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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Raytheon Company; Department of the Navy--Reconsideration

File: B-242484.2; B-242484.3

Date: August 6, 1991

S. Steven Karalekas, Esq., and James Noone, Esq., Karalekas & McCahill, for EMS Development Corporation, the protester.
Joseph J. Kelley, Esq., Raytheon Company, and Keith Dunn, Esq., and Robert J. Boardman, Department of the Navy, for the requesters.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration of decision sustaining protest on the basis that agency provided clarifications of solicitation requirements to offeror under sole-source solicitation, but did not provide same clarifications to protester when requirement was resolicited on competitive basis, is denied where requesting parties had opportunity to raise reconsideration arguments during protest process but did not do so.

2. Request for reconsideration of decision sustaining protest on the basis that agency provided clarifications of solicitation requirements to offeror under sole-source solicitation, but did not provide same clarifications to protester when requirement was resolicited on competitive basis, is denied where requester has not shown that conclusion that protester may have been prejudiced was erroneous.

DECISION

Raytheon Company and the Department of the Navy request reconsideration of our decision, EMS Dev. Corp., B-242484, May 2, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 427, in which we sustained EMS' protest of the award of a contract to Raytheon under request for proposals (RFP) No. N00024-90-R-2141, issued by the Naval Sea Systems Command for the manufacture and installation of equipment for the magnetic silencing facility at Kings Bay, Georgia.

We deny the requests.

The Navy originally issued the RFP on a sole-source basis to Raytheon. After receiving a copy of the RFP, Raytheon forwarded to the Navy four sets of questions, primarily concerning the technical specifications. The Navy provided a six-page response. Meanwhile, EMS learned of the solicitation, and on April 26, 1991, protested the sole-source procurement to our Office. In response to the protest, the Navy issued a competitive solicitation on June 29. EMS responded to the solicitation with questions, which were answered in an amendment to the RFP. Both firms submitted proposals by the amended August 28 due date. Following written discussions and submission of best and final offers, the Navy determined that award to Raytheon was in the best interest of the government, and awarded the contract on December 21.

In its protest, EMS alleged that Raytheon had been afforded an unfair competitive advantage by virtue of discussions the Navy held with it during the sole-source stage of the acquisition. We agreed with EMS, noting the fundamental principle of competitive negotiation that offerors must be treated equally by a procuring activity, and that an essential element of that treatment involves providing offerors with identical statements of the agency's requirements so as to provide a common basis for the submission of proposals. Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 CPD ¶ 134. Consistent with this principle, the Federal Acquisition Regulation (FAR) provides that agencies must furnish any information given to an offeror in a negotiated procurement to all other offerors if the information is necessary in submitting proposals, or if the lack of such information would be prejudicial. FAR § 15.410(c). Here, 64 of the 67 questions Raytheon submitted to the Navy--and the Navy's answers--concerned the technical specifications. On that basis, we concluded that the lack of the information contained therein was prejudicial to EMS, and that the Navy therefore should have provided the information to EMS once the sole-source acquisition was converted to a competitive one. EMS Dev. Corp., B-242484, supra.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must either show that our prior decision contains errors of fact or law, or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1991). We will not reconsider a decision based upon arguments that could and should have been raised while the protest was pending since the goal of our bid protest forum--to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record--otherwise would be

undermined. American Management Sys., Inc; Dept. of the Army--Recon., B-241569.2; B-241569.3, May 21, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 492. Thus, parties that withhold or fail to submit all relevant evidence, information or analyses for our initial consideration do so at their own peril. Id.

In their reconsideration requests, Raytheon and the Navy offer information and arguments that they could have and should have presented during our initial consideration of the protest. First, both parties assert that our decision was in error because EMS did in fact receive some of the information contained in the Raytheon questions and answers in an amendment to the competitive solicitation, and that the remainder of the information would not have been helpful to EMS in preparing its proposal. The parties have submitted annotated versions of the questions and answers explaining why each one that was not furnished to EMS was irrelevant to EMS' competitive position. We will not consider this new information, as both parties--particularly the Navy--had the opportunity to submit it during the protest process. In this regard, the Navy was specifically asked to respond to EMS' allegation that Raytheon was afforded an unfair competitive advantage by virtue of the Navy's discussions with it prior to the issuance of the competitive RFP, and was asked to furnish for the record a copy of any questions and answers. The Navy thus was on notice that the questions and answers were in issue and should have presented its detailed, point-by-point response regarding each question and answer at that time. Similarly, Raytheon knew that the Navy was providing us with the questions and answers--in fact, Raytheon requested that the documents not be released to EMS--and thus also should have presented its views about their relevance to EMS' position at that time. Therefore, because neither party timely raised these arguments or presented the detailed information on which they now are based, we will not reconsider our decision based upon these arguments.

Raytheon contends that our decision goes beyond the scope of the authority of our Office to review agency procurement actions. Specifically, Raytheon asserts that our authority is limited by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(b)(1) (1988), to reviewing alleged violations of procurement statutes and regulations. Raytheon argues that the Navy did not violate any procurement regulations here since, as we noted in our decision, the FAR does not specifically address the factual situation in this case. Raytheon concludes that our holding that the agency acted improperly was in error.

Raytheon's position is without merit. As we found in our decision, this procurement was not exempt from the FAR § 15.410 requirement for furnishing equal information to all offerors; thus, the Navy's failure to provide EMS with the Raytheon questions and answers violated this regulation. More fundamentally, our authority extends to considering whether an agency's actions violated CICA, whether or not there exists a regulation addressing the specific actions in question. In addition to certain specific rules, CICA sets forth several basic requirements that reflect long-established procurement principles. Among these are the fundamental requirements that agencies conduct procurements using full and open competitive procedures, 10 U.S.C. § 2304(a)(1)(A), and, as stated in our prior decision, that all offerors be treated equally, including being afforded a common basis for the submission of proposals. Union Carbide Corp., 55 Comp. Gen. 802, supra. In addition to FAR § 15.410, we found the Navy violated these requirements of CICA.

Alternatively, the Navy and Raytheon argue that, even if the agency acted improperly, we should not have sustained the protest because EMS was not prejudiced by the agency's actions. Specifically, the parties assert that EMS would have had no reasonable chance of receiving the award even if it had received the Raytheon questions and answers because of its unacceptable proposed approach to the RFP's automatic flux control requirement.

Generally, if our Office determines that a solicitation, proposed award or award does not comply with statute or regulation, we will sustain the protest unless we find, based on the record, that the protester clearly would not have been the successful offeror absent the violation. Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401. In other words, where the agency has violated procurement requirements, a reasonable possibility that the protester would have been otherwise successful is a sufficient basis for sustaining the protest. Id. The effect of the Navy's failure to provide EMS with the same information it provided Raytheon was not precisely determinable; we could only conclude that the Navy's failure had an apparently material impact on EMS' technical proposal and, consequently, its technical evaluation. This is a sufficient basis for concluding that EMS was prejudiced by the Navy's actions. Id. The Navy's assertion that EMS could not have been the successful offeror because of its proposed approach to the automatic flux control requirement, again, is not a proper basis for reconsideration because the Navy could have but did not offer this argument during our initial consideration of the protest. In any event, we are not persuaded by it since it contradicts the Navy's earlier position that EMS' proposal was properly included in the competitive range (i.e., it had a "reasonable chance of being

selected for award," FAR § 15.609), and that the firm's best and final offer constituted a significant improvement over its initial proposal.

The Navy and Raytheon also challenge our conclusion that the Navy's price evaluation may have been improper. While it was not a basis for sustaining the protest, we questioned the reasonableness of the Navy's cost evaluation in the context of a fixed-price incentive contract. Specifically, we found that the cost evaluation appeared to have been based on the amount EMS' costs were expected to exceed its proposed target cost without regard for the fact that, under the RFP's sharing arrangement, the government would only be responsible for 65 percent of those excess costs up to the ceiling price (130 percent of the proposed target price). In other words, even though the ceiling price was based on the offeror's proposed target price, the Navy adjusted EMS' target price upward, effectively raising the ceiling price. We questioned the reasonableness of this effective adjustment to the ceiling price, notwithstanding the fact that the RFP provided for adjustments to proposed costs, since the Navy would not have been responsible for any costs above EMS' proposed ceiling price under the sharing arrangement.

In addition, we found that a $1.2 million upward adjustment to EMS' target price was not supported by the record. The Navy adjusted EMS' proposed overhead costs upward by applying an overhead rate significantly higher than the rate proposed by EMS. We questioned the Navy's rejection of EMS' proposed rate because the rate the Navy applied was based on the Defense Contract Audit Agency's (DCAA) estimate, even though DCAA admittedly was unable to calculate projected overhead rates without cost and pricing data, which were not required under the RFP. Moreover, the Navy's evaluation rejected without explanation EMS' justifications for its proposed lower overhead rate.

The Navy argues that the price evaluation was conducted in accordance with the criteria stated in the RFP and was reasonable, essentially reiterating arguments it made previously. We find no basis for changing our position. The Navy effectively adjusted EMS' ceiling price notwithstanding

the RFP's sharing arrangement and the lack of support in the record for the $1.2 million overhead adjustment. Neither the Navy nor Raytheon has shown that our conclusion in this regard was in error.

The requests for reconsideration are denied.

for James F. Hinchman
General Counsel