteria.

Simplex's system was based on a multiple-reel concept under which the pipeline would be deployed from eight separate reels, each weighing 100,000 pounds. For the same essential reasons that Coflexip's single basket system was disfavored, Simplex's reels were deemed advantageous: the reels would be easier to install, operate, maintain, repair, retrieve, transport and transfer. At the same time, Simplex's proposed cost was lower than Coflexip's. Simplex proposed a life cycle cost of \$5.4 million over the 20-year system life, while Coflexip proposed a \$5.8 million initial system cost plus \$70,000 of projected annual maintenance costs for a life cycle cost estimate of \$7.2 million.

Based on the evaluators' conclusions and Simplex's lower cost, MARAD and the Navy began final contract negotiations with Simplex after May 30. Simplex was awarded a \$5.6 million contract on August 3, with a 9-month delivery schedule.

Coflexip challenges the award to Simplex on several grounds, the most relevant of which are discussed in detail below.

Operational Superiority of Simplex's System

Coflexip contends that the reasons given by MARAD for selecting Simplex were invalid and inconsistent with the stated evaluation criteria. The protester argues that while its single basket may require extensive tanker modification to support its 1-million-pound weight, Simplex's eight reels will necessitate reinforcing a substantially larger deck area. Coflexip seems to concede that transferring its system from ship to ship would require a substantial effort, but submits that a similar effort would be required to transfer Simplex's system and that, moreover, the RFP did not require transferability at all. Coflexip concedes that its system cannot be transported across land, but argues that neither can the Simplex system, since that system's 30-foot-diameter reels are too large for truck or rail.

It is neither the function nor the practice of our Office to determine independently the acceptability or relative technical merit of proposals. Our review of an agency's evaluation of proposals is limited to examining whether the evaluation was fair, reasonable and consistent with the evaluation criteria. We will question an agency's assessment of the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion, or violation of procurement statutes or regulations. Georgetown Air & Hydro Systems, B-210806, Feb. 14, 1984, 84-1 C.P.D. ¶ 186. We do not believe Coflexip has made such a showing.

MARAD explains in its report that since Simplex's system will be spread over 3,000 square feet of the deck and the load on any portion of the deck thus will not be excessive (267 pounds per square foot), the deck reinforcement can be accomplished by adding light foundation to the hull. Conversely, the agency states that because Coflexip's 1-million-pound basket will be situated on a 16-foot-diameter area of the deck (more than 6,000 pounds per square

foot), extensive modifications within the hull would be necessary to reinforce the deck. We see no basis to question MARAD's determination that these internal hull modifications are more involved than the reinforcement needed for Simplex's system, and Coflexip has offered no contrary evidence beyond its own unsupported assertions.

Although the RFP did not specify system transferability as a minimum requirement, neither did it provide that transferability would not be considered. In view of the RFP's "best approach" format and the broad evaluation criteria (e.g., benefits of the proposed approach), we think offerors were sufficiently on notice that innovative system features would be weighed in the evaluation. The transferability of a system from ship to ship, in our opinion, reasonably can be viewed as a benefit of an approach, and it thus was appropriate for MARAD to consider this system feature in the evaluation.

We also believe MARAD reasonably determined that Simplex's system could be transferred more easily and quickly than Coflexip's system. While Coflexip concedes that its system can be transferred from ship to ship only in a shipyard, Simplex explains that, contrary to Coflexip's further assertions, its system in fact can be transferred out of port. Specifically, it claims that its system can be hoisted with 90-ton cranes (since each of the eight reels weighs only 50 tons) and points out that the Navy currently has ships in operation equipped with these cranes. This explanation appears reasonable on its face, and we find no contrary evidence in the record.

Coflexip's contention that Simplex's system, like its own, is not transportable across land by rail or truck is based on its understanding that the Simplex reels are 30 feet in diameter. MARAD and Simplex both state, however, that the reels actually are only 10 feet in diameter and 30 feet long. Coflexip has not argued that reels of this size are not easily transportable.

As for pipeline repair capability, Coflexip argues that MARAD ignored the repair package offered in its proposal which, Coflexip claims, included a method for replacing damaged sections of pipe and a repair kit for lesser damage. We have examined Coflexip's proposal, and while it does set forth a "maintenance and repair" concept involving a replacement of damaged 2,200-foot pipe sections, it does

not mention any minor repair procedure. Simplex's proposal did detail both a major repair procedure and a minor procedure which apparently can be performed by government personnel in the field while the pipeline is in service. MARAD considered this an operational advantage, and we find no basis for concluding otherwise.

We conclude that these several considerations provided a sufficient basis for MARAD's determination that Simplex's system was technically superior to Coflexip's system under the RFP's evaluation criteria.

Coflexip believes it should have had "the opportunity to demonstrate that those factors which MARAD accepted as tipping the balance in Simplex's favor were illusory or that the Coflexip system was equal or superior in those respects as well." It is not the purpose of discussions, however, to afford an offeror an opportunity to establish that its approach is superior to another offeror's, and it is not incumbent upon the contracting agency to disclose another offeror's approach for this purpose. Coflexip was free to attempt to persuade MARAD as to the merits of its single basket on its own initiative, but could not rely on the agency to reveal Simplex's or any other offeror's approach for discussion or any other purpose.

Four-Mile Standoff Requirement
Changed Without Notice to Coflexip

Coflexip maintains that Simplex's proposal should have been rejected as technically unacceptable because it was based on furnishing exactly 4 statute miles of pipeline. Alternatively, Coflexip argues that MARAD improperly relaxed the 4-mile standoff requirement for Simplex without informing Coflexip that the requirement was relaxed. The RFP required that the conduit be able to "span the distance from the tanker to the shore manifold, at any mooring location from 2,000 to 21,120 feet [4 miles] offshore." Coflexip argues strenuously that the 4-mile standoff requirement cannot be met with only 4 miles of pipe due to the "catenary effect" (curvature in the deployed pipe) which would be caused by a 1.5-knot crosscurrent during deployment of the pipe to shore and the limited pulling capacity of the tugboats used to deploy the pipe. For this reason, Coflexip explains, it offered a system with 5 miles of pipeline.

MARAD responds that: (1) it should have been clear from the preproposal conference that MARAD interpreted the RFP as requiring only 4 miles of conduit; (2) this aspect of the protest is untimely since the requirement for only 4 miles of pipe was clear from the conference and Coflexip did not protest the requirement prior to the closing date for submission of proposals; and (3) MARAD reasonably concluded that Simplex's system, as offered, could meet the 4-mile standoff requirement, since its technical experts never found otherwise. Simplex, basically adopting this latter argument, asserts that MARAD's technical experts reasonably concluded that, due to the essentially straight-line deployment possible using Simplex's proposed "float-sink" deployment method, Simplex can meet the 4-mile standoff requirement with exactly 4 miles of pipeline.

We find that the RFP required a system capable of spanning 4 miles of pipe, that MARAD never relaxed this requirement for all offerors, and that MARAD did not reasonably determine that Simplex's system could meet this requirement with 4 miles of pipeline.

As already noted, the RFP stated that the system must "span" a 4-mile distance from a moored tanker to shore; it does not call for 4 miles of pipeline. We consider this language clear and unambiguous, and while MARAD may have intended to accept exactly 4 miles of pipe, we find no evidence that MARAD ever altered this requirement. It is true that some of the questions posed at the conference included a reference to 4 miles of pipe, but these were indirect references only--no offeror asked whether, or was told that, the RFP called for 4 miles of pipe. Coflexip therefore had no reason to protest the requirement prior to the closing date; its interpretation of the RFP was correct. This portion of the protest thus is not untimely under our Bid Protest Procedures. 4 C.F.R. 21.2(b)(1) (1984).

We find Coflexip's position that more than 4 miles of pipe was necessary persuasive. Even assuming no catenary effect during deployment and, thus, a straight-line deployment, exactly 4 miles of deployed pipeline would be perfectly taut across the surface of the water for a 4-mile distance. Neither MARAD nor Simplex has attempted to rebut Coflexip's view that a perfectly taut pipeline would not have the tensile strength to withstand the various environmental conditions (such as wind, currents, etc.) likely to

be encountered during any period the pipe would be deployed. Since Simplex actually proposed laying its pipeline on the sea floor, furthermore, and not in a straight line across the surface, it seems clear that some additional length of pipe beyond exactly 4 miles would be needed to allow for the distance from the sea floor to the mooring connection at the surface. Again, the record includes no explanation of how MARAD determined that a straight-line deployment would overcome this apparent need for additional pipe.

Information furnished MARAD by Simplex during discussions seems to support Coflexip's view. In a May 14 clarification responding to certain technical questions posed by Watters, Simplex acknowledges that extra pipe length will be necessary for the catenary, the exact amount depending on various factors such as distance to shore, depth beneath the tanker, and speed of any crosscurrent. Simplex goes on to state that, allowing for a 1/2-mile "billow" (catenary) in extreme crosscurrents, as much as "1200 feet of extra pipe will be needed," and that, "therefore, a 21,120 foot distance to shore will require 22,320 feet of pipe."

We conclude that, whether or not MARAD actually intended to relax the 4-mile standoff requirement, award of a contract to Simplex for exactly 4 miles of pipeline was tantamount to a relaxation of the requirement only for Simplex. It is a fundamental principle of federal procurement that a contract award must reflect the requirements upon which the competition was based, and that a material change in government requirements may not be negotiated with only the otherwise successful offeror. Cohu, Inc., 57 Comp. Gen. 759 (1978), 78-2 C.P.D. ¶ 175. It is inherently unfair to unsuccessful offerors to award a contract on a basis other than what the government said it wanted in the solicitation. Coflexip claims that it would have been able to reduce its proposed cost significantly by eliminating a mile of pipeline as well as pumping and handling equipment, had it been informed that only 4 miles of pipeline was required. Since the award was based in part on Simplex's low proposed cost, and Simplex's proposed cost was based on meeting the relaxed requirement, Coflexip was denied the opportunity to have its system cost fairly evaluated. See E.C. Campbell, Inc., B-205533, July 8, 1982, 82-2 C.P.D. ¶ 34. We sustain the protest on this ground.

Delivery Requirement Changed Without Notice to Coflexip

The RFP required delivery in time for testing scheduled for August 1984, that is, within 5 to 6 months after the planned award. As indicated above, MARAD emphasized in the RFP and at the preproposal conference that time was of the essence. Sometime after receipt of the proposals, MARAD became aware that the scheduled testing would not be possible due to delays in the single-point mooring procurement being conducted by the Navy. MARAD apparently never informed Coflexip, however, that the delivery requirement had been changed. While Simplex proposed delivery within 8 months after award, Coflexip offered delivery within 6-1/2 months. The final contract with Simplex established an even more lenient 9-month delivery schedule (from date of award).

Generally, a delivery schedule or time of performance requirement is regarded as a material requirement, a change in which--as with the 4-mile standoff requirement discussed above--must be communicated to all offerors. Ford Aerospace & Communications Corp., B-200672, Dec. 19, 1980, 80-2 C.P.D. ¶ 439. Here, the change in the agency's delivery deadline from August 1984 to May 1985 clearly constituted a material change which should have been communicated to Coflexip; Coflexip claims it could have reduced its bid had it not had to plan on paying premiums to subcontractors for expedited delivery in accordance with the deadline expressed in the RFP and emphasized at the conference. While it is unclear precisely what impact the relaxed delivery schedule would have had on Coflexip's bid price, we recognize that extending delivery by at least 1-1/2 months could have led Coflexip to reduce its cost significantly. Coflexip's proposal does clearly indicate an effort to provide for delivery as close to the testing date as possible.

Improprieties Not Excused by Procurement Statute Exemption

MARAD argues that improprieties under this procurement should not constitute a basis for sustaining Coflexip's protest because MARAD has been exempted from the policies and procedures of the general federal procurement statute, the Federal Property and Administrative Services Act of 1949, by the act's provision at 40 U.S.C. § 474(16) (1982). That provision states:

"Nothing in this act shall impair or affect any authority of--

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(16) the Maritime Administration with respect to the construction, reconstruction, and reconditioning (including outfitting and equipping incident to the foregoing), the acquisition, procurement, operation, maintenance, preservation, sale, lease, or charter of any merchant vessel or of any shipyard, ship site, terminal, pier, dock, warehouse, or other installation necessary or appropriate for the carrying out of any program of such Administration authorized by law, or nonadministrative activities incidental thereto: Provided, That the Maritime Administration shall to the maximum extent that it may deem practicable, consistent with the fulfillment of the purposes of such programs and the effective and efficient conduct of such activities, coordinate its operations with the requirements of this Act, and the policies and regulations prescribed pursuant thereto. . . ."

By its plain terms, the provision applies only to installations necessary for carrying out MARAD programs (and nonadministrative activities incidental to these programs) authorized by law. The conduit system here is part of a Navy program and is funded entirely by the Navy. MARAD is merely conducting the procurement at the Navy's request.

In any event, MARAD's exemption from the act is not unqualified. The legislative history of the act indicates that Congress intended MARAD and other agencies with exemptions to comply with the act except to the extent that doing so would actually interfere with the operation of their programs. See H.R. Rept. No. 670, 81st Cong., 1st Sess. (1949), reprinted in 1949 U.S. Code Cong. & Admin. News 1475, 1504. MARAD has not explained how advising Coflexip of the relaxing of material requirements would have interfered with any MARAD program, and it is not evident to

us that this would have been the case. Moreover, while the record shows that MARAD deemed it desirable to avoid certain preliminary competitive requirements (such as the Commerce Business Daily publication requirement), there is no indication that MARAD ever determined that it would be impracticable to comply with competitive procurement requirements generally. Indeed, the fact that MARAD endeavored to conduct a normal competitive procurement suggests that MARAD considered it practicable to comply with the act.

We conclude that section 474(16) of title 40 does not provide a basis for excusing MARAD's failure to advise Coflexip that the 4-mile standoff requirement and delivery schedule had been relaxed.

Recommendation--Proposal Preparation Costs

Ordinarily, where, as here, an agency has failed to assure that offerors were competing on an equal basis, we would recommend that negotiations be reopened to permit offerors to modify their proposals based on the same requirements, and that a new award be made, if necessary, based on the results of a reevaluation. We have been advised by MARAD, however, that Simplex has procured all conduit production materials; that a subcontractor has begun manufacturing the reel systems and machinery; that the tanker modifications have been scheduled; and that termination costs therefore likely would be significant. Under these circumstances, it would not be in the government's best interest to terminate Simplex's contract in the event the reevaluation was favorable to Coflexip; it thus would serve no purpose to recommend reopening negotiations at this point. See System Development Corporation and Cray Research, Inc., B-208662, Aug. 15, 1983, 83-2 C.P.D. ¶ 206; Fitts Construction Co., Inc., 62 Comp. Gen. 615 (1983), 83-2 C.P.D. ¶ 190.

Coflexip maintains it has learned from several unnamed sources that Simplex has experienced undue delays in performing its contract and that MARAD and the Navy are considering terminating Simplex's contract for default. Coflexip presumably is attempting to establish that performance has not progressed significantly, and that it would be practicable to recommend award to Coflexip. MARAD has informed us, however, that there have been no

unacceptable performance delays, that Simplex is performing in accordance with the terms of its contract, and that it is not considering terminating Simplex's contract. As we find no basis for questioning MARAD's information, we reject any suggestion by Coflexip that Simplex has not made significant progress under the contract. We add, for Coflexip's general information, that whether a contractor is performing in accordance with the terms of its contract is a matter of contract administration, which is solely the responsibility of the contracting agency, not our Office. See 4 C.F.R. § 21.3(g)(1) (1984); Radix II, Inc., B-216635, Dec. 17, 1984, 84-2 C.P.D. ¶ 676.

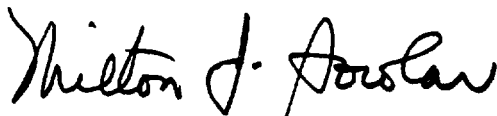
Coflexip claims entitlement to recovery of its proposal preparation costs. An unsuccessful offeror will be entitled to recover such costs where the agency has acted improperly in conducting the procurement, and the claimant would have had a substantial chance of receiving the award but for the agency's improper action. See Heli-Jet Corporation v. United States, 2 Ct. Cl. 613 (1983). As we have found that MARAD's actions were improper here, the determinative question is whether Coflexip had a substantial chance of receiving the award. We find that Coflexip did have such a chance.

The award to Simplex was based not only on certain operational advantages of its system, but also on Simplex's lower proposed life cycle cost. It thus would seem to follow that, had Coflexip's cost been lower than Simplex's, one of the reasons for making award to Simplex actually would have become a reason for making award to Coflexip. Had Coflexip's cost been far enough below Simplex's, it might have been viewed by MARAD as sufficient to offset the operational advantages of Simplex's system, and thus to warrant an award to Coflexip. Whether such a tradeoff might have occurred cannot now be determined with certainty both because Coflexip's cost apparently was significantly inflated by MARAD's improper action and because the record contains no contemporaneous evaluation documentation indicating the relative importance MARAD assigned Simplex's operational advantage vis-a-vis cost.

We have held that where an agency's improper action makes it impossible to determine precisely the claimant's chance of receiving the award, and the claimant had a

colorable chance at the award, fairness dictates that we adopt a presumption favoring the claimant. See System Development Corporation and Cray Research, Inc.--Reconsideration, 63 Comp. Gen. 275 (1984), 84-1 C.P.D. ¶ 368; M.L. MacKay & Associates, Inc., B-208827, June 1, 1983, 83-1 C.P.D. ¶ 587. Coflexip had a colorable chance of receiving the award since it was one of only two technically acceptable offerors and, but for MARAD's failure to reveal the relaxed requirements, the firm's cost might have been low enough to offset Simplex's technical advantage. As we have found it impracticable to reopen negotiations at this juncture, it is not now possible to determine whether this would have been the case. Applying the above rule, we believe fairness requires a finding that Coflexip's chance at the award was sufficient to support its claim based on MARAD's improper action.

The protest is denied in part and sustained in part. Proposal preparation costs are allowed. By letter of today, we are advising the Secretary of Transportation of our findings and recommending that steps be taken to assure that similar deficiencies do not occur in future procurements.

for 
Comptroller General
of the United States