The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Consulting and Program Management Services, Inc.--Request for Reconsideration

File: B-225369.2

Date: July 15, 1987

DIGEST

1. Resolicitation under revised specifications, rather than award to protester, is appropriate remedy where solicitation requirements exceeded agency's minimum needs and unduly restricted competition.

2. Although protester will have an opportunity to compete for award under resolicitation, it is entitled to recover the costs of filing and pursuing its protest, including reasonable attorney's fees, where the schedule for resolicitation deprives the protester of the opportunity to compete, and be awarded a contract, for the basic contract period.

DECISION

Consulting and Program Management Services, Inc. (CPMS) requests reconsideration of our decision in Consulting and Program Management, B-225369, Feb. 27, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 229. In that decision, we sustained CPMS' protest against award of a contract to Massachusetts Technological Laboratory, Inc. (MTL) under request for proposals (RFP) No. L/A 86-19, issued by the Department of Labor (DOL) for property management services. CPMS, however, questions our recommendation that the agency resolicit its requirement for property management services and argues that we should instead recommend award to CPMS. We affirm our prior decision.

BACKGROUND

CPMS originally protested the award on the ground that the individual staff members proposed by MTL failed to satisfy experience and qualification requirements for each of several labor categories set forth in the solicitation. In agreeing with CPMS, we rejected the agency's apparent interpretation of the solicitation that one individual's

experience could offset another individual's failure to meet the stated experience requirements. We found that, whatever the agency's intent, the only reasonable interpretation of the solicitation was that these were individual, rather than collective, staff requirements. Since we also found that individuals on MTL's proposed staff did not meet the minimum qualifications set forth for each labor category, we concluded that the award was improper and sustained the protest.

In considering the appropriate remedy, we recognized that DOL maintained that our literal interpretation would make the experience requirements more restrictive than intended and create a sole-source procurement, since only CPMS could satisfy them. We also noted that contracting officials had been so concerned about the possible restrictiveness of the requirements before the solicitation was issued that they modified the restrictions for selected labor categories. Finally, we noted that the contracting officer stated at the administrative conference that the transition from CPMS to MTL had been achieved without problems. These facts led us to find that the experience requirements, under the only reasonable interpretation, exceeded the agency's minimum needs. Because only three small businesses had submitted proposals, we also reasoned that the overstated requirements may have deterred other prospective offerors from competing. We thus concluded that the only appropriate remedy was a resolicitation of the requirement with a solicitation reflecting DOL's true needs, and subsequent termination of MTL's contract in the case of a different outcome.

RESOLICITATION

In its request for reconsideration, CPMS maintains that, rather than recommend resolicitation, we should instead recommend termination of MTL's contract and an award to CPMS under the original solicitation. CPMS claims that there is no factual basis for the conclusion that the experience requirements in the solicitation exceeded the agency's minimum needs, and argues that we should not have considered MTL's performance under the new contract. In any case, CPMS alleges that there has been a deterioration of service under MTL. DOL, on the other hand, continues to maintain that the experience requirements in the original solicitation, when interpreted as individual rather than collective requirements, exceed the agency's minimum needs and unduly restrict competition. The agency denies that MTL's performance under the contract is unsatisfactory.

We decline to alter our prior recommendation or to question the agency's evident intention to relax the experience requirements.

In fashioning an appropriate remedy where we have sustained a protest, we will take into account all relevant information. Where, as here, the issue is whether solicitation requirements were unduly restrictive, the agency's view of the awardee's performance under the contract in question, we believe, is relevant. In any event, our recommendation was based on the several facts noted above--not primarily MTL's performance--all of which indicated that, while MTL did not meet the experience requirements as we found they must be interpreted, DOL never intended that the requirements be interpreted so restrictively.

CPMS's emphasis on the quality of MTL's performance is misplaced, since, even if that performance were shown to be deficient, DOL nevertheless considers less stringent experience requirements adequate for its needs. In asking us to find that DOL's minimum needs can only be satisfied by a contractor whose employees satisfy more stringent experience requirements than the agency considers necessary, CPMS, in effect, is proposing that we require the agency to adopt more restrictive minimum needs. This determination generally is within the discretion of the agency, not our Office. CAD/CAM On-Line, Inc., B-226103, Mar. 31, 1987, 87-1 CPD ¶ 366. Moreover, since the objective of our bid protest function is to insure full and open competition for government contracts, our Office generally will not review a protest that has the explicit or implicit purpose of reducing competition; a protester's presumable interest as the beneficiary of a more restrictive specification is not protectable under our bid protest function. Ingersoll-Rand Co., B-224706 et al., Dec. 22, 1986, 86-2 CPD ¶ 701.

Although CPMS expresses concern that DOL may be relaxing the experience requirements only in response to the protest, CPMS has not demonstrated, and we find no reason to assume, that this is the case.

SCHEDULE FOR RESOLICITATION

The agency has recently advised our Office that the synopsis of its solicitation appeared in the Commerce Business Daily on June 18, and that it intends to make award before the expiration of the base year for MTL's contract on September 30, 1987. CPMS maintains that the agency must fully implement our recommendation within 60 days of the decision, and that DOL's delay thus is improper. In support of its contention, CPMS cites the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(e) (Supp. III 1985), which provides that the head of the procuring activity must report to the Comptroller General if our recommendation has not been fully implemented within 60 days of the agency's receipt of the recommendation.

We do not interpret CICA as requiring full implementation of our recommendations within 60 days under all circumstances. Rather, we view the reporting requirement as recognizing that implementation within 60 days may be impracticable in certain instances. We read the provision as requiring agencies to exert their best efforts to implement our recommendations within 60 days and to notify our Office within 60 days if full implementation is not possible within that period.

Here, DOL notified our Office of its proposed schedule within 60 days after the issuance of our decision. Although DOL's schedule will result in a new award as late as 7 months after our initial decision, we do not find this delay to be unreasonable, since DOL is contemplating significant revisions to the experience requirements, must evaluate new offers, and may again need to undertake negotiations. Accordingly, we are unwilling to conclude that DOL abused its discretion in proposing that any new contractor commence performance in October. See Furuno U.S.A., Inc.--Reconsideration, B-221814.2, June 10, 1986, 86-1 CPD ¶ 540 (details of implementing recommendation for corrective action are within the sound discretion and judgment of the contracting agency).

PROTEST COSTS

We find that CPMS is entitled to the costs of filing and pursuing its protest, including reasonable attorney's fees. Our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1986), limit the recovery of protest costs to situations where the contracting agency has unreasonably excluded the protester from the procurement (except where we recommend that the contract be awarded to the protester and the protester receives the award). We have construed this to mean that where our recommendation will afford the protester an opportunity to compete for award under the solicitation, the recovery of protest costs generally is inappropriate. See Genisco Technology Corp., B-224201.2, Feb. 18, 1987, 87-1 CPD ¶ 180. Here, however, the agency's schedule for resolicitation deprives the protester of any opportunity to compete, and be awarded a contract, for the basic contract period. Under these circumstances, CPMS is entitled to

recovery of protest costs. E.H. Pechan & Associates, Inc., B-221058, Mar. 20, 1986, 86-1 CPD ¶ 278; see Allstate Rent-A-Car, Inc., B-225633, May 1, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ ___.

Our prior decision, as modified to allow for protest costs, is affirmed.

Shilton J. Hoslar

Acting Comptroller General
of the United States