

DECISION

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

FILE:

B-221888

DATE:

July 2, 1986

MATTER OF:

Newport News Shipbuilding and
Dry Dock Company

DIGEST:

1. Protest alleging improprieties in a solicitation issued under the Pub. L. 99-190 test program for overhaul of Navy vessels falls within the definition of protest in the Competition in Contracting Act (CICA) since CICA does not require that an award be proposed at the time a protest is filed and a proposed award within the statutory definition was contemplated when the solicitation was issued.
2. A protester which did not submit a proposal but is a potential competitor if the protest is successful is an interested party to pursue a protest alleging, among other things, that solicitation contains ambiguously defined work scope.
3. Protest that ambiguities and omissions in the statement of work preclude a common basis of bidding is denied where the record shows that offerors have been given access to all information reasonably available to the agency. To the extent that there are uncertainties as to exactly what will be required, offerors can take these uncertainties into account in computing their offers; the mere presence of risk in a procurement does not make the competition improper.
4. Protest against agency's selection of lowest target price as the sole evaluation criterion is sustained, and costs for filing and pursuing the protest, including attorney's fees, are granted. In view of the unique nature of Pub. L. 99-190's public-private competition, the Navy should have conducted some type of analysis of the price elements to ascertain their reasonableness.

130263 / 035867

5. Where protester raises new grounds of protest in its comments to the agency report and the grounds were known more than 10 working days prior to the submission of the comments, the new grounds of protest are untimely and will not be considered.
6. Under the Competition in Contracting Act of 1984, agencies are primarily responsible for determining whether to release certain documents. Nevertheless, decisions on bid protests are based on the entire record and not merely on those portions that have been released to the protester.

Newport News Shipbuilding and Dry Dock Company (NNS) protests the Naval Sea Systems Command's (NAVSEA) January 24, 1986, request for proposals (RFP) for the overhaul of two nuclear submarines, USS Benjamin Franklin (SSBN 640) and USS George Bancroft (SSBN 643). NNS contends that the RFP contains an ambiguously defined work scope, an improper evaluation factor of lowest target price, and a fixed-price contract format which precludes a true, fair and meaningful competition between public and private shipyards.

We deny the protest in part and sustain it in part.

BACKGROUND

Title II of the Department of Defense Appropriations Act for fiscal year 1986, Pub. L. No. 99-190, appropriated funds for a test program to acquire the overhaul of four or more vessels by competition between public and private shipyards. Specifically, the act provides:

"That of the total amount of this appropriation made available for the alteration, overhaul, and repair of naval vessels, not more than \$3,650,000,000 shall be available for the performance of such work in Navy shipyards: Provided further, That from the amounts of this appropriation for the alteration, overhaul and repair of naval vessels, funds shall be available for a test program to acquire the overhaul of four or more vessels by competition between public and private shipyards. The Secretary of the Navy shall certify, prior to award of a contract under this test, that the successful

bid includes comparable estimates of all direct and indirect costs for both public and private shipyards. Competition under such test program shall not be subject to section 502 of the Department of Defense Authorization Act, 1981, as amended, or Office of Management and Budget Circular A-76:"

The two submarines involved in this protest were among the vessels designated by the Navy for participation in the test program.

On January 24, 1986, the Navy issued letters to NNS and the Charleston Naval Shipyard (CNSY),^{1/} a government-owned and -operated field activity of NAVSEA, requesting proposals for the overhaul of SSBN 640, SSBN 643, or both ships, on a fixed-price, incentive basis with 50/50 sharelines and ceiling prices set at 130 percent of target cost. Award was to be made to the responsible offeror submitting the lowest target price for each ship. On February 26, 1986, NNS protested to our Office, alleging various solicitation improprieties. NNS submitted a proposal on the SSBN 640 overhaul by the March 6, 1986, closing date, but submitted no proposal on the SSBN 643. CNSY submitted a proposal for both overhauls. After determining that urgent and compelling circumstances significantly affecting the interest of the United States would not permit waiting for our decision on NNS's protest, the Navy assigned both overhauls to CNSY.

JURISDICTION

The Navy asserts that our Office lacks jurisdiction to consider this matter. According to the Navy, since the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(1) (Supp. II 1984), applies only to the award of contracts, NNS cannot protest the Navy's assignment of work to CNSY.

^{1/} According to the Navy, NNS is the only nuclear-qualified private shipyard currently capable of performing complex refueling overhauls of SSBN submarines, which are nuclear powered and carry ballistic missiles; CNSY is the only naval shipyard with the capability to perform the overhauls commencing in fiscal year 1986.

CICA defines a protest as:

" . . . a written objection b, an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract." 31 U.S.C. § 3551(1), as added by section 2741 of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, title VII, 98 Stat. 1175, 1199.

The Navy, in effect, is arguing that by deciding to assign the overhaul work to CNSY, there is no longer a "proposed award" and, therefore, there is no statutory basis to consider the protest. However, we do not interpret CICA so narrowly as to require that an award be proposed at the time a protest is reviewed in order to be considered by our Office. In issuing a solicitation,^{2/} an agency proposes to award a contract under the terms and conditions set forth in the solicitation and offers are submitted on that basis. In our view, a "proposed award," within the statutory definition, is contemplated under these circumstances and, therefore, a timely protest of an agency's action concerning the solicitation will be considered. See Contract Services Company, Inc., B-219430, Oct. 28, 1985, 65 Comp. Gen. ___, 85-2 C.P.D. ¶ 472.

The Navy further argues that its final decision here involves no more than the allocation of overhauls to the public and private sectors, which is a matter of executive branch discretion not reviewable by GAO. To support its contention, the Navy cites our previous decisions that,

^{2/} We regard the Navy's letters dated January 24, 1986, to NNS and CNSY, requesting fixed-price proposals for the overhaul of SSBN 640, SSBN 643 or both ships and attaching pro forma overhaul contracts, as a solicitation. We note that the Navy's February 7, 1986, letters to NNS and CNSY, attaching certain documents to be reviewed and completed as part of their offers, instructed NNS and CNSY that the pro forma contracts and the February 7 enclosures should be read as a whole and interpreted as an RFP for purposes of preparing a proposal.

generally, we do not review an agency decision concerning whether work should be performed in-house or by a contractor, since we regard this to be a matter of executive branch policy not within our bid protest function. See, e.g., Crown Laundry and Dry Cleaners, Inc., B-194505, July 18, 1979, 79-2 C.P.D. ¶ 38.

We have considered as an exception to this rule an agency use of the procurement system to aid in its decisionmaking, spelling out in a solicitation the circumstances under which the government will or will not award a contract. Joule Maintenance Corp., B-208684, Sept. 16, 1983, 83-2 C.P.D. ¶ 333; Dynateria Inc., B-221089, Mar. 31, 1986, 86-1 C.P.D. ¶ 302. Since the Navy used the procurement system in soliciting an offer from NNS, we will review the Navy's compliance with applicable procurement laws and regulations. 31 U.S.C. § 3552, as added by section 2741 of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, title VII, 98 Stat. 1175, 1199. Our standard of review will include 10 U.S.C. § 2301, et seq., and the Federal Acquisition Regulation (FAR) to the extent they do not conflict with the Navy's broad procurement authority under Pub. L. No. 99-190.^{3/} Cf. CoMont Inc., B-219730, Nov. 14, 1985, 65 Comp. Gen. _____, 85-2 C.P.D. ¶ 555. (Though the Department of Housing and Urban Development has extraordinary authority under the National Housing Act (NHA), we applied FAR provisions in deciding a protest against a procurement conducted under NHA absent a determination that regulatory procurement procedures would impair or affect the carrying out of NHA programs.)

The Navy also argues that NNS did not submit an offer for the SSBN 643 overhaul and, therefore, is not an interested party to protest the assignment of that overhaul. NNS contends that due to insufficient available information and lack of clarification by the Navy, it had no choice but to elect not to submit a proposal. An interested party is defined in CICA, 31 U.S.C.A. § 3551(2) (West Supp. 1985), as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of

^{3/} We note that the Navy advised offerors that the competition was being conducted under Public L. No. 99-190 title II, using as guidelines basic underlying procurement principles, including those that may be reflected in the FAR.

the contract." This statutory definition of an "interested party" is reflected in the language of our Bid Protest Regulations, which implement CICA. 4 C.F.R. §21.0(a) (1985). Under CICA and our implementing Bid Protest Regulations, NNS's interest as a potential competitor, if the protest is successful, is sufficient for it to be considered an interested party. See Tumpane Services Corporation, B-220465, Jan. 28, 1986, 86-1 C.P.D. ¶ 95.

SCOPE OF WORK

NNS protests that the ambiguities and omissions in the statement of work, specifically the General Clarification provision, preclude a common basis of bidding. The General Clarification provision states that:

"The contract target cost and target fee are based on, among other things, costs incurred by the Contractor under recent previous submarine overhaul contracts. In arriving at the target cost and target fee, the parties have assumed that work to be performed under this contract will be similar to work performed under those recent previous contracts. It is recognized that some work may be required to redeliver the ship in accordance with applicable specifications which, because such work is 'abnormal' or 'dissimilar' to work performed under the recent previous contracts, it cannot be reasonably inferred that the contract target cost and target fee include amounts for such work. Such 'abnormal' or 'dissimilar' work is not included within the work required to be performed under the specifications of this contract and shall be performed only pursuant to separately priced contractual modifications."

According to NNS, NNS and CNSY have experienced different types and amounts of work on previous submarine overhauls, and there is no "normal and similar" baseline based on their previous overhaul work. NNS asserts that it and CNSY are basing their offers on different overhauls, and there is no way that "normal and similar" can be interpreted to assure that they are competing for the same scope of work.

The Navy responds that it provided both offerors with an identical General Description of work, which directed the contractor, in accordance with specifications, to prepare

for and accomplish the overhaul, refueling and subsequent testing of the reactor plant of the vessel, and prepare for and accomplish the overhaul, alteration, repair and subsequent testing of the vessel. The Navy notes that the first specification cited is the Overhaul Work Package (OWP), a two-volume document, six inches thick, containing over 300 line items. The Navy also notes that there are about 50 specifications identified in the statement of work.

Furthermore, contends the Navy, NNS has not identified any portion of the OWP, which NNS helped definitize for SSBN 640 during performance of an overhaul preparation contract, as being ambiguous or containing omissions. The Navy argues that the General Clarification provision which NNS cites in support of its ambiguity argument is not a statement of work requirements but, rather, a general clarification of the work specifically described in the rest of the statement of work, specifications, and OWP. According to the Navy, the language simply states one of the bases upon which the target price is based: costs under recent previous submarine overhauls. The Navy asserts that the language indicates the parties assume the work will be similar to work performed on prior overhauls; to the extent it is not similar, the contractor will receive a contract adjustment. To the extent that offerors must calculate into their offers the risks of similar work, the risk is proper, argues the Navy. The Navy notes that NNS helped draft the language in 1981 and has agreed to such language in its seven most recent SSBN overhaul contracts.

Regarding NNS's argument that some jobs are significantly different from others, the Navy notes that about 85 percent of the work in the SSBN 640 OWP is identical to the work in the OWP's for the five most recent nuclear refueling overhauls for the SSBN 640 class completed by NNS. The Navy also reports that 85 percent of the work in the OWP for a recent submarine overhaul performed by CNSY is identical to the work in a recent OWP for an overhaul performed by NNS.

NNS comments that although the OWP language may be identical for a number of overhaul jobs, as applied to each job, the actual work scope is different. Each overhaul job is unique, since the extent of repair and the number of items needing repair or replacement have not been the same on all overhauls. NNS further comments that the normal and similar language significantly modifies the OWP and allows the Navy to demand more work without the accountability or visibility offered when the work scope is clearly defined. According to NNS, because the amount of work required is

significantly dependent upon the desires of cognizant Navy personnel, and there is no assurance of uniformity of interpretation or demand at different locales, a contract form that permits this use of discretion does not provide a common basis for proposal submission.

Solicitations must be drafted to inform all offerors in clear and unambiguous terms what is required of them so that they can compete on an equal basis. Dynalelectron Corp., B-198679, Aug. 11, 1981, 81-2 C.P.D. ¶ 115. Specifications should be free from ambiguity and should describe the agency's minimum needs accurately. Klein-Seib Advertising and Public Regulations, Inc., B-200399, Sept. 28, 1981, 81-2 C.P.D. ¶ 251. There is no legal requirement, however, that a competition be based on specifications drafted in such detail as to eliminate completely any risk for the contractor, or that the procuring agency remove every uncertainty from the minds of every prospective offeror. Dynalelectron Corp., B-220518, Feb. 11, 1986, 65 Comp. Gen. ___, 86-1 C.P.D. ¶ 151.

NNS has not met its burden of affirmatively proving that the solicitation lacked sufficient clarity to permit competition on an intelligent and equal basis. See Crimson Enterprises, Inc., B-209918.2, June 27, 1983, 83-2 C.P.D. ¶ 24. NNS has not shown that there is any information reasonably available to the Navy that offerors have not been given. NNS has not cited any portion of the OWP as being ambiguous or containing omissions other than language on particular line items such as "repair or restore" or "inspect and repair, as necessary." NNS comments that such language may affect the scope of the overhaul work because the extent of repair and the number of items needing repair have not been the same on all overhauls and cannot be determined until the ship is at the yard and the individual components are disassembled. NNS's objection to the General Clarification provision is similarly phrased.

Here, there is no legal requirement that competition be based on plans and specifications which state the work in detail so as to completely eliminate the possibility that the successful contractor will encounter conditions or be required to perform work other than that specified. See Hero, Inc., B-213225, Dec. 14, 1983, 83-2 C.P.D. ¶ 687. We have stated that such perfection, while desirable, is manifestly impracticable in some procurements. See 41 Comp. Gen. 484 at 488 (1962); Gibson & Cushman Dredging Corp., B-194902, Feb. 12, 1980, 80-1 C.P.D. ¶ 122. (Protest that statement of work was not specific was denied where

Corps of Engineers was able to describe dredging services required, but unable to identify precise dredging and disposal spots until after performance was to begin.)

We agree with the Navy that the language of the General Clarification provision indicates the parties assume the work will be similar to work performed on prior submarine overhauls and, to the extent it is not similar, the contractor will receive a contract adjustment. With regard to NNS's contention that there is no assurance of uniformity of interpretation of the General Clarification provision by Navy personnel, we have previously held that to the extent that there are uncertainties as to exactly what government officers will require, offerors can take these uncertainties into account in computing their offers. See Industrial Maintenance Services, Inc., B-207949, Sept. 29, 1982, 82-2 C.P.D. ¶ 296. NNS would be protected from arbitrary determinations by the contracting officer by the standard disputes clause incorporated in the solicitation. See Richard M. Walsh Associates, Inc., B-216730, May 31, 1985, 85-1 C.P.D. ¶ 621.

STATUTORY CERTIFICATION REQUIREMENT

NNS contends that the Secretary of the Navy has not complied with the requirement in the DOD Appropriations Act for fiscal year 1986, Pub. L. 99-190, that "The Secretary of the Navy shall certify, prior to award of a contract under this test, that the successful bid includes comparable estimates of all direct and indirect costs for both public and private shipyards." NNS alleges that the Secretary's March 19, 1986, letter to the Chairman of the Senate Subcommittee on Defense, Committee on Appropriations, does not comply with the statutory certification requirement because: (1) at no point does the letter purport on its face to be a certification; (2) the preestablished criteria mentioned in the letter have not been divulged; and (3) the Secretary merely states that he finds the "proposals to be comparable between the private and public shipyards" and has not certified that the successful bid "includes comparable estimates of all direct and indirect costs."

On March 19, 1986, the Secretary of the Navy wrote to the Chairmen of the congressional Committees on Appropriations, Subcommittees on Defense, stating, in pertinent part, that:

"The FY 86 Department of Defense Appropriations Act appropriated funds for a test program to acquire the overhaul of four or more

vessels by competition between private and public shipyards. The law further stipulated that I must certify, prior to award of a contract under this test, that the successful bid includes comparable estimates of all direct and indirect costs for both public and private shipyards.

Proposals from a total of two offerors were received for the refueling overhaul of the USS BENJAMIN FRANKLIN (SSBN 640). Charleston Naval Shipyard, Charleston, South Carolina submitted the low overall bid for the SSBN 640, and is the successful offeror. Charleston Naval Shipyard is the only offeror for the USS GEORGE BANCROFT (SSBN 643). We have analyzed the price proposals for both ships in accordance with preestablished criteria, and found the proposals to be comparable between the private and public shipyards.

Based on this comparability finding, and overall low costs, we will assign both ships to Charleston Naval Shipyard."

Contrary to NNS's view, we think the letter complies in form with the statutory certification requirement.^{4/}

NNS also protests the Navy's solicitation of offers on a fixed-price, incentive basis, alleging that it precludes a true, fair and meaningful competition between public and private shipyards. According to NNS, the fixed-price, incentive concept of a ceiling price is meaningless to a public shipyard because the public shipyard is under no contractually enforceable risk. NNS contends that the sole evaluation criterion of lowest target price is inconsistent with the congressional mandate authorizing this procurement and with accepted procurement principles. NNS, assuming CNSY's proposal was submitted on a cost-reimbursement basis, argues that the Navy must not only evaluate target price but must perform a cost realism analysis. Furthermore, argues NNS, it is difficult to envision how the Secretary of the Navy, without the conduct of a cost realism study, can properly certify that NNS's and CNSY's proposals include comparable estimates of all direct and indirect costs.

^{4/} As discussed below, we do not conclude the facts reasonably supported the certification in the case of SSBN 640.

The Navy contends that there are safeguards against CNSY's alleged freedom to propose an unrealistically low target cost and target price. CNSY's proposed target price is constrained by direction from the Navy as to what costs it must propose, in order to permit the Secretary's comparable cost certification. CNSY's proposed price is also constrained because CNSY will not be reimbursed from Operations and Maintenance, Navy (O&M,N) funds for more than the ceiling price. Costs above the ceiling price will come from CNSY's Accumulated Operating Results (AOR) in its Navy Industrial Funds (NIFs) account.^{5/} Thus, the O&M,N funds provided by Congress for the overhauls will not be charged costs above the ceiling price in the event of an overrun, regardless of whether a public or private shipyard performs the work.

NNS comments that the latter safeguard is just an accounting practice and that taxpayer money will still be used to fund cost overruns. We agree. While we have no doubt that CNSY made a conscientious effort to formulate a realistic estimate, the fact remains that the government will pay for any cost-overruns by CNSY from public funds, be they O&M,N or AOR. In contrast, NNS will absorb any overruns from NNS' own corporate funds. The CNSY reimbursement arrangement is more closely analogous to a cost reimbursement type contract than the fixed price contract NNS was bound to perform, in which the government is legally obligated to pay the private contractor no more than the ceiling price. Absent any more effective constraint than the possible AOR deficit, we believe that the Navy should have conducted some type of cost realism analysis of CNSY's proposal.

In view of the above, we do not believe the estimate that formed the basis for the Secretary's certification was properly reviewed or verified. The Secretary is required to

^{5/} Work is ordinarily assigned to a public shipyard by a project order. The NIFs provide the operating capital, which is expended by the shipyard in performing the work and is reimbursed by the ordering activity up to the fixed price. If the naval shipyard performs the work at less than the fixed price, the difference is added by the shipyard to its AOR. If the naval shipyard performs the work at more than the fixed price, the difference is taken from the shipyard's AOR. The AOR operates much like a private company's retained earnings, the net amount of the business' overruns and underruns on all work.

certify that the successful bid includes comparable estimates of all direct and indirect costs for both public and private shipyards. In the case of SSBN 640, where there were offers from both a private and public shipyard, the individual elements of the bid estimates prepared by CNSY were not reviewed to ascertain whether they were reasonable. An audit firm reviewed CNSY's bid estimate to ascertain how it was prepared and what elements it contained. This audit made no judgment or review of the reasonableness or quantum of these elements.

Although no formal review under OMB Circular No. A-76 was required, it is our view that Public Law 99-190 envisions more than an unverified bid estimate by the public shipyard, in view of the nature of this public-private competition. That is, we do not believe the estimate for the public shipyard can be deemed comparable under Public Law 99-190 unless its elements are reviewed as to reasonableness to determine if they are in line with independent government estimates. A certification by the Navy without a proper verification that the elements of the public shipyard's estimate are reasonable would render the purpose of this certification meaningless.

OTHER ISSUES

In commenting on the agency report, NNS raises two new protest issues: that CNSY "bought in" to this procurement because its price was between 20 and 40 percent below the lowest total cost on any previous SSBN overhaul by CNSY, and that the Navy's determination to award in the face of this protest because of urgent and compelling circumstances is an abuse of discretion.

Protest arguments not raised in a protester's initial submission must independently satisfy the timeliness requirements of our Bid Protest Regulations, 4 C.F.R. part 21 (1985). Where the protester supplements its original timely protest with new grounds of protest in its response to the agency report more than 10 working days after the basis for the new arguments should have been known, the new grounds are untimely. See Consolidated Group, B-220050, Jan. 9, 1986, 86-1 C.P.D. ¶ 21. The Navy notified NNS on March 21, 1986, of its determination in the face of the protest to assign the overhauls to CNSY for a target price of \$224,166,288. Since we received NNS's comments on April 11, 1986, the new grounds are clearly untimely and will not be considered. 4 C.F.R. § 21.2(a)(2).

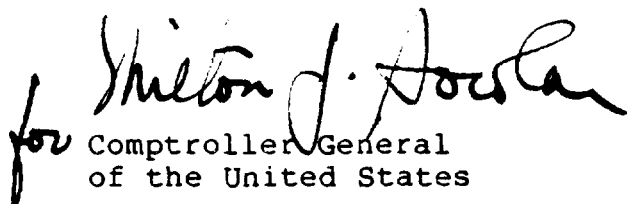
NNS objects to the Navy's failure to provide NNS with copies of all documents which the Navy has relied upon in its responses to GAO and asks GAO to supply NNS with copies of the entire record that we will consider. However, the authority to determine what documents should be released to a protester is vested in the contracting agencies, not this Office. See 31 U.S.C.A. § 3553 (f) (West Supp. 1985). Consistent with our practice, we have reviewed and base our decision on the entire record, not merely those portions that have been provided to the protester. S&Q Corp., B-219420, Oct. 28, 1985, 85-2 C.P.D. ¶ 471.

CONCLUSION

The protest is denied in part and sustained in part. In view of the urgent need for the overhaul work involved, we do not recommend that performance of work on the SSBN 640 be disturbed.

We will not grant NNS's request for proposal preparation costs. The award of proposal preparation costs is only justified where the protester shows both that the government's conduct towards the protester was arbitrary and capricious, as opposed to merely negligent, and that, if the government had acted properly, the protester would have had a substantial chance of receiving the award. I. E. Levick and Associates, B-218294.2, Apr. 12, 1985, 85-1 C.P.D. ¶ 424. The record does not show that, if the Navy had performed a cost realism analysis, NNS would have had a substantial chance of receiving the award. Accordingly, we deny the claim for proposal preparation costs.

However, since the protest had merit in part, we recommend that NNS be allowed to recover its costs for filing and pursuing this protest, including attorney's fees. See 4 C.F.R. § 21.6(a). NNS should submit its claim for such costs directly to the Navy.


for Comptroller General
of the United States